AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000056

A:AP:IE:2019:000515

High Court Record No. 2014/3892 P

[2022] IESC 13

MacMenamin J.

Dunne J.

Baker J.

Woulfe J.

Hogan J.

BETWEEN/

PAIDRAIG HIGGINS

Appellant

-AND-

THE IRISH AVIATION AUTHORITY

Respondent

JUDGMENT of Ms. Justice Marie Baker delivered on the 7th day of March 2022

1. I gratefully adopt the analysis of the facts, evidence, legal principles and course of the High Court trial set out in the judgment of MacMenamin J. I write this short judgment primarily to explain why I do not agree with the judgment of Hogan J. on the matters hereinafter mentioned.

2. This short judgment explains the reasons for my view that this Court should not interfere with the verdict of the jury in its measure of damages for defamation. In that regard I am of the view that *Kinsella v. Kenmare Resources plc.* [2019] IECA 54, [2019] 2 I.R. 750 can be distinguished, and indeed most other cases, as the level of the award in *Kinsella* was so manifestly excessive that it does not offer a useful paradigm for the purposes of the present appeal.

3. As noted by all of my colleagues, Captain Higgins has had a most impressive career from a reading of the transcript he comes across as a most intelligent, careful and reasonable man. He represented himself at the hearing of this appeal, ably assisted by his son, Mr. Joey Higgins. Captain Higgins made careful, considered submissions that did not overstate the arguments he made or the approach he urged this Court to adopt on the appeal. The jury clearly thought very highly of him and that is reflected in the figure awarded for the defamatory actions of the defendant. As MacMenamin J. said in his judgment, Captain Higgins dealt admirably with the vigorous cross-examination and challenge to him in the course of the trial in the High Court. That too must have influenced the jury.

4. The first matter I wish to address, is the view expressed eloquently by my colleague Hogan J., with regard to the effect of s. 13(1) of the Defamation Act 2009 ("the Act of 2009") and whether, as he suggests, that subsection may be read as illustrating the intention of the Oireachtas to afford to a court hearing an appeal from a jury award a much wider discretion to recalibrate the figures that had existed theretofore.

5. The starting point identified by Hogan J. is what has been the starting point in the authorities generally, that an appellate court should be "slow" to interfere with the jury award of damages in defamation cases. He quotes, as I would have, the judgment of Finlay C.J. in *Barrett v. Independent Newspapers Ltd.* [1986] I.R. 13 at p. 19, and its reference to the "very unusual and emphatic sanctity" to be afforded to a jury decision and award. That was also the approach of this Court in *de Rossa v. Independent Newspapers Plc.* [1999] 4 I.R. 432,

and the judgment of Dunne J. for this Court in *Leech v. Independent Newspapers (Ireland) Ltd.* [2014] IESC 78, [2015] 2 I.R. 178 where she referred to the "considerable weight" to be afforded to an assessment of damages by a jury, and that a decision to set aside such an award could be made only if it is "so disproportionate" to amount to an unreasonable award.

6. The award of €10 million for defamation awarded by the jury in *Kinsella* was undoubtedly disproportionate, not merely disproportionate in the light of other jury awards referred to in the judgments of my colleagues, but also disproportionate to any amount for general damages that could be awarded in any sphere of life, and the figure of €10 million must have had a flavour of winning the Lotto Jackpot, perhaps even the EuroMillions Jackpot, and a figure that high would have afforded any plaintiff with sufficient money to live an extravagant life. An award of general damages could never be intended to produce such extravagance or excess, and an award for loss or damage to reputation is often made in circumstances where a person has not lost his or her earning capacity or other financial security, and therefore is not intended to replace earnings and amount to a windfall in all senses.

7. The figure awarded by the jury to Captain Higgins in this case does not in my view amount to an exorbitant or excessive figure in this sense, and while it might be seen by some to be high, or even very high, it could also be said to be a moderate figure and one which would not permit Captain Higgins to extravagantly live without working, and could not be said to be a figure in compensation so large as to afford him financial stability and security way beyond the imaginings not just of ordinary citizens, but even relatively wealthy citizens.

8. Hogan J. expresses the view that the Act of 2009 evidences an intention on the part of the Oireachtas to afford greater flexibility to an appellate court to depart from a damages award by a jury. He argues that s. 13(1) in its use of the word "appropriate" in substituting its award for the award of a jury must be seen as different from the language in s. 96 of the

Courts of Justice Act 1924 (as applied by s. 48 of the Courts (Supplemental Provisions) Act 1961) which used the word "proper".

9. On a plain reading the words "appropriate" and "proper" are not different in meaning and intent. The Oxford English Dictionary describes each of them in broadly similar terms ("suitable or proper in the circumstances" and "of the required or correct type or form; suitable or appropriate", respectively). Indeed, it seems to me that the word "appropriate" is now more commonly used in statutory language, written judgments of the courts, and in language generally, to permit a consideration of the circumstances so that, grammatically, the expression "appropriate in all the circumstances" is more common, and less arcane, than the expression "proper in the circumstances". Either the words have broadly speaking the same meaning, or "appropriate" is intended to permit a court to have regard to a wide range of circumstances in considering the substitute figure.

10. It is equally possible that the word "appropriate" suggests a tempering of discretion in the light of circumstances, and the word "proper" might be interpreted as suggesting the Court is at large to consider what it thinks is correct, rather than coming to a conclusion in the light of the circumstances.

11. More fundamentally however it seems to me that the difference in meaning between these words, a difference which is difficult to discern and is subtle at best, is not such as to enable a court to discern an intention to depart from the prior well-articulated jurisprudence of this Court that a jury award is in general to be treated with a very large degree of respect. I do not believe that it is possible for this Court to discern from the change in the words used an intention to displace the role of the jury in defamation cases. That would have been quite a dramatic rejection of recent Supreme Court jurisprudence, such a change is scarcely one which the Court should regard as having been made by implication in a statute, and further, and this is commented upon by my colleague MacMenamin J., it was never argued in the

course of this appeal that the previous decisions of this Court regarding the proper approach to a jury award were wrong.

12. I also agree with the observations of Hogan J. that one must bear in mind the presumption against unclear changes in the law *per* Henchy J. in *Minister for Industry and Commerce v. Hales* [1967] I.R. 50, and my view is that an approach that relies on the substitution of the word "appropriate" in substitution for the word "proper" in the Act of 2009 does not permit a court to substitute its own views of what the appropriate level of damages should be, unless it considers that the award of the jury was excessive.

13. As the Act of 1924 provided almost identical powers to those repeated with variation by s. 13 of the Act of 2009, the precedential value of pre-2009 defamation actions cannot be fully discounted, as the approach in these cases took into account their jurisdiction to set aside jury judgments if considered proper, but routinely shows a disinclination to exercise that jurisdiction as to do so would fail to respect the important role of the jury. As O'Donnell J. (as he then was) observed in *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 59, [2018] 2 I.R. 79:

> "the better view is that the court has always had jurisdiction and the reason that the jurisdiction was rarely exercised was because of prudential rather than jurisdictional limits." (at p. 110)

14. As such, the question is not if the appellate court has jurisdiction to interfere with a jury's award of damages, but rather if the court ought to interfere, and exercise its power to substitute such amount as it considers appropriate. More precisely, the question in this case therefore ought to be: is it appropriate to substitute the award of jury damages, in light of the specific importance of the jury in calculating damages in defamation cases?

15. In my view, while the legislation permits the substitution by the Supreme Court (or since 2014 the Court of Appeal) of an amount for damages, that substitution would be appropriate only if the appellate court considers first that the jury decision is wrong as a

matter of principle, and the jurisdiction to substitute an award of damages has as its primary function the avoidance of the promulgation of litigation and the remittal of proceedings back to the High Court, see: *Holohan v. Donoghue* [1986] I.R. 45 (at para. 12) and in *McDonagh v Sunday Newspapers Ltd* (*supra*).

16. An alternative approach would be inconstant with the recognition this court has given to the special importance of the jury. As observed by McKechnie J. *McDonagh v. Sunday Newspapers Ltd.* although he dissented as to the result:

> "It is hard to believe that a routine redetermination of damages by this Court would result otherwise than in the reduction of the value of awards in the vast majority of such cases […] Such would very quickly deprive the law of defamation of its teeth." (at p. 173)

17. The purpose of s. 13 was to permit the appellate court to measure damages, but it can do that only if the gateway conclusion to the exercise of that power is reached: the award of the jury must have been disproportionate, such that no reasonable jury would have come to that figure, before an appellate court could substitute its own figure.

18. I also agree with the observation of my colleague Hogan J. that s. 31 of the Act of 2009 which requires that the judge would give guidance to the jury in the matter of damages, does afford a window within which a jury award may be scrutinised. But again, the scrutiny is of the amount of the award in the light of the general principles concerning the award of damages in defamation, and does not of itself permit a substitution by a court unless it is satisfied that the award is inappropriate.

19. It seems to me that the legislation envisages a two stage process: the court must start with the proposition that the jury award is entitled to a considerable degree of respect, it is entitled to scrutinise the award, but does so applying a test of reasonableness, and in the light of s. 31(2) that analysis includes what now might be called a proportionality analysis, having regard to the fact that s. 31(4) identifies a range of matters to which a jury is to have regard,

and which *ipso facto* must bear on the analysis of the jury award by an appellate court. It is only if that stage is reached can one say that the court can substitute a more "appropriate" figure.

20. This approach to the decision of a jury is reflective of the view that "defamation if a community tort" as " a community reaction to a wrong that is alleged to have happened" see Cox and McCullough *Defamation Law and Practice* (Clarus Press, 2022, 2nd edition) at para. 11.218.

21. O'Donnell J. put it succinctly in *McDonagh* at p. 112: the decision to vest the decision on liability and quantum to a jury is the result of the pragmatic choice of the Oireachtas to have these matters determined by a "representative and randomly selected sample of the population", and not by a judge, whether at first instance or on appeal.

22. Although O'Donnell J. (still at p. 11) cautions against a view that the decision of the jury possesses some "mystical quality", it is still worth bearing in mind the writings of Sir Jack I.H. Jacob in *The Fabric of English Civil Justice* (Stevens & Sons, 1987, 1st ed.), writing on the civil jury in an English context, that:

> "[T]rial by jury has been its most outstanding and distinctive invention. [...] It has allowed lay people to play a decisive part in the machinery of civil justice. It has been justly admired for its fairness, openness, open-mindedness and uprightness, sometimes in the face of the judicial disfavour and censure." (p. 158)

23. Woulfe J. in his judgment in the present case, which I have had the opportunity to read, eloquently expresses this judicial deference as stemming from **"**compelling logic and common sense"

24. Thus, by reason of the statutory scheme once a judge is required as a matter of law to afford guidance to a jury before it assesses damages, an appellate court is entitled to ask whether a jury obviously ignored that guidance, or indeed that the guidance was wrong or incomplete. But these are threshold requirements and of itself do not give an appellate court

the power to replace one award of damages with another it considers to be more appropriate in all the circumstances.

25. More importantly however, and to my mind an overwhelming consideration, the Act of 2009 did not take the opportunity to remove the jurisdiction of the jury in defamation cases, and it had done so in personal injuries cases by the Courts Act 1988 in legislative terms relatively close in time to the enactment of the Defamation Act 2009. It must be said also that the Act of 2009 was enacted against a backdrop of judicial and academic commentary, and also concerns in the media in particular regarding high level of damages, the possible chilling effect that this would have on free speech and independent journalism.

26. McMahon and Binchy *Law of Torts* (Bloomsbury Professional, 2013, 4th ed.) and comments as follows:

> "Whilst the Act as a whole is somewhat laconic on key principles, it seems clear enough that the effect of s 13 will not be to encourage the Supreme Court to depart from its well-established policy of overturning jury awards only where they are clearly disproportionate and instead substitute an amount it considers appropriate in cases where the award is not obviously disproportionate." (at para. 34.363)

27. Cox and McCullough (cited *supra*) thought that the change effected by s. 13(1) was "perhaps mainly of symbolic significance" and commented that:

> "[w]here there *is* such an objective flaw, then it was always open to the appellate tribunal to remit the case for a rehearing on the issue of damages. Alternatively, an appellate tribunal, pursuant to s 96 of the Courts of Justice Act 1924, could enter its own verdict on the matter (which could include making its own order for damages), rather than remitting the matter for a full rehearing". (at para. 11-231)

This comment is echoed by Hogan J. who thought, not that the power of substitution was new, but rather that the approach to a substitute figure was new.

28. Further it seems to me that it would be wrong to consider that the role of a jury in defamation is merely to assess and measure the amount of damages. A jury has an important role in assessing the seriousness and impact of a particular defamation and an award by a jury must be seen as reflecting not just the jury's assessment of the injury and of the seriousness of the defamation but also the jury's own view of the character and reputation of the person defamed. As O'Donnell J. said in *McDonagh* damages and liability are "bound up together" (at p. 113).

29. The jury in this case did have an opportunity to observe Captain Higgins over several days and the jury award must be seen as reflecting the fact that it was most impressed with the character of Captain Higgins, and with the devastating effect that such a serious imputation of unprofessional behaviour had on his character.

30. Captain Higgins enjoyed a reputation at a very high level as a commercial airline pilot, and also flies light aircraft as a hobby. The defamation went to a core part of his person and profession and its impact goes to his personal as well as to his professional reputation. It is readily apparent that his reputation matters hugely to him and it was one achieved from long work, including work on safety for light aircraft, a reputation which he was entitled to have preserved not just in Ireland but also overseas, in particular in the light of the fact that he flies international commercial flights where he could have in his hands the lives of hundreds of passengers, an immense responsibility and evidently one he treated with a great degree of reverence.

31. Taking that factor into account, and without wishing to state the obvious, the jury award reflects its view of the character of Captain Higgins and of the injury done to him. It is not so disproportionate in my view to that injury, nor is it an award so out of kilter with the annual salary of a commercial pilot, as to be extravagant or exorbitant and equivalent to a windfall which could not be justified. I am not convinced that the jury award can in those circumstances can or should be reversed in those circumstances: the jury had the role of

assessing the character and reputation of Captain Higgins and the damage done to that by the actions of the defendant which it clearly considers to be defamatory, and grossly so. The figure it awarded for general damages should be respected for that reason as it reflects precisely those findings, and it is not difficult to understand the relationship between the figure arrived at and the assessment by the jury of the character of Captain Higgins and the damage caused to his reputation, professional and personal life. It is the fact that the figure can be reasonably said to flow from those findings, and not to be wholly disconnected from them or disassociated from the element of reputational damage and the high personal regard which the jury must have had for Captain Higgins.

What to do now?

32. My own view is that the jury award should not be interfered with.

33. However, the issue for this Court is not simply whether or not it should find that the award of the jury is so unreasonable that it cannot be upheld, it must also determine whether it should substitute its own award for that of the jury's if it does find it to be unreasonable; if it does not substitute its own award, it must remit the matter for a re-trial. Accordingly, the choice here is between alternatives, neither of which is attractive.

34. I have read the judgments of my four colleagues, and understand that the effect of this judgment, with which Woulfe J. agrees, will be that no consensus has been reached by this Court regarding the figure to awarded to Captain Higgins in respect of general damages. Captain Higgins was adamant in the course of the hearing of the appeal that he wanted an end to the litigation, and that he did not want the matter to return for a new jury trial in the High Court.

35. In those circumstances, and without wishing to depart from the propositions that I have set out in this judgment, I propose agreeing with the figure arrived at by MacMenamin J. on a pragmatic basis, in the light of the practical result that this will achieve that will enable Captain Higgins to finally put an end to this litigation.

36. While routinely substituting jury awards of damages would not be an appropriate exercise of this Court's appellate jurisdiction under s. 13 of the 2009 Act, it would not be appropriate to remit this case for a new jury trial in the High Court as that would fail to respect the wishes of Captain Higgins.

37. I agree with the analysis of, and conclusion in regard to, the award of aggravated damages expressed by MacMenamin J.