THE SUPREME COURT

[RECORD NO.: 56/21]

[2022] IESC 13

MacMenamin J.
Dunne J.
Baker J.
Woulfe J.
Hogan J.

BETWEEN:

PADRAIG HIGGINS

PLAINTIFF

AND

THE IRISH AVIATION AUTHORITY

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 7th day of March, 2022

Introduction

1. This appeal arises from a judgment of the Court of Appeal delivered on the 16th June, 2020 ([2020] IECA 157). In a careful judgment, Binchy J., speaking for the court (Noonan J., Murray J., Binchy J.), held that the award of damages which had been made to the plaintiff in these defamation proceedings was disproportionate, excessive and unreasonable. In the High Court, the jury had awarded the plaintiff €300,000 in general damages, and €130,000 in aggravated damages against the defendant (the "Irish Aviation Authority", or the "IAA"). Applying the "Offer of Amends" procedure set out by s.22 and s.23 of the Defamation Act, 2009 ("the Act"), the jury applied a discount of 10% to the overall figure such that the plaintiff stood to recover €387,000 by way of damages. This judgment addresses the law as it stands, as set out in the Defamation Act, 2009. This judgment does not address any issues regarding proposed reform of the law, which is a matter for the legislature.

2. The IAA appealed the award of the High Court. The Court of Appeal concluded that the jury award of €300,000 in general damages should be reduced to €70,000, and that the award of €130,000 in aggravated damages should be reduced to €15,000. The court did not interfere with the 10% discount awarded by the jury, holding that the defendant had not acted sufficiently quickly in bringing an offer of amends to court pursuant to s.22 of the 2009 Act. Thus, in place of the total award of €387,000, the plaintiff's award was reduced to €76,500.

3. The appellant, who for clarity will be referred to as "the plaintiff" or "Captain Higgins", applied for leave to appeal to this Court. He submitted that the Court of Appeal had erred in law in arriving at the figures for general damages and aggravated damages. In granting leave, the panel of this Court observed that, as this was the first case in which a jury in defamation proceedings had been provided with information concerning the level of awards made in earlier cases, a judgment in this appeal might include guidance as to the manner in which a jury might be instructed as to the quantum of damages to be awarded. Additionally, the determination also identified the following issues as appropriate for consideration; namely the basis upon which jury awards might be overturned on appeal; the extent to which a discount might be given for an offer of amends; and whether it might be possible to set out "bands", or guidelines, involving a range of appropriate damages drawn from Irish or foreign case law.

4. The judgment deals with the following matters:

V Assessment of the General Damages Award in the Court of Appeal (para. 138);

VI Decision on General Damages (para. 162);

VII Aggravated Damages (para. 165);

VIII Decision on Aggravated Damages (para. 180);

IX Discount (para. 181);

X Guidance to Juries (para. 190);

XI Conclusion (para. 195);

XII Summary and Outcome of the Appeal (para. 199).

I. The Legislation

5. To place what follows in context, it is necessary to deal with a number of legal issues that arose both before the High Court hearing and subsequently in the appeals to the Court of Appeal and this Court. In its long title, the objective of the 2009 Act is to revise, in part, the law of defamation and to repeal the Defamation Act, 1961. Abolishing the distinction between libel and slander, s.2 of the Act defines a defamatory statement as one that "*tends to injure a person in the eyes of reasonable members of society*". (See McMahon & Binchy, *Law of Torts* (4th ed.) Ch. 34 and esp. Ch. 34.99.)

The Offer of Amends Procedure

6. One legislative innovation lies at the centre of this appeal. I come to it immediately. A new "offer of amends procedure" was laid down in s.22 and s.23 of the Act. This permitted a defendant to make an offer to publish a correction and apology, and pay compensation to a plaintiff. As provided there, such an offer might not be made after delivery of a defence, but might be withdrawn at any time prior to acceptance, when another offer might be made (s.22(3) and (4)). These, and other provisions of the Act, were the subject of detailed and thoughtful analysis by Professor Neville Cox in a submission to a seminar on defamation hosted by the Minister for Justice in 2019 (Department of Justice, Published 14th November, 2019, as part of the consideration of a review of the 2009 Act).

Section 22 of the 2009 Act

7. The Act did not provide for any limitation provision governing the time within which parties might avail of this new procedure. By contrast, s.24 of the Act makes provision that, in the case of an *apology*, a defendant might give evidence in mitigation of damage that he had made or offered an apology (s.24(1)(a)), and published it (s.24(1)(b)) *as soon as practicable after the plaintiff made complaint*. The Act provided that a defendant might treat the offer of amends as representing *one* element of a settlement offer, which, if accepted, could be relied upon in order to mitigate damages. But this, too, had the potential to give rise to legal issues

which actually emerged in this case. Section 22, was nonetheless quite clear in providing that the content of such an offer should, generally, involve three elements, *viz.* (a) a suitable correction and sufficient apology; (b) an offer to publish that correction and apology in such *manner* as was *reasonable and practicable* in the circumstances; and (c) payment of such sum in compensation or damages, and such costs as might be agreed upon or determined by the parties. This procedure was to apply whether a court was awarding general, or other types of damages. The section provided that an offer might be accepted as a matter of principle, without determination as to what precisely such offer might entail. But, as a result, all that might potentially flow from an offer could be that a suitable correction and apology would be published in such a manner as was "reasonable and practicable" in the circumstances, without any determination on damages. The clear legislative intention was that it should be a "damage limitation" exercise for defendants. But, in this case, the intention was not fulfilled. (See some prescient observations on the section in practice in Cox & McCullough*, Defamation Law & Practice*, (1st ed, 2014), Ch. 10-30 et. seq., and now, based on experience, the magisterial 2nd Edition (2022) at Chapter 10-24, and see also, generally, McMahon & Binchy, *Law of Torts*, 4th Edition, Ch. 34.14.8 and 29.)

Section 23

8. Section 23 is particularly relevant to what happened in this case. It sought to make further provision as to how the offer of amends procedure should operate, and allowed for a two-way procedure. If the parties agreed on the precise measures to be taken, a claimant might apply to the court for an order directing the person who made the offer to take appropriate measures (s.23(1)(a)). If, however, there was no agreement as to what should be done in fulfilment of such agreement, an offeror might, nonetheless, with the leave of the court in which the action was being heard, issue a correction and apology by means of a statement made before the court, in such terms as might be approved by the court, and might also give an undertaking as to the manner of publication (s.23(1)(b)).

9. But, as pointed out earlier, one of the difficulties in the provision, just as in s.22, was that the offer of amends could be made and accepted as a matter of principle but without any certainty as to what precisely this would, in fact, entail. These various practical difficulties are now discussed in Cox & McCullough (2022) Chapter 10-29.

Determining Damages: A judge alone, or a judge and jury?

10. Section 23 was less than clear in another respect. It did not provide for what was to happen if a plaintiff accepted an apology, but was unable to agree on the issue of damages. Clearly, an application could be made to the court under s.23 of the Act to approve the text of

the offer, but was the function of determining damages thereafter to be vested in a judge alone, or a judge sitting with a jury? (For convenience, I refer to this later as the judge/jury issue). The Act did not contain any clear guidance, specifically on what was intended to be meant by the term "*court*", and whether, when used, that term meant a judge sitting alone, or a jury and jury. (Cox, 'Defences under the Defamation Act, Conference on Defamation and Privacy Law', Trinity Law School, 7 April 2009, quoted at para. 34.148 of McMahon & Binchy.) Was it intended to change the law on this question?

Determination of the judge/jury of the issue: The High Court

11. As matters evolved in this case, the IAA brought an application to the High Court for determination of this precise issue. There, Moriarty J. held that, in the absence of specific words directed at changing the law in this, a fundamental area, the intent of the Oireachtas must be taken as being that the adjudicatory role should continue to be performed by a judge and jury ([2016] IEHC 45). He held that, if the Oireachtas had intended to remove or delete the right to jury trial in s.23, it would have to have done so expressly by specific words. Instead, while the 2009 Act was closely modelled on the UK's Defamation Act, 1996, which expressly held, at s.3(10), that the offer of amends procedure was to be operated in the absence of a jury, no equivalent provision was contained in the 2009 Act. It simply stated that matters such as damages should be "*determined by the High Court*" (s.23(1)(c), without going further to say whether this was by a judge alone, or with a jury.

The Court of Appeal on the same issue

12. The High Court judgment was upheld in a detailed decision of the Court of Appeal ([2016] 3 I.R. 308) (Peart, Hogan and Hedigan JJ.). Hogan J., speaking for that court, held that, in the absence of express statutory language excluding the role of the jury from one of its traditional functions in a defamation trial, the plaintiff had the right to an assessment of damages by a jury in cases coming within s.23(1)(c) of the 2009 Act, where there was disagreement on damages following an offer of amends. The Court of Appeal judgment referred specifically to the key principle of statutory interpretation; namely, the presumption against unclear changes in the law, and that for "good or ill" the role of the jury in the award of damages in defamation cases was embedded in the common law, a right which was expressly preserved by s.48 of the Supreme Court of Justice (Ireland) Act, 1877, and s.94 of the Courts of Justice Act, 1924.

13. The carefully reasoned judgment went on to point out that the right to jury trial which, prior to the Judicature Act 1877, had been referred to as a *nisi prius* action, had been subsequently much abridged in statute both before and after 1922, and that *"[In] every such*

case ... the abridgement of that entitlement has been done in express terms". Thus, in the absence of express statutory words, or something approaching this, the plaintiff's right to a trial of the issue of damages must be taken to have been preserved (para. 33-34). The court differed from Moriarty J. in resort to the English Defamation Act as an aid to interpretation (para. 38). But it then went on to observe that it might have been that, viewed purely subjectively, the Oireachtas intended to dispense with jury trials in cases coming within s.23(1)(c) of the 2009 Act. But, if that had been the subjective belief of the members of the Oireachtas when enacting the 2009 Act, it presented the difficulty that such an intention could not be plainly ascertained from the language of the Act as a whole in the manner required by s.5 of the Interpretation Act, 2005, and that a court must, rather, focus on the words actually used by the Oireachtas to convey its intention, rather than seeking to construe legislation by reference to the subjective beliefs and understandings of the legislators (*Crilly v. T. J. Farrington Ltd.* [2001] 3 I.R. 251, p. 295). I agree with what was said and held in that judgment. See also *Lennon v. HSE* [2015] 1 I.R. 92; and *Bederev v. Ireland* [2016] 3 I.R. 1.

Judge/Jury Issue in this Court

14. The IAA, however, being dissatisfied with the result, applied to this Court for leave to appeal. The judgment of this Court dealt jointly with this, and another case, where the same point of law arose (*White v. Sunday Newspapers Limited,* Unreported). Speaking for this Court (O'Donnell, MacMenamin, Dunne, O'Malley, Finlay Geoghegan JJ.), Dunne J. upheld the decisions of the High Court, and the Court of Appeal ([2018] IESC 29). She pointed out that the Act of 2009 did not contain clear and express words on this core issue. Were there to be a change of such a fundamental nature, it would have required specific statutory words. She held that, where legislative changes were proposed which might potentially have far-reaching effects, such changes must be clearly expressed, rather than being so unclear as to give rise to the trial of a legal issue which, by then, had been brought and heard before at three levels of jurisdiction. Dunne J. also added the prophetic observation that the Act had not clearly set out how the offer of amends procedure would operate in a range of different circumstances. The determination of this legal issue took from 2014 up to 2018.

Section 13: Jurisdiction of Appeal Courts

15. As there is disagreement on this issue, I turn then to s.13 of the Act, which provides:-

> *"(1) Upon the hearing of an appeal from a decision of the High Court in a defamation action, the Supreme Court may, in addition to any other order that it deems appropriate to make, substitute for any amount of damages awarded to the plaintiff by the High Court such amount as it considers* ***appropriate****.*

*(2) In this section "decision" includes a judgment entered pursuant to the verdict of a jury." (*Emphasis added)

16. The provision just quoted empowers an appeal court to substitute its own award, in addition to any other order it deems "*appropriate to make*". I refer to my colleague Hogan J.'s judgment in this case. I respectfully disagree with his conclusions on the question of interpretation, which arises on this section. He concludes that the section evinces an intention to alter the legal status of jury awards. The provision does not contain clear words, or anything approaching clear words, which evince any such legislative intention to change the law regarding the status of jury awards, or to alter the already identified power of this Court to set aside a jury award in the event that such award is objectively flawed and disproportionate (cf. *Barrett v. Independent Newspapers* [1986] I.R. 13).

17. I agree with Hogan J. that s.13 is material to the issue at hand. This raises the question as to whether, in this context, there is significant or material distinction in the meaning of the terms "*proper*" and "*appropriate*".

18. Section 96 Courts of Justice Act, 1924 empowered an appeal court to enter its own verdict as the court considered "*proper*". Are the words "*proper*", as used in the 1924 Act, and the term "*appropriate*", as deployed in the Act of 2009, synonymous in meaning? In the Concise Oxford English Dictionary, I find the term "*Proper*" defined as "*suitable or **appropriate***". Similarly, the word "*Appropriate*" is defined as meaning "*suitable or **proper***". I am unable, therefore, to agree with Hogan J. that the words of s.13 are any more specific than those of s.96 of the Courts of Justice Act, 1924. The words "*proper*" and "*appropriate*", in the context in which they are used, have the same meaning. Had it been the intention of the legislature to alter the law so that the pre-existing judicial practice of deference to jury awards should be removed, this would have been a simple legislative task, capable of being achieved by simple words.

19. I entirely agree with the statement made by the Court of Appeal on the judge/jury issue, that a court must not seek to glean the subjective intention of the legislature, but, rather, must look to the text of the legislation under scrutiny. I am unpersuaded, therefore, that the words of s.13 either show an actual legislative intention to change the current understanding that courts should be "slow" to interfere with jury awards, or even that the usage of the words goes so far as to indicate that there might have been a subjective legislative intention to alter the existing law. The wording of the section is described in Cox & McCullough (1st ed., 2014) as "*perhaps being of symbolic significance that a specific statutory appellate jurisdiction to deal with*

awards of damages is now provided in respect of defamation cases". I do not think subsequent experience has done anything to change the accuracy of those observations (Ch. 11-46).

Jurisdiction to set aside an award

20. In *Barrett v. Independent Newspapers* [1986] I.R., Finlay C.J. described the "*unusual and emphatic sanctity*" of a jury award of damages. But nonetheless, in *Barrett*, this Court did set aside the jury award of €65,000. The case concerned an allegation that the plaintiff, a politician, had tugged the defendant's beard during the course of a political celebration.

21. The law now is as defined by Dunne J. in *Leech v. Independent Newspapers* [2015] 2 I.R. 214. She stated that, while the assessment by a jury is not sacrosanct, it does carry considerable weight, such that appellate courts have been slow to interfere with assessments by a jury, and an appellate court should only set aside such an award if the appellate court is satisfied that the award is so disproportionate to the injury suffered, and wrong done, that no reasonable jury would have made the award, in all the circumstances of the case.

22. By contrast with s.13 of the 2009 Act, s.31(2) does provide, in very clear words, that the "*judge **shall** give directions to the jury in relation to the matter of damages*" (emphasis added). I conclude, therefore, that, had it been the intention of the Oireachtas to alter the status of jury awards in defamation cases, or to vest a broader jurisdiction in this Court than that hitherto provided for by law, it would have required express wording. Such words are absent.

An award of damages: Section 31(3) and (4)

23. By contrast to s.13, s.31(3) of the 2009 Act does represent an amendment to the law. The sub-section directs that, in assessing damages, a court is to have regard to "*all the circumstances of the case*". Section 31(4) then lists a range of additional factors that a court shall bear in mind, including, insofar as material in this case:-

> *"(a) the nature and gravity of any allegation in the defamatory statement concerned; (b) the means of publication including the enduring nature thereof; (c) the extent to which the defamatory statement was circulated; (d) the offering or making of any apology, correction or retraction by the defendant; (e) the making of any offer to make amends under s.22 of the Act, whether or not the making of such offer was pleaded as a defence; (f) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement; …".*

Comparison with factors in *Leech*

24. It is doubtful whether these provisions, as outlined in s.31(3) and (4), make a practical difference from the criteria set out by this Court in *Leech,* where Dunne J. held that it was necessary to examine (a) the gravity of the libel; (b) the effect on the plaintiff; (c) the extent of the publications; and (d) the conduct of the defendant. Whether outlined in the words of the Act of 2009, or more succinctly in *Leech*, these were the key factors which were to be borne in mind by the jury in assessing general damages in this case. While s.31(3) is phrased in rather broader terms than those identified in *Leech* – the words in the statute direct the jury to have regard to "*all the circumstances*" - the other factors which are material here are those identified in s.31(4)(a) to (f), to which this judgment refers later.

II Circumstances of the Case

Some Observations

25. This judgment will presently set out something of the circumstances of the case in order to determine how the damages in this case were assessed by the jury in the High Court, where the plaintiff was represented by highly experienced leading counsel. A number of preliminary points arise. First, as mentioned earlier, although the defendant admitted the defamation, the form of words of the offer of apology was not finally agreed until the second day of the High Court hearing, six years after the events in question. In circumstances where the Offer of Amends procedure was intended to bring 'vindication without litigation', its application in practice in this case suggests the legislature's aim has not been fully achieved.

26. Second, malice was not pleaded in this case, and the judge so directed the jury. But there was a substantial degree of material which was admitted in evidence which set out the background of the prior unhappy relationship between the plaintiff and the IAA.

27. Third, the outline of the evidence which follows is far more detailed than would be usual in an appeal. For this, I offer no apology. In defamation, as in all law, loyalty and adherence to the facts of the case must be a paramount consideration. It is hard to explain the dynamics of what occurs in a defamation case before a jury by a short summary. Hypothetically, the facts of this case could be simply, but unfairly, summarised as being that "*the defendant, a public authority, was ordered to pay €387,000 damages to the plaintiff, an Aer Lingus pilot, arising from a series of emails alleging that he had engaged in a series of unauthorised flights, in bringing a microlight aircraft from Italy to Dublin*". However, what emerged before the jury was much more than that, as the following outline hopefully shows. The essence of this defamation lies as much in the minute detail and phraseology, as in the meaning of what was conveyed in a series of emails concerning Captain Higgins.

28. Fourth, when the twelve jurors, as members of the community, came to deal with the issues in this defamation action, they had before them material which showed *how* the evidence emerged, as well as *what* it proved. The jurors had the opportunity to assess the demeanour of the witnesses, and the myriad of other ways in which each juror could bring their life experience and judgement to bear in the task of adjudication, and public accountability. The jury could also discern not only how both parties sought to address the issues to be determined, but what was not addressed. The task of the jury was to apply its values as members of the community. Under the Act of 2009, jurors are the judges of fact and credibility.

29. Fifth, the description of evidence is detailed in order to assess how each of the requirements of s.31(3) and (4) of the 2009 Act was satisfied, and in order to understand how, and why, the jury arrived at its verdict on general and aggravated damages, and on the applicable discount.

30. Finally, it should be said that the case was conducted with a degree of sensible flexibility regarding the rules of evidence. But the facts were quite complex. Despite the aspirations underlying the 2009 Act, this plenary hearing took 7 days in total. This was not the fault of the judge or counsel, nor due to the fact that it was heard by a judge and jury. But, even at risk of repetition, by the time the High Court came to deal with this case in late 2019, it was dealing with a defamation which had occurred 6 years previously. When a person's constitutional right to good name is taken away, the courts must be adequately resourced, and mechanisms provided in law, so as to ensure that vindication of the constitutional right can be achieved as soon as is practicable, and in a timely way.

The Plaintiff's Case

The Evidence

31. I now set out what the jury heard, saw and assessed. It must be recollected that, by then, the defendant had admitted that the emails were defamatory and, for that reason, the plaintiff was not cross-examined on much of the evidence which he gave.

The Plaintiff

32. Captain Higgins was born in Galway to a large family. He is a married man. He and his wife have five children, aged from their teens into their twenties. From a young age, he had always aspired to become an airline pilot. He studied engineering at National University of Ireland Galway. But whilst in University, he was offered a cadetship with Aer Lingus. He was one of 6,800 applicants who undertook aptitude tests. Ultimately, this number was whittled

down to just 68 candidates who were selected to be trained as pilots. He qualified as a pilot in 1989, and was one of the first to be trained on the Airbus 320 when it was later introduced.

Microlights

33. The plaintiff's interest in flying was not confined to commercial work. He also engaged in flying small two-seater airplanes, known as microlights. The plaintiff was Vice Chairman of the National Microlight Association of Ireland. He testified that he also played a leading role in establishing an umbrella body, known as the General Aviation Safety Council of Ireland, which sought to apply safety standards for various categories of air enthusiasts, including microlight pilots.

The Microlight Association and the IAA

34. The plaintiff gave evidence to the effect that the relationship between the Microlight Association of Ireland and the IAA became a very strained one. In the years 2009 to 2011, there were acrimonious discussions concerning the provision of training for microlight pilots in Ireland. The Association, in particular the plaintiff, was deeply concerned that the IAA was not dealing properly with these issues. The plaintiff believed that its proposals to introduce microlight training in this State by Irish pilots were impractical and inappropriate. He testified that he and the Association, would inform the next-of-kin as to the inadequacies of what the Authority had proposed, in the event of fatalities. Ultimately, the IAA broke off all communication with the Association and the plaintiff.

Relationship with Captain Steel

35. In the course of these negotiations, the plaintiff had a very substantial number of contacts with a Captain John Steel, then the General Manager of Aviation Standards in the IAA. The evidence was that he and Captain Steel, had spoken by telephone literally hundreds of times, had known each other well, and that, at an earlier stage, the plaintiff had brought both Captain Steel and his wife up for microlight flights.

The Flight on 22nd April, 2013

36. The trigger-event took place on the 22nd April, 2013. The plaintiff was returning from a trip to Italy accompanied by a passenger. He was accompanied by another pilot, a Mr. David Bolger, who was also carrying a passenger in his aircraft. Both were travelling in Italian registered microlights which they were purchasing. As these planes have a limited range, the journey from Italy had to be carried out in a number of stages. On this leg, the two were travelling between Exeter in England, and Haverford West in Wales. The flight was, therefore, an entirely "internal" U.K. flight.

37. The two pilots encountered serious adverse weather conditions. Ultimately, they were compelled to make an emergency landing on a building site near Swansea. In the course of landing, the plaintiff's microlight sustained damage to its wheel and propeller. In accordance with procedure, he reported the incident to the Air Accident Investigation Branch of the U.K. Civil Aviation Authority ("U.K. CAA"), which, like the defendant, carries out an important supervisory and regulatory role in air traffic.

The letter from the U.K. CAA on 11th July, 2013

38. The plaintiff's microlight was brought back to Ireland by road. But, shortly afterwards, Captain Higgins heard rumours from people at a small airfield in Newcastle, County Dublin. It was being said that the U.K. CAA "had it in for him" arising out of the flight. Nothing emerged immediately. But on the 11th July, 2013, the plaintiff received a letter from the U.K. CAA. It contained a series of very serious accusations. These included the assertion that he had flown without an appropriate licence, that he had no insurance, that his aircraft was unregistered, and did not have clearance to be in United Kingdom airspace. He was also accused of a range of other breaches of aviation regulation legislation. Captain Higgins testified that, for him as a commercial pilot, these were profoundly serious, career threatening, and carried with them the potential of serious criminal sanctions. Subsequently, he provided the U.K. CAA with all the relevant documentation to dispose of these charges. This process was completed on the 18th July, 2013.

Exoneration by the U.K. CAA

39. On 22nd July 2013, the plaintiff was scheduled to take up a roster flying to Heathrow. He still had concerns in doing so, in view of the complaints. He made enquiries with the U.K. CAA. On 25th July 2013, the plaintiff was telephoned by an official of the U.K. CAA., Mr. Robert Webb, who told Captain Higgins that he had done nothing wrong, and that the investigation was closed. On the 26th July, 2013, this was confirmed in writing. The CAA stated there would be no further enquiries or action, and the investigation was closed.

Contact with the IAA

40. The plaintiff remained concerned however. He was confused and suspicious as to why all this had happened. He placed data access requests with the U.K. CAA, and the IAA. The IAA sent him two apparently innocuous emails. The evidence later established that Ms. Gahan, the Secretary of the Authority, was provided with these by Captain Steel.

41. But the material which Captain Higgins received did not present the full picture. Later in the case, Ms. Gahan, the secretary of the IAA, testified that Captain Steel told her in an email

that he had been unable to find anything more than what he had sent her, and that, as a matter of policy, the Flight Operations department regularly deleted unnecessary or irrelevant emails. Ms. Gahan testified that a particular sentence contained in one of the emails was inserted at Captain Steel's suggestion. The IAA stated, in terms, that it had not in the past, or did not currently have, any concerns regarding the plaintiff's compliance with professional standards. This was said to be the IAA's position as of 21st October, 2013.

42. But, by contrast to the IAA, the U.K. CAA provided the plaintiff with over 100 pages of documentation. What was contained there was entirely at variance from the apparently innocuous material obtained from the IAA, and caused deep concern to Captain Higgins.

The Emails

43. It was in this way that the plaintiff established that officials of the IAA, and in particular Captain Steel, had made very serious defamatory statements to officials of the CAA, specifically a Ms. Diane Park, who was the Investigations & Enforcement Manager. The text, content and tone of these emails can only be understood having regard to the fact that, ultimately, it was not disputed that the IAA had seriously defamed the plaintiff. The gravity of the words must be assessed in light of the fact that the IAA held an important regulatory and supervisory role over the plaintiff as a commercial pilot.

44. The emails are now designated (a) to (g). The first of these four emails, (a) to (e), were sent within a 30 minute period on 21st June, 2013, two months after the incident on 23rd April, 2013. The first was:

(a) *"*E-mail from Ms. Diane Park of the U.K. CAA to Captain John Steel of the appellant on 21 June 2013 at *15:21*:

"John

Copy of the AAIB notification." (This acronym referred to the U.K. Air Accident Investigation Board)

(b) Response of Captain John Steel sent to a Mr. Lou Fine and Mr. John Murray (of the IAA), copying Ms. Diane Park and Mr. Terry O'Neill, of the U.K. CAA on 21 June 2013 at *15:35:*

"Gents,

It would appear that Mr. Padraig Higgins and A. N. Other, believed to a Mr. David Bolger carried out a flight from Milan to the Dublin area (Rathvilly) on or around 22 April 2013. As per the content of the attached ACCID from the UK AAIB, one of the aircraft had an incident on landing.

Can you liaise with Diane and give her any assistance she needs in tracking down and contacting the individuals, including their licence details. Additionally, can you check with our the Gardai [sic] and Revenue to see if they complied with their requirements to advise of the intended flight and also with AWSD [Air Worthiness Safety Department of the IAA] to see if any validation was applied for or issued in respect of the Foreign Permit(s) to Fly.

Once we have all of the available information we can liaise with Diane and see how we wish to proceed."

(c) Diane Park to Captain John Steel, Subject Pilots, *15:39 21st June*:

"John,

It's a bit more … I have looked at both pilots on our system and although Higgins is registered with us with an up to date medical, we have not heard from him since 2000. However, I have a Mr. David Bolger date of birth who lives in Rathvilly, Co. Carlow, Ireland, who is the holder of an NPPL on microlight airplanes. Is he the one do you think? Di

Diane Park, Investigations & Enforcement Manager in Kingsway London"

(d) E-mail from Ms. Diane Park (U.K. CAA) to Captain John Steel (IAA) on 21 June 2013 at *15:57:*

"He would need permission from the Italians to fly on this licence in an Italian registered aircraft and Italian airspace and also seek your permission as well wouldn't he?"

(e) E-mail from Captain John Steel to Ms. Diane Park on 21 June 2013 at *16:05:*

"As I understand it he would in all cases as his Microlight Rating is valid only within Ireland unless validated by the relevant NAA for use in their territory or on their aircraft."

But emails (f) and (g) were written on 26th July, 2013, five weeks later.

(f) E-mail from Mr. Robert Webb (U.K. CAA) to Captain John Steel, copying Ms. Diane Park and Ms. Mary-Anne Chance, on 26 July 2013 at *14:35*

"Dear John

I have attempted to call you to give an update to the investigation. It is the one relating to the two microlights that made a forced landing in Swansea en route to Haverford West on 22 April 2013.

I have made many enquiries, looked at many documents and consulted with [unreadable] at Gatwick. I have received documentation from both pilots and all seems

to be in order. There is no evidence to substantiate any offence being committed. Both aircraft are now on the IAA register.

I have, therefore, concluded the investigation and informed both parties that there will be no further investigation and our file will be closed. …"

(g) E-mail from Captain John Steel to Mr. Robert Webb on 26 July 2013 at *14:41*: *"Hi Robert*

Sorry for not being available to take your call. Thank you for the update, we still have a couple of issues to deal with this side of the Irish Sea so the two boys will not be getting away 'scot free'."

45. Later, in evidence, Captain Higgins laid considerable emphasis on the wording of the last email, and the words "*scot free*". What was conveyed or implied in some of the emails, he said, made his hair "stand on end".

46. He testified that he received a further email from Robert Webb of the CAA on the 26th July, 2013 at 15:29. This was addressed to Diane Park, Alison Slater, and Mary-Anne Chance, all CAA officials. This followed receipt of the "*scot free*" email. Mr. Webb's email written to CAA colleagues read simply:

"*Sent for your information, and to note the IAA response!*"

Mr. Higgins received this email, along with the others, in response to the data request to the U.K. CAA.

The plaintiff's evidence regarding the emails

47. Captain Higgins described his reaction to this material as one of outrage, anger and anxiety. He conveyed his feelings by email to the IAA on the 14th October, 2013. He stated that he was an Aer Lingus Captain with an unblemished career, and took seriously what he described as a clandestine and unwarranted attack on his reputation by an organisation obliged to maintain and observe a "just culture" policy. He explained in evidence that such a policy is applied by pilots, as it allows for the identification of why incidents occurred without ascribing blame, save in cases of deliberate avoidance of protocol.

48. One part of the contents of Captain Steel's email caused the plaintiff particular concern. This was because the Accident Report Form, with which the IAA had been provided, contained only a description of the plaintiff's accident. Yet, within a short time, Captain Steel had been in a position to provide the CAA with the name of David Bolger, and had also made reference to the intended flight as one between Milan and Rathvilly. None of this had appeared anywhere in the CAA emails. Even by the time of the High Court hearing, he did not know where that information came from, although what was said there was correct. The plaintiff was particularly

concerned in the light of the previous history between himself and the IAA, and in view of the fact that Captain Steel knew him well. Captain Higgins' perception was that there was a "cross on his back", meaning that he had become a target. There had been no need for him to be "tracked down". He found what was conveyed by the words "*scot free*" in the penultimate email particularly worrying, implying that he was still facing allegations of misconduct. The references to the Gardaí and the Revenue caused him deep concern.

Proceedings

49. The plaintiff instructed his then solicitors to send an initiating letter on the 17th December, 2013. The IAA's solicitors replied on the 24th January, 2014, saying they were currently taking instructions, but requested the plaintiff to give particulars regarding any clearance or consent which had been obtained for the flight, details of his licence, and his permit. Some days later, the IAA's solicitors sent a further letter indicating that they were awaiting Captain Steel's return to Ireland. On the 7th February, 2014, the IAA's solicitors wrote again, maintaining that a further "key factor" in their client's defence would be whether the plaintiff had obtained the necessary consent to fly over U.K. airspace, contending this issue was not within their client's knowledge. A further issue would be whether the plaintiff had complied with Garda and Revenue requirements. There was further inconclusive correspondence.

The Statement of Claim

50. The plenary summons was issued on 16th April 2014. The Statement of Claim, issued on the plaintiff's behalf on 1st July 2014, pleaded that, in a series of emails written and sent by the defendant, he had been formally accused by the U.K. CAA, in a letter of 11th July 2013, of committing serious aviation offences within its jurisdiction. These included allegations that he had (a) flown an aircraft without the appropriate flight crew licence; (b) flown over British airspace without obtaining relevant clearance, and when not licenced to do so; (c) had somehow concealed the flight or incident from the relevant authorities supported by the suggestion that the United Kingdom authority had needed "assistance" in "tracking down" and contacting the individuals, including their licence and details; (d) had suggested that the plaintiff would have flown an aircraft without clearance from the relevant Irish authorities; (e) had not cleared the flight plans with either the Gardaí or the Revenue Commissioners; (f) was in breach of the Irish criminal law; (g) in breach of the Irish revenue law; and (h) had put the safety and life of himself and a passenger at risk by flying an aircraft when not properly licenced to do so. It set out the circumstances of the flight, and the events which followed, claiming that each of the allegations had been made by the defendant in the emails. At the hearing, the case was made

that these were allegations of the most serious and damaging kind for a commercial pilot, which, if sustained, could result in a criminal prosecution and the end of his career.

The Offer of Amends in 2019

51. For clarity, it is now necessary to anticipate matters a little, and bring the narrative up to the High Court hearing in 2019, six weeks after the publications, noting that the case had been listed on two previous occasions, but did not get on because there was no judge available to deal with the claim. When the case was called on, the wording of the offer of amends was not agreed and remained outstanding. The text, which the plaintiff testified was entirely satisfactory to him, was ultimately drafted, agreed and ruled on the second day of the High Court action.

52. Barton J. delivered a ruling, approving the text on the second day of the trial, in the absence of the jury. What was alleged in the Statement of Claim is to be compared with what the defendant accepted to be so in the offer of amends. This read:-

> *"This is an offer of amends for the purposes of s.22 of the Defamation Act, 2009 in respect of all of the statements made complained of in these proceedings.*
>
> *In 2013 the Irish Aviation Authority published several statements internally and to external agencies which contained false and defamatory statements concerning Captain Higgins. The IAA accepts that these statements were unsubstantiated and caused Captain Higgins upset and reputational damage.*
>
> *The IAA acknowledges that Captain Higgins is a person of high personal and professional integrity and did nothing to warrant this undesired attention. The IAA acknowledges Captain Higgins's role in contributing to improvements in air safety.*
>
> *The IAA hereby retracts all defamatory statements made concerning Captain Higgins.*
>
> *The IAA apologises unreservedly for this episode and regrets the length of time it took to reach a resolution.*
>
> *The IAA has agreed to pay Captain Higgins damages and legal costs associated with the above named proceedings.*
>
> *The defendant undertakes to publish this retraction and apology to the list of apology recipients attached to the plaintiff's solicitor's letter dated 30th July, 2015 and in addition to the chairman of the Revenue Commissioners and the Commissioner of An Garda Síochána and in addition the defendant undertakes to ask the UK Civil Aviation Authority to remove the defendant's email of the 26th July, 2013 from its file. The defendant undertakes to publish the retraction and apology to those recipients within seven days from the date hereof."*

Barton J. ruled that this statement should not be approved by the jury, but rather that he himself should rule on what was written there. (See s.23(1)(b) Defamation Act 2009, and Order 1B, 4(1).) But what was communicated in this offer did not represent the defendant's position when proceedings were first issued and for the two years after that.

The letter of the 11th November, 2014

53. It is now necessary to travel back to the year 2014. The Statement of Claim was in the hands of the defendants. There were many letters in the intervening correspondence, but one letter was key to the defendant's conduct of the defence. It will be remembered the jury awarded €130,000 aggravated damages. Later, this judgment discusses the extent to which this provision significantly altered the law on aggravated damages in defamation claims. What is necessary for the moment is to note that the material which is now described is different and distinct from the original defamatory material.

54. On the 11th November, 2014, the defendant's solicitors wrote a letter on instructions from IAA. This was 18 months after the incident, and 16 months after the defamatory emails. At minimum, this letter represented something of an alteration in what was being claimed in defence. The defendant was not retreating. To the contrary, the solicitors enclosed a notice for particulars seeking details about the flight and the pilots, and also stating that the IAA had instructed their solicitors to "*vigorously defend these proceedings*" for the reasons then set out. The letter then contained a series of headings. The first of these contained an explanation of the emails later considered to be defamatory:-

> Captain Steel's initial emails:
>
> *"The emails written by Captain Steel, which are the subject matter of these proceedings, were written in response to a query received from the U.K. Civil Aviation Authority (CAA) in respect of a flight carried out by your client on 22 April 2013. Our client was contacted by Ms. Diane Park of the CAA, who informed our client of an incident whereby an Irish pilot, identified as your client, had been forced to make an emergency landing in the U.K. on 22 April 2013. Our client maintains good lines of communication with the CAA, and they would often assist each other with similar enquiries.*
>
> *The report naturally caused some concern to our client. As the regulator of civil aviation in Ireland, it would have been remiss of our client not to investigate this incident. This is exactly what Captain Steel did in his email to his colleagues within the IAA on 21 June 2013. The emails sent by our client and referred to in your statement of claim clearly attract qualified privilege and are also not defamatory.*

Captain Steel's second email on 21 June 2013 to Ms. Park was in response to a query from Ms. Park in relation to whether your client was required to seek validation of his licence before making the flight in question. At the time of writing this email Captain Steel understood that the aircraft flown by your client was ultimately flown to Ireland following the emergency landing in the U.K. Captain Steel's second email on 21 June 2013 therefore also clearly attracts qualified privilege and is not defamatory."

55. The second heading, however, was rather different, and dealt with material other than in the defamatory emails:-

"Failure to Validate Permit to Fly

Paragraph 7(a) of your client's statement of claim pleads that in advance of making this flight your client "established as he would in all cases that all of the relevant papers were in order and that his licence and ratings were valid". Our instructions are:

(i) your client was flying an Italian registered aircraft (EI-FBX (previously I-9631);

(ii) the intended destination was Rathvilly, Co. Carlow;

(iii) this aircraft was registered on the Irish Aircraft Register on 5 July, 2013;

(iv) this aircraft did not hold an ICAO certificate of air worthiness, (as required pursuant to the Irish Aviation Authority (Airworthiness of Aircraft) Order 1996.

Ordinarily there is an exemption for such foreign registered aircraft to hold a certificate of airworthiness when flying to Ireland pursuant to Aeronautical Notice A19. However, the intended flight to Rathvilly would not have fallen within the exemption under A19, as one condition to the exemption is that the aircraft must not remain in the Republic of Ireland for more than 28 days without prior permission from our client. We are instructed that, as this aircraft remained in Ireland for longer than 28 days, and your client did not seek prior permission from our client, your client would have had to validate this aircraft's Permit to Fly in order to fly this aircraft into Ireland. We are instructed your client did not do this.

Captain Steel's email to Ms. Park of 21 June 2013 was clarifying his understanding that your client would have been obliged to validate his aircraft's Permit to Fly in advance of the intended flight to Rathvilly. We fail to see how this statement could be deemed to be defamatory of your client. As stated above, it clearly attracted qualified privilege in any case. As set out below, your client has also completely misinterpreted Captain Steel's remarks regarding the gardai and Revenue in this email."

56. The third heading was:-

"Failure to Comply with Revenue/Customs Requirements

The CAA notified our client by an email from Mr. Webb to Captain Steel on 26 July 2013 that it had concluded its investigations and that it was satisfied that no further action was required. Captain Steel replied that "we still have a couple of issues to deal with this side of the Irish sea, so the two boys will not be getting away 'scot free'". At this time, Captain Steel was still of the understanding that your client's aircraft had ultimately landed at Rathvilly. While the CAA may have been satisfied that the flight over U.K. airspace did not create any issues, Captain Steel's response relates to our client's concerns in respect of the importation of the foreign registered aircraft into Ireland. There are certain obligations to be complied with in advance of flying such an aircraft into Ireland which were not complied with in this case.

(i) General Aviation Report

In advance of flying an aircraft into Ireland, the pilot in question is required to give a minimum of 24 hours notice of the flight by completing and submitting a Customs & Excise Form (known as a General Aviation Report). This is a routine procedure aimed at assisting with preventing the illegal importation of goods into Ireland. We are advised that no official notification of this flight was received by Revenue Customs with the exception of an email forwarded to Customs Officer, Ken Byrne by officers at Haverford West. It appears that any such notification of this flight was sent to Haverford West, rather than directly to Revenue Customs as was required.

(ii) Landing in Rathvilly

There are three customs airports in Ireland – Cork Airport, Dublin Airport, and Shannon Airport – as appointed under the Customs & Excise (Aircraft) Regulations, 1964/1967. There are also a number of Irish aerodromes which have customs facilities, (for example, Knock and Kerry). As mentioned above, while we note that the plaintiff's aircraft was ultimately brought into Ireland by road following the damage endured by it during the emergency landing, the intended destination of the flight was Rathvilly, County Carlow. We are instructed that Rathvilly is a private landing strip. Revenue Customs have confirmed to our client that they have no record of Rathvilly having applied for, or being granted, "Approved" status for intra-EC flights.

Your client did not comply with his obligations in respect of his intention to fly his Italian registered aircraft into Ireland. Your client's failure to submit a General Aviation Report in compliance with Customs & Revenue requirements for intra-EC

flights when he was intending to fly his aircraft into Ireland justifies Captain Steel's remark regarding the gardai and Revenue in his 21 June email, and Captain Steel's comment in his email to Mr. Webb on 26 July 2013.

In summary, your client's intended flight into Ireland was not compliant with the above requirements. Captain Steel's emails clearly attracted qualified privilege and, in any case, were justified by your client's failure to comply with these requirements.

<u>Sphere of Publication</u>

Your client pleads at paragraph 9 of the statement of claim that "On or about 23rd June, 2013" he was made aware of "rumours which were circulating among individuals at Newcastle Airfield of something untoward which involved the plaintiff". This is only two days after Captain Steel's first email of 21 June 2013 to his colleagues in the IAA which, as set out above, simply made enquiries on foot of the enquiry received from the CAA and is well in advance of Captain Steel's email to Mr. Webb on 26 July 2013. Further, our client has confirmed that none of its officers, including Captain Steel, spoke to anyone at Newcastle Airfield in respect of this incident. This, together with the chronology outlined above, clearly demonstrates that our client is not responsible for whatever rumours it is alleged were circulating in Newcastle Airfield on or before 23 June 2013.

Further, we understand that the incident on 22 April 2013 was reported in newspapers local to where the incident took place, and was also referred to in a number of popular aviation websites. Therefore, it was the incident itself rather than communications from our client that were the subject of any such rumours in Newcastle Airfield. Our client is not responsible for these rumours.

Your client also claims at paragraph 10 of the statement of claim that the IAA was responsible for the republication of the allegations against him, specifically referring to Mr. Webb's email to Captain Steel on 26 July 2013 which noted that he had "consulted with colleagues at Gatwick". We are not aware of the substance of Mr. Webb's consultation with his colleagues at Gatwick. However, we understand that the CAA safety regulation staff are based at Gatwick Airport. Therefore, given that the CAA was the body investigating the incident in the first instance, we can only assume that it made enquiries of its' safety regulation colleagues at Gatwick similar to those it made off our client following the incident. It is clear from the chronology of events that the CAA's investigation was triggered by the incident itself, and not by communications

from our client. Therefore, our client is not responsible for whatever discussions the CAA had with colleagues at Gatwick, which were clearly prompted by the incident.

Legal Costs

We note that in your client's particulars of special damage he has listed legal fees paid by him in dealing with the original allegations maintained by the CAA. It is clear from the chronology of events that the CAA began their investigation prior to making any contact with our client. Hence, Captain Steel's remarks were not what gave rise to the CAA's investigation. Rather, the CAA's investigation was prompted by the incident itself on 22 April 2013. Our client is not liable for these costs.

Conclusion

Our instructions are to strongly defend this matter on the grounds that:

The comments made in Captain Steel's email were justified on the basis that your client failed to adhere to various requirements in respect of flying his aircraft into Ireland; and

The comments attracted qualified privilege.

…"

Effect on the plaintiff

57. The plaintiff testified that he was even more deeply concerned by these added, and effectively new, allegations, especially the very serious claim that he had flown an aircraft without the appropriate flight crew licence. Captain Steel had flown with him in his microlight, as had his wife, and yet Captain Steel was alleging his licence was invalid for flying abroad, despite having issued that licence. If some part of his paperwork was not right, and that had been proven, his career would have been over. He was shocked, devastated, and angry. He had been accused of doing something that was absolutely wrong, and in fundamental breach of the standards to be expected of a pilot. He felt like a prospective criminal.

58. As matters transpired, the evidence was that all the further allegations made in the letter of the 11th November, 2014, 15 months after the defamatory emails, were capable of being answered, and were responded to. It is clear that what was written in the letter was based on instructions, presumably from Captain Steel. But what was contained in the letter was a series of queries which, in many ways, were as serious as any of the earlier allegations contained in the original emails. The legal significance of this question is considered later.

The first offer of amends

59. The first offer of amends letter was sent on the 26th May, 2015. The offer was in the terms of s.22 of the Defamation Act, 2009. The plaintiff testified that his then solicitor contacted him to indicate that he had "won". But no agreement could be reached in relation to the terms of the offer. Many drafts and re-drafts were exchanged. The determination of the judge/jury issue took three years to conclude.

Termination of negotiations

60. There were further negotiations, but these concluded on the 22nd July, 2015, when, in response to the plaintiff's solicitor's latest draft of the apology, the defendant's solicitors wrote stating that their client's believed that the financial offer suggested - by then €25,000 - represented a true reflection of the value of the case, even without the application of a discount. The letter went on to state:-

> *"In those circumstances, we do not see any merit in attending a meeting with your client to discuss the matter further.*
>
> *In the event that you reject the financial element, please make the necessary application to the High Court for a determination on the damages."*

61. The letter went on to state that, in the event that the plaintiff applied to court for a determination on the offer, and the court ordered damages which did not exceed that sum, the defendant would rely on the letter in fixing the plaintiff with any costs incurred in defending the unnecessary application. In his closing speech, counsel for the plaintiff laid considerable emphasis on this letter as signifying an unwillingness to negotiate further.

Resumed correspondence in 2016

62. The plaintiff testified that his anger was made worse by a letter written on the 3rd February, 2016. There, the defendant's solicitors contended that the plaintiff had deliberately and completely mischaracterised their client's offer and their genuine efforts to engage in an offer to make amends in order to inflate the value of the claim. The plaintiff was deeply angry at this allegation. He was still dissatisfied at what was offered. In particular, he had asked for details of who in the Revenue and the Gardaí had been contacted, but had not received this information.

The Effect on the Plaintiff

63. Matters rested thus in the negotiations. In the meantime, the issue regarding the potential role of the jury proceeded through the High Court, the Court of Appeal, and to this Court. The plaintiff testified he was deeply concerned at his exposure to costs, and the risk of bankruptcy at this stage, and that all the results of his work over the years might be put at risk,

including money set by to educate his children. He was unwilling to accept that the defendant's efforts to settle the matter were genuine.

Cross-examination

64. The plaintiff was cross-examined in detail as to his own conduct. It was put to him that, after the original offer of amends on the 26th May 2015, he had acted unreasonably, that the defendant's efforts to resolve the matter were genuine, and that the trial of the issues regarding the role of the jury were *bona fide* intended to clarify the law. The plaintiff believed the IAA was "cynical" in its intent, by having the judge/jury issue tried and determined in three courts. To his mind, it was a disgrace that the State authority, with unlimited resources and no accountability, was exposing him to costs orders, and attacking him again because it did not like the message he was portraying.

65. Counsel for the defendant put it to him that the IAA had acted entirely fairly once it had been made clear, in May, 2015, by Captain Cummins, Captain Steel's successor, that the statements in the emails should not have been made. The plaintiff indicated that none of the apologies which had been proffered during that period was satisfactory. They had either restated everything that had been alleged, refused to indicate who in the Gardaí and the Revenue had been contacted, or accused the plaintiff of trying to inflate the value of the claim. The defendant had also successfully resisted an application for discovery on these issues in the High Court on a technical point, as, by then, the original offer of amends had been made, and it could not have been claimed that the matters sought in discovery were any longer in issue.

66. In cross-examination, it was put to the plaintiff that he had appeared at nearly all stages of the proceedings, including motion hearings. He accepted this was so. In response to questioning to the effect that Ms. Gahan and Captain Cummins had been unaware of the previous conflict, the plaintiff's own evidence was that, on his information, very many IAA officials were aware of the situation.

67. On the claim of bringing the microlight into Rathvilly without authorisation, the plaintiff rejected any suggestion that the IAA had simply been under a misunderstanding regarding whether the flight was going to go to Rathvilly on the date in question. At that stage, he said, the defendant was only in receipt of his accident report which concerned the flight to Haverford West. He testified that "*something very untoward had happened*" before the whole train of events, as within a couple of minutes of the IAA receiving the email on 21st June, 2013, there had been a response with Mr. Bolger's details, and reference to flight plans. He testified, "*There was digging*". He testified that, when the emails went off, the author already had all relevant information at his fingertips.

Evidence of Captain Ted Murphy

68. Captain Ted Murphy testified next on behalf of the plaintiff. He was a former Aer Lingus pilot with forty-five years of experience. He also had wide experience of other airlines, and had worked for three years in the International Civil Aviation Organisation, the U.N. body responsible for aviation which sets standards for aviation throughout the world. The witness was the author of a handbook for light aircraft, and another handbook on emergency response to incidents involving dangerous goods in aircraft. He had also, on two occasions, been President of the Irish Airline Pilots Association. The witness confirmed that he was acquainted with the plaintiff, although they were not friends as such. While he was an Aer Lingus captain, he (the witness) had worked with the plaintiff, who had flown with him as co-pilot.

69. This evidence focused on the nature and gravity of the defamation (s.31(4)(a)). Captain Murphy testified that he believed that, if the defamatory conduct as described in the Statement of Claim were true, no airline would continue to employ such a pilot. It was essential for airlines to have absolute trust in their pilots, and that they would behave properly and in compliance with regulations. Similarly, it was essential that a Regulator should have the same trust in pilots.

70. It was put in cross-examination to Captain Murphy that the allegation comprised merely a few emails sent to a small number of people, and was not of any great consequence. He responded that, if he was in a position of authority over the plaintiff, or if he were in a position where he might be asked to hire the plaintiff, he would be very concerned about such allegations. Moreover, the plaintiff would not, as a pilot, get the necessary clearance from the State authorities to work as a pilot if such allegations were pending.

71. Under further cross-examination, the witness agreed that the plaintiff was a pilot in very good standing, with a very high reputation. He said he had never any reason to think otherwise. He was aware that some issues had arisen between the plaintiff and the defendant, but that was the extent of his knowledge before becoming involved as a witness for the plaintiff. This concluded the plaintiff's case.

The Defendant's Case

Evidence of Captain Niall Cummins

72. The defendant called just two witnesses, Captain Niall Cummins and Ms. Aideen Gahan. Captain Cummins deposed that he had thirty years' experience as a pilot. He spent ten years working for Ryanair, during which he was based both in Dublin and London Stansted. He also flew for Ryanair around Europe. In 2005, he took up a position working with the defendant as Chief Flight Examiner, having previously worked part-time in a more junior role. The role of Chief Flight Examiner involved, *inter alia*, setting standards for Flight Examiners

and flight schools, as well as dealing with pilot licencing. This involved ensuring pilot licences issued in this country were to an international standard. In 2015, he replaced Captain Steel as manager of general aviation, that being aviation that does not fall within the category of commercial airline work.

Meeting on 13th May, 2015

73. Captain Cummins said that he had had no involvement at all in the matters that formed the background of these proceedings in 2013, nor did he have any awareness of those matters until he took over from Mr. Steel as general aviation manager. He said, at that time, he knew Captain Higgins by reputation only, as a man who had made a very significant contribution to aviation, but had never met him personally. Captain Cummins was invited to attend a meeting with two directors of the defendant at the offices of its solicitors on the 13th May, 2015 to discuss the defamation proceedings, and he stated that this was the first time he became aware of the litigation.

Captain Cummins' reaction to the emails

74. When he was shown the emails, he was "*a little bit shocked*" at the content. One email in particular from Captain Steel (the third) struck him as being objectionable. As the meeting developed, he formed the view that the plaintiff had done nothing wrong, and had followed correct procedures in making a precautionary landing. He said that it was perfectly normal for the local authority in that region to investigate the landing, and for those same authorities to make contact with the authorities here seeking information regarding the licencing and associated documentation issued to the pilots concerned. He added that pilot licencing and certification requirements varied from jurisdiction to jurisdiction. He stated that, on receipt of a query regarding the validity of a person's licence, he would expect the person receiving the query to check with a suitably qualified or experienced person as to whether or not the person concerned held the necessary licence or certification. In this instance, when the U.K. CAA had formed its conclusion that everything was in order, and informed the IAA that it was not carrying out any further investigations, the appropriate reply would have been to thank the U.K. CAA for that information, and to leave the correspondence at that. The additional text in the reply in this case to the effect that "*the boys won't get away scot free"* was inappropriate, and should not have been said. He expressed this view to his superiors and the defendant's legal team at the meeting of 13th May, 2015 that they should apologise and bring the litigation to an end.

The Evidence of Ms. Gahan

75. The evidence of Ms. Gahan was not referred to in the judgment of the Court of Appeal. Without any reflection whatsoever on Ms. Gahan, what she said was highly material to the issues which the jury had to determine, not least the conduct of the defendant at the time of the emails and afterwards. Her testimony described the sparse nature of the material which Captain Steel sent to her in response to the data request. However, Mr. Fine, an IAA official included in the email correspondence, had not deleted all the emails and provided them to Ms. Gahan upon her subsequent request following on from the plaintiff's freedom of information request. These were short terse emails. It is unnecessary to set out what they said. But their brevity may be compared, first, to what the plaintiff obtained from the United Kingdom Civil Aviation Authority, and, second, to the subsequent letters from the IAA from the time of the proceedings onwards, including the letter of the 11th November, 2014. Ms. Gahan was not in a position to deny that the information which she had been asked to provide to the plaintiff in response to his data information requests was, through no fault of her own, incomplete and inaccurate.

The defendant's change of attitude

76. Ms Gahan testified that the IAA changed its attitude after Captain Cummins' meeting with senior management and the IAA's solicitors. But against that, the IAA had persisted with its rigorous defence up to the 26th May, 2015. Ms. Gahan's testimony was that, from May 2015 onwards, the IAA's efforts to seek to resolve the case had been entirely genuine. She accepted that the material which the U.K. CAA had disclosed made it clear that there had been considerably more interaction between the CAA and IAA than one single phone call, which was the message she had been asked to convey to the plaintiff on the 8th October, 2013. She accepted matters had not been confined to that single phone call, and that a number of further steps had been taken, including enquiries regarding the pilots licences, and with the Gardaí and the Revenue. The defendant's position with regard to the offer of amends was that the plaintiff's demands were "utterly unrealistic". The witness accepted that the defendant was aware, and had been so advised, that it was open to it to make an application to court to have the offer of amends approved, regardless of whether there had been agreement on the issue of damages.

Closing Speeches

77. The High Court judge held a discussion with counsel on the form of their closing speeches in the absence of the jury. Counsel for the defendant referred the jury to the case of *Christie v. TV3* [2017] IECA 128, as being an appropriate marker for the level of damages which should be awarded. There, the Court of Appeal held an award of €140,000, beginning with a starting point of €200,000, but reduced because of an offer of amends, made by a judge

without a jury in the High Court, began at a wrong starting point, which should have been €60,000, thereafter reduced because of an offer of amends to €36,000. Counsel for the plaintiff, in turn, referred the jury to *Leech v. Independent Newspapers* where a jury award of €1.87 million was reduced to €1.2 million, although indicating that the case before them was not comparable in its order of magnitude to *Leech*, a Supreme Court judgment. *Ward v. Donegal Times* [2016] IEHC 711 was referred to in the context of the 20% discount in that case for the offer of amends. The judge also made observations as to the level of damages which might be appropriate in the case of very serious and permanently incapacitating injuries, which would attract high levels of general damages, perhaps in the region of €500,000, and, in one instance, €700,000.

78. The comparisons the High Court judge made to other cases and instances where damages had been be awarded followed consultation with counsel. But what happened in this case must surely be a cause for reflection. No matter how careful counsels' closing speeches, and what was said in the judge's directions, this jury was hardly assisted when the main focus when they were asked to make a just and proportionate award was put to place before them two polar opposites in the annals of defamation case law. Even while referring to other cases briefly, to give a jury a choice between, on the one hand, a starting point, or an award of €60,000 and, on the other hand, €1.2 million, was of little assistance. Significantly more would have been needed by way of guidance to place this claim within the range of other cases.

The jury's requests for material

79. It is also necessary to make one further observation. Once the judge had completed his charge to the jury, the foreperson actually requested that they be provided with two pieces of documentation, the first being the precise provisions of s.31 of the Defamation Act, 2009, as an *aide memoire;* the second a passage from Irvine J.'s judgment in the Court of Appeal in *Kinsella v. Kenmore Resources* [2019] IECA 54, at para. 219, in which she referred to the need to assess damages in defamation having regard to a "*good moral compass*". The judge charged the jury that both defendant and plaintiff were entitled to justice, and that the jury would not be doing anyone a service were they to award exorbitant sums by way of damages. He made no comment on the evidence. He left the assessment of that testimony to the jury. The questions which the jury had to answer were to assess general damages, and aggravated damages.

III. The Case Law

80. Prior to considering the judgment of the Court of Appeal, it is now necessary to outline some of the defamation case law. This judgment later discusses the Court of Appeal judgment, where the total award was €78,500. But any assessment of that judgment, now appealed to this

Court, requires a consideration of prior defamation case law for the purpose of comparison. However, such comparisons are not easy in defamation. In many cases, the meaning of the publication, and whether it is defamatory, are distinct issues of fact for the jury. Whether such fact-specific cases can be useful as guidance for another jury must be open to question. Absent a full description of the issues in each case, and how a previous jury was asked to approach each issue, a jury verdict, in itself, will have little or no precedential value.

81. A further, obvious, point arises. Discussion of jury awards by appeal courts generally takes place in the context of very high or excessive awards, which do occur. But extrapolation from the extreme particular to the general sometimes means that quite broad arguments are based on the circumstances of one individual, and atypical case. In the survey which follows, I choose the authorities decided by this Court which have the most bearing on the matters at hand, but having regard to other relevant decisions.

***de Rossa* [1999]**

82. In *de Rossa v. Independent Newspapers* [1999] I.R. 432, the publication alleged that the plaintiff, a prominent politician, tolerated serious crime, personally supported antisemitism and violent communist oppression. This Court dismissed the defendant's appeal against a jury award of £300,000, now equivalent roughly to €460,000. The Court held that the assessment of damages was a matter for the jury, who should base their assessment entirely on the facts as found by them.

83. In *de Rossa*, this Court deprecated the concept of a jury being informed of figures awarded in other cases (*Barrett v. Independent Newspapers Limited* [1986] I.R. 13), stating that it was not necessarily fair to compare awards for loss of reputation with damages for personal injury, as compensation for damages of reputation operated as a vindication of the plaintiff to the public, and as consolation to the plaintiff for a wrong done, and not as a monetary recompense for a harm which is measurable in money.

84. The Court observed that if a judge and counsel could mention figures to the jury, the proceedings would be in danger of developing into an auction, or that a jury would be overwhelmed with figures, and the practice could lead to confusion. The court was also of the view that, in assessing quantum of an award, a jury should not be given guidelines by the court or by counsel (*Ward v. James* [1966] 1 QB 273 approved).

85. In so holding, this Court specifically did not follow *John v. MGN Limited* [1997] QB 586 or *Rantzen v. Mirror Group Newspapers Limited* [1994] QB 670 on guidance to juries. This Court observed that the assessment by a jury of damages in defamation had an unusual and emphatic sanctity, and an appellate court should be slow to interfere with such assessment.

However, importantly, the Court added that the discretion of a jury in the assessment of damages was not limitless, and damages awarded must be fair and reasonable having regard to all the relevant circumstances, and must not be disproportionate to the injuries suffered by the plaintiff, or the necessity to vindicate the plaintiff in the eyes of the public.

86. The Court held that an appellate court was only entitled to set aside an award of damages by a jury if it were satisfied, in all the circumstances, that the award was so disproportionate to the injury suffered and the wrong done, that no reasonable jury would have made such an award. The Court held that general compensatory damages were such as should amount to a sum to compensate a plaintiff for the damage to his reputation, vindicate his good name, and take into account distress, hurt and humiliation. The most important factor was the gravity of the libel. Also relevant were the extent of publication and the defendant's conduct of the action. It is in the nature of a living jurisprudence that it evolves incrementally, and not in large leaps.

87. I should add that the European Court of Human Rights ("ECtHR") held that the award in *de Rossa* did not infringe the Article 10 rights of Independent Newspapers, because of the nature of the judge's charge to the jury, which dealt with proportionality (*Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (Application no. 55120/00) The ECtHR distinguished this case from *Tolstoy Miloslavsky v. the United Kingdom* [1995] 20 E.H.R.R. 442, where the award, which was three times the size of the next largest award ever made, was not proportionate, was not subject to sufficient guidelines, nor potential review, and was not "prescribed by law" under Article 10 ECHR.

***O'Brien* [2001]**

88. *O'Brien v. Mirror Group Newspapers* [2001] 1 I.R. 1 ("*O'Brien*"), marked a step in a gradual evolution after *de Rossa*. It was alleged that the plaintiff, a prominent businessman, had bribed a politician in order to gain a substantial business advantage. The jury awarded the sum of £250,000. This Court held that this was a most serious libel, but nonetheless concluded that the jury award was excessive. Significantly, Keane C.J. engaged in comparison with other cases. He observed that the award could not be regarded as coming within the category of the grossest and most serious libels which have come before the courts. The Court rejected the submission that the judgment in *de Rossa* had been incorrectly decided, or that it should be overruled. However, giving the majority judgment, Keane C.J. did hold that the award in *O'Brien* was disproportionately high, and remitted the matter for a rehearing. But he was not prepared to review the decision of the court in *de Rossa v. Independent Newspapers,* relying on the application of the rules relating to *stare decisis*.

89. Keane C.J. also commented that previous awards should be considered with caution, given the fact that there would always be nuanced differences and facts between cases. The Chief Justice compared the award in *O'Brien* with that endorsed by this Court in *McDonagh v. Newsgroup Newspapers* (Unreported, Supreme Court, 23rd November, 1993) and *de Rossa.*

90. In *McDonagh* [1993], the plaintiff, a barrister, was awarded £90,000 for an allegation interpreted as meaning that he was sympathetic to terrorist activity. In *O'Brien*, Keane C.J. considered *de Rossa* to be a far more serious defamation. Additionally, it is noteworthy that, for the first time, the judgment also referred, by way of comparison, to the level of damages typically awarded in personal injury actions, in contrast to the jury award in *O'Brien*. The award was, he held, "*comparable to the general damages in the most serious cases of paraplegic or quadriplegic injuries*" (at p. 19).

***Stare Decisis* and *Mogul* [1976]**

91. My colleague Hogan J.'s judgment expresses the view that this case was wrongly decided. I am unable to agree. There is no basis for concluding that what was decided in *O'Brien* there was "patently wrong". Insofar as reference to Strasbourg case law is concerned, it will be remembered that in *de Rossa* the ECtHR found in the defendant Ireland's favour, and upheld the application of the Defamation Act, 1961 in that case. The close link between *de Rossa* and *O'Brien* is not purely one of time. While their application differs, the fundamental principles applied in each case are consistent. In *O'Brien*, this Court rejected an application to hold that *de Rossa* was wrongly decided.

92. I add that, insofar as there is now discussion as to whether *O'Brien* or *Leech* were wrongly decided, that no reference was made in this appeal to the doctrine of *stare decisis*, or the judgment of this Court in *Mogul of Ireland v. Tipperary (NR) Co. Co.* [1976] I.R. 260, where O'Higgins C.J. and Henchy J. set out the tests for declaring a previous decision to be "erroneous" or "clearly wrong". It is not the function of the courts to amend the law, but interpret the statute before it. The Court is not here dealing with a constitutional question where the principle of *stare decisis* may, on occasion, be applied less rigidly.

Leech v. Independent Newspapers

93. This remarkable case concerned a series of articles published by the defendant, which were accompanied by a misleading and misrepresentative cropped picture showing the plaintiff and the Minister in formal evening wear, alleging that the plaintiff had engaged in an improper relationship with the Minister, overcharged for her advices as a communications consultant, had travelled to, but improperly failed to attend, a U.N. conference at taxpayers' expense when there was no need for her do so, that she had travelled abroad for improper and unprofessional

purposes; that she had an improper sexual relationship with the Minister; and had been unfaithful to her husband and children.

94. In *Leech*, the detailed reasoning of this Court was set out in very great detail. Murray J. and Dunne J. set out their reasons for rejecting the jury award of €1,872,000 as disproportionate, on what was a profoundly unusual case. They made a substituted award of €1.2 million. McKechnie J. disagreed, and in adopting that course considered the gravity of the libel, the extent of the publication, the conduct of the defendant, and the import of the defamation, having regard to the evidence. The Court had regard to the constitutionally enshrined value of freedom of expression, and the risk of a chilling effect of very large awards. (See *Dawson v. Irish Brokers Association*, Supreme Court, Unreported, 27th February, 1997, O'Flaherty J.) In the face of the plaintiff's submissions that, in the event of this Court setting aside the verdict, it should be remitted for rehearing, the majority of the Court held it was desirable from the point of view of all of the parties that the litigation should be brought to an end. McKechnie J. disagreed. The defendants applied to the ECtHR, contending that the award of damages was such as to raise questions as to the protection of freedom of expression guaranteed under Article 10 ECHR.

Leech* in Strasbourg: *Independent Newspapers v. Ireland

95. The Court of Human Rights concluded subsequently, in *Independent Newspapers (Ireland) Limited v. Ireland*, Application No. 28199/15, that unreasonably high damages for defamation can have a chilling effect on freedom of expression, and therefore there must be adequate domestic safeguards so as to avoid disproportionate awards being granted. In its opinion, the ECHR found that the safeguards had not proved effective in this case. At first instance, this was because domestic law prevented the judge from giving the jury specific instructions about an appropriate award of damages for the libel. On appeal, the ECtHR considered that, although the award had been overturned and replaced with a lower amount, it was said, this Court had not given sufficient explanation as to how the new amount had been calculated, and had not addressed the domestic safeguards at first instance nor the strict limits on judicial guidance to juries.

96. The ECtHR took the view that the award by this Court constituted an interference with the right of free expression guaranteed under Article 10 of the Convention. It was higher than any other award which had previously been allowed or granted on appeal. It had the capacity to act as a benchmark in the future. The court was of the opinion that the exceptional substitution of a new award by the Court, and the exceptionally high nature, had pointed to a need for comprehensive reasons explaining the final figure.

97. The court also observed that jury trials were an entirely legitimate way to assess defamation cases, and that it was not its task to call into question that legislative choice, or take the place of the national court. Rather, the issues were as to the nature and extent of the direction given to juries to protect against disproportionate awards and, in the event that an appellate court engaged in a fresh assessment, the need for relevant and sufficient reasons for the substituted award. The court adverted to the fact that the proceedings in question had been conducted under a legal regime that had since changed with the adoption of the Defamation Act, 2009. It welcomed the comments by a majority of the Court, which noted that under the new legislation it would now be possible for a trial judge to give more detailed instructions to a jury as to assessment of damages. The applicant, Independent Newspapers, was awarded €20,000 in respect of costs and expenses. It was not awarded any pecuniary or non-pecuniary damages. The ECtHR laid emphasis on the role of appeal courts in guaranteeing legal certainty by giving reasons for decisions which might provide a benchmark for future court awards and settlements.

98. It would appear that the judge's reference to the purchasing power of money in his charge to the jury was seen by the ECtHR as a positive and possibly distinguishing factor from *de Rossa*. Delivering judgment in *McDonagh*, members of this Court stated, in terms, that a more sympathetic reading of the judgments of this Court might very clearly discern the basis of the substituted award. I entirely agree with those observations. It must be said also that *Leech* was a truly exceptional case, where the defendant newspaper, at an apparently chosen time, when the appellant was launching a new business, embarked on what can only be described as a vendetta or campaign of vilification suggesting gross impropriety, where the jury concluded that the allegations were without justification.

99. The ECtHR did not, however, identify any ceiling figure on damages, where its concerns as to chilling effect would be met. While the judgment expressed the view that juries have an important role to play in defamation, it did not seem to address the fact that, of their nature, a selected body of twelve people does not give reasons for decisions which, in most cases, are tried on what are factual issues. While the judgments of the Court did not find favour in Strasbourg, I do not consider that this fact alone should lead to a conclusion that the case was wrongly decided as a matter of the law of this State.

***McDonagh* [2018]**

100. These earlier decisions provide a background to the more recent judgments delivered by this Court in *McDonagh v. Sunday Newspapers Limited*. appeal was heard in two stages. I refer to them as *McDonagh (1)* ([2018] 2 I.R. 1) and *McDonagh (2)* ([2018] 2 I.R. 79). In

McDonagh), the defendant, relying on a plea of justification rejected by the jury, alleged that the plaintiff was a drug dealer and a loan shark. But, in reaching its verdict, the jury had failed to answer a question posed on the issue paper as to whether the reputation of the plaintiff had been materially injured, where the drug dealer and loan shark's claims were not proved to be true, but where allegations that the plaintiff was a tax evader and criminal had been found to be true. The jury assessed damages at €900,000.

101. The defendant appealed to the Court of Appeal, which set aside the verdict of the jury effectively as perverse, dismissed the claim of the plaintiff in relation to the drug dealing allegation, and remitted for retrial the claim in relation to the loan shark allegation. On appeal, this Court (Denham C.J., O'Donnell, McKechnie, MacMenamin, Dunne, Charleton, and O'Malley JJ.) found the Court of Appeal had erred, upheld the jury verdict on liability, but invited further submissions as to whether a retrial was required. This Court held that, although circumstances could exist where it might be necessary to overturn a jury verdict because all the evidence tendered at trial pointed in one direction, such a decision could only be made in exceptional circumstances. An appellate court could not find a verdict of a jury to be perverse merely because that court would have decided otherwise. It could make such a finding only where the decision was one that no reasonable jury could have reached. An appeal court would substitute its own award only in exceptional circumstances.

102. The judgments in *McDonagh v. Sunday Newspapers Limited (2)* [2018] 2 I.R. 79 are detailed. I deal with them only insofar as is material to the question of the level of award. The judgment of this Court cautioned against substantial alterations in decided case law by appeal courts. This Court observed that transcripts of evidence were not a sound basis for substituting findings of fact made by a jury (*Hay v. O'Grady* [1992] 1 I.R. 210 followed). The court held that the right of freedom of expression was not an answer in itself to a defamation action, nor was there an unqualified right to publish material once the publisher believed it to be true.

103. When this Court came to give judgment in *McDonagh (2),* the parties had settled the case. But in view of the importance of the matter, the Court nonetheless delivered its judgments on the legal issues. The majority of this Court held that a retrial was not required, and that, in the circumstances, it was appropriate for this Court to adopt the exceptional course of substituting an award of damages. These exceptional circumstances included: (i) the fact that the issue had been argued in the Court of Appeal; (ii) that there was by then guidance from the European Court of Human Rights on the law of defamation; (iii) that a very substantial time had elapsed since the publication; (iv) that significant costs had already been incurred; and (v) that there was a risk of further costs of a retrial, and possibility of an appeal on foot thereof.

104. While not specifying what award would have been substituted, the Court went on to hold that a fair, reasonable and proportionate award would have been very substantially less than the award of €900,000. The Court held the damages awarded by the jury were not proportionate, having regard to the gravity of the libel, the effect on the plaintiff, the extent of publication, and the conduct of the defendant. The fact that the plaintiff did not enjoy a good reputation did not give a licence to defame him, but was nonetheless relevant to the assessment of damages.

105. In reaching its conclusion, the majority made specific reference to *Barrett v. Independent Newspapers Limited* [1986] I.R. 13; *de Rossa v. Independent Newspapers Plc.* [1999] 4 I.R. 432; *Leech v. Independent Newspapers (Ireland) Limited* [2015] 2 I.R. 214; and *Independent Newspapers (Ireland) Limited v. Ireland*, Application No. 28199/15, [2018] 66 EHRR 33. The majority of this Court held that it would be inconsistent with the high value ascribed to a jury verdict in defamation matters to set aside a verdict and direct a retrial on the basis of mere speculation that a jury had ignored or not understood a matter on which it had been addressed and instructed. This Court did not overrule any of its earlier decisions.

The legal status of a jury verdict

106. O'Donnell J. quoted from the well-known passage from Henchy J.'s judgment in *Barrett v. Independent Newspapers*, p. 19, to the effect that:-

> *"Whilst the assessment by a jury of damages for defamation is not sacrosanct in the sense that it can never be disturbed upon appeal, it certainly has a very unusual and emphatic sanctity in that the decisions clearly establish that appellate courts have been extremely slow to interfere with such assessments, either on the basis of excess or inadequacy".*

107. O'Donnell J. went on to state:-

> *"This vivid phrase gives a strong sense of the height of the bar but was not, I think, intended to suggest that the award of damages by a jury in a defamation case had some mystical quality putting it beyond review. Rather, I consider that however described, the appellate reluctance to review a jury award and substitute its own award is based on pragmatic and persuasive considerations rooted in the decision made in this and other jurisdictions to have the questions of meaning, defamation, and assessment of damages determined by a representative and randomly selected sample of the population, under the guidance of an experienced judge*." (para. 105).

108. *McDonagh (2)* contains a number of observations on the role of juries as part of the legal system in the case of defamation and false imprisonment. A jury verdict represents the

considered view of a group of twelve disinterested persons bringing to bear together their collective wisdom. In general, this should work against idiosyncratic or capricious decisions. Thus, such decisions deserved a significantly wide margin of appreciation. But this did not mean that jury awards were sacrosanct to the extent of being impervious to review.

109. *McDonagh* concerned a case brought under the 1961 Act. But, even speaking in the year 2018, nine years after the 2009 Act was enacted, the majority did not consider that the formulation of the test for setting aside an award should be altered, whether by reference to anything that was to be found in s.13 of the 2009 Act, or otherwise.

110. This Court, therefore, identified the test as follows:-

> "*that to be set aside, an award must be such that no reasonable jury could have made the award on the evidence: but the award of a jury must be such that it may viewed as just and proportionate."*

111. This states the law. I go no further than to observe that, in the event of any discordance, the views of this Court in *McDonagh* must be taken as stating the binding law. It has not been suggested that this recent judgment was wrongly decided.

Free Speech vs. Defamation

112. I pause in this brief survey of the damages awards to make an observation relevant to this case, and to respond to Hogan J.'s observations on the constitutional values engaged in assessing damages under the 2009 Act. The point arises in the context of *McDonagh (2)*. In his judgment, O'Donnell J. made the important observation that a statement made and *alleged* to be defamatory is an expression of speech itself, protected in principle by the Constitution. However, when a court comes to assess damages for defamation, it does so only after it has been determined that the statement is both defamatory and wrongful, and that none of the defences protecting a wide range of free speech applies (para. 115). Therefore, if it has been determined that the words are not true in substance in themselves, they are not subject to the same protection under the Constitution as *bona fide* expressions of conviction or opinion, which are protected by Article 40.6.1. I respectfully agree.

113. What was said in the emails in this case has been accepted as being defamatory. The contents were not, therefore, governed by a free speech protection. It cannot be said, either, that these defamatory statements were an expression of conviction or opinion, in the sense of being a belief of the defendant.

114. I would add that the words of the First Amendment to the Constitution of the United States differ very significantly from the terms and guarantees contained in the Constitution of 1937. The United States' Constitution was amended to provide that Congress shall "*make no*

law abridging freedom of speech or the press". What is sometimes encountered on the internet might now raise questions about such an absolute protection, when there is hate speech and character assassination may be accessible on every desktop and mobile phone.

115. Another, less understood, point is that, in *New York Times v. Sullivan* [1964] 376 U.S. 254, the Federal Court also held that, in libel cases, the evidential burden should be shifted from the defendant to the plaintiff, who had to show the allegedly defamatory statement was false. The law in this State provides otherwise.

A Further Observation on the Constitution

116. Here, it is necessary to make a further important distinction. Article 40.3.2 of the Constitution provides that the State shall, in particular, by its laws protect as best it may from unjust attack the "good name" of every citizen. While it is necessary to deal with comparisons with other defamation cases, this case does not, in fact, directly concern the "marketplace of ideas and convictions", or the necessary legitimate freedom of expression on the part of media organs. Article 40.6.1 of the Constitution protects freedom of expression to citizens to express their convictions and opinions. It then proceeds to state the "education of public opinion" is a matter of such grave import to the public good, the "organs of public opinion", while preserving their rightful liberty of expression, shall not be used to undermine public order or morality or the authority of the State.

117. But this defamatory material was not an "education of public opinion" by the press or media. The emails were published by this State body to a limited but influential audience. It cannot, therefore, be said that this case concerns restrictions on the freedom of the press to publish matters concerning freedom of convictions or opinion. Those questions simply do not directly arise in this case. Insofar as there were "convictions or opinions" here, they were false and defamatory. Thus, the Court is not here considering the balance to be struck to the same extent which would arise in other more "typical" defamation cases. In such cases, the duty of the State to vindicate the good name of an individual has to be balanced against the vital freedom granted to the organs of the public opinion designated under the Constitution as having liberty to express opinions and convictions. If that balance is to be fundamentally altered, it is a matter for the Oireachtas, and not for this Court. A court can clarify the law, but is not empowered to engage in legislation.

118. The fact that the leading defamation law textbooks refer to Shakespeare's Othello is no coincidence. It is a case history of how lies can undermine good name and reputation. Such lies can be destructive to those who believe the defamation and act on that belief. Ultimately, the defamer can suffer consequences.

119. In Othello, Cassio pointed out, reputation can be a most vital part of oneself. Dignity, a value identified in the Preamble to the Constitution, and reputation move hand in hand. But, in this case, these concepts are purely abstract. Reputation held a real commercial significance for the plaintiff in the world of aviation.

120. Even this is to some extent an "atypical" defamation, therefore, comparisons with other cases on damages can assist in the process of identifying an appropriate level of damages for this case.

***McDonagh* is a binding authority**

121. To summarise: insofar as observations are made in the minority judgment casting doubt on *O'Brien* and *Leech* as authorities, I simply respond that the views expressed by the majority in *McDonagh* are binding on this Court. No party to this appeal contended *Leech*, *de Rossa, O'Brien,* or for that matter *McDonagh* (2), which considered and adopted the principles expressed in these earlier decisions, were wrongly decided. Both plaintiff and defendant accepted the authorities as part of the evolving case law. I say this in acknowledgement that concerns regarding deficiencies in some recent jury awards have been made in judgments delivered by the Court of Appeal.

122. But I think any judgment in this case must have regard to the binding nature of principles expressed by the majority – and indeed the minority – in *McDonagh*, regarding the legal status of jury awards generally in *McDonagh*. This is not a constitutional case but, rather, a claim in tort of defamation in an area where the Oireachtas has spoken, most recently in the year 2009. All the factors speak strongly against re-characterising this case as a claim under the Article 40.6.1, where a balance of rights would come more directly into play, as in a true constitutional claim. The court here faced a confined task to answer a series of questions.

123. I find it very difficult to discern how, if *O'Brien* and *Leech* were wrongly decided, then *McDonagh* does not come into the same category. *McDonagh* affirms the fundamental principles decided in the earlier cases on the status of jury awards, but considered that, in that instance, the award was objectively disproportionate and, exceptionally, that the case should not be remitted. It is true that, in the instant case, reference was made to the authorities to which I have referred, and the judgment delivered by the Court of Appeal in *Christie*. But neither party to this appeal referred this Court to the Court of Appeal judgment in *Kinsella v. Kenmare Resources Plc.* [2019] I.R. 750, as representing part of their case.

***McDonagh*: Comparisons**

124. *McDonagh (2) is* also authority for the proposition that broad comparisons can be made with personal injuries awards and awards in other defamation cases (para. 119). These can

provide some sense-check for the assessment of damages because they represent a system which attempts to put monetary values on injuries whether physical, psychological, or reputational. However, they cannot be treated as precise guidance. That would be, to quote O'Higgins C.J. in *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523, "*essaying the impossible*".

125. Against that, however, the assessment of damages in personal injury cases may be a more sophisticated and precise exercise than the assessment of damages for defamation, in that the range of injuries which may be caused to a person is relatively finite compared to the variation in every defamation case. There is a very large data-set of damages available. Maximum levels of damages for pain and suffering have been identified in case law. By contrast, identifying markers for defamatory publications is more difficult. Finding a reasonable proxy to provide a separate basis for assessing an award in a defamation case is challenging. I return now to the relevant case law.

***Christie* [2017]**

126. The Court of Appeal judgment made extensive reference to the Court of Appeal judgment in *Christie v. TV3* [2017] IECA 128. In that case, where there had been a timely offer of amends, the Court of Appeal reduced an award of €140,000 made by the High Court judge sitting alone, to €36,000. In *Christie*, the plaintiff, a highly respected solicitor, was unintentionally defamed in a news bulletin broadcast by the defendant. He had been representing a Mr. Thomas Byrne, formerly a solicitor in the case of a long-running criminal trial. Mr. Byrne had been charged with a multiplicity of fraud related offences. The case had received widespread media coverage. In the TV broadcast, words describing the circumstances of the prosecution were accompanied by footage not of the accused but of Mr. Christie making his way into the Criminal Courts of Justice building. He was not mentioned by name in the course of the broadcast, which lasted for approximately nine seconds. When the initiating letter was written, three days after the broadcast, the defendant's solicitor immediately accepted that there had been an error, and that it was an innocent mistake for which sincere apologies were offered. Within days after the broadcasting of the defamatory material, the defendant took almost immediate steps to remedy the damage to the plaintiff's good name. The Court of Appeal judgment drew a contrast between the instant case, and *Leech* and *Christie*, where the judgment observed that the plaintiff had suffered dreadful consequences.

Crofter

127. I refer now to a case which was not cited, but does nonetheless have some relevance. The case at hand has some slight resonances with *Crofter Properties Limited v. Genport* [2005] 4 I.R. 28, a case where concocted allegations of serious criminality were made. In this case,

too, it was alleged that Captain Higgins had engaged in conduct which could lead to criminal charges. There, however, the aggrieved party was a limited company. It was alleged that its hotel was being used as a front for money laundering by members of an illegal organisation, and that the prime mover behind the company, and his brother, a senior member of An Garda Síochána, were connected to illegal organisations. In that case, decided a decade and a half ago, the publication, like here, was to a limited number of persons, but that was not a ground to reduce the award of general damages, given the publication was to influential people – as here - to whom the defamatory material was published, and the fact that the publication was made with a view to causing damage. In reversing a decision of the High Court, (McCracken J., sitting alone), to award £50,000 for general damages and £250,000 for punitive or exemplary damages, this Court did not interfere with the award of general damages to the claimant, but reduced the award of £250,000 exemplary damages to the sum of £100,000. Here, by contrast with *Genport*, the Court of Appeal was undoubtedly correct to hold that malice was not in the case. It was not pleaded, one would imagine, on legal advice. As has been frequently pointed out, such an allegation is notoriously difficult to prove.

Other cases

128. I do not ignore either the fact that, although not part of this appeal, there are other carefully reasoned Superior Court authorities, such as *Ward v. Donegal Times* [2016] IEHC 711, where the two plaintiffs sued a local newspaper claims in respect of articles alleging that, as Chief Executive and auditor, they embezzled a local community organisation. The circulation of the newspaper was limited. But a respected and experienced High Court judge pointed out the effect that such defamatory material could have in a small rural area, and awarded general damages of €120,000 prior to any discount.

129. While not similar in facts, I mention also *Nolan v. Sunday Newspapers Limited (trading as the Sunday World)* [2019] IECA 141, which concerned articles which were described by Peart J., in the Court of Appeal, as salacious in nature, accompanied by the photographs of the plaintiff attending what were described as sex or swingers' parties in the company of scantily clad members of the opposite sex. The plaintiff was described as having been the organiser of such parties, although he had accepted that he had attended them. The defence was based on the proposition that the article did not contain the meanings that were imputed. The case does not seem comparable to the instant one, in that it involves quite different facts, a wide publication, but to a degree is relevant in light of the fact that Peart J. in the Court of Appeal awarded €200,000 for general damages for defamation, as well as €30,000 for punitive damages and €30,000 for exemplary damages, and, in addition, made an award of €50,000 for

breach of the respondent's constitutional right to privacy. This was a total award of €310,000. While the level of damages is noteworthy, I would respectfully suggest that the headings under which the awards were made by the Court of Appeal in *Nolan* might raise some questions on overlap between general damages, aggravated damages, punitive damages, and an award for invasion of privacy.

130. Having sought to identify comparisons and distinctions from other cases cited, I would reiterate the point made earlier that the experience in this case does not demonstrate that reference to extreme cases will be helpful either to a jury, or indeed to a judge. In defamation, as in all law, not only is context everything, but contextualisation is fundamental. Here, courts do not have available to them a compendium of awards, such as is available to courts in England and Wales. (See Duncan & Neill, *Law of Defamation*, 5th Edition, Appendix A).

IV The Court of Appeal Judgment

131. The judgment of the Court of Appeal must now be considered seen from the perspective of those authorities decided by this Court, and other case law. The judgment outlined the main points in the evidence, and referred to authorities. But the description of the evidence, and how it emerged, is quite brief. In considering the award of damages, Binchy J. made reference to the case of *Kinsella v. Kenmare Resources Plc & Another*, a case where, it must be said, the jury award of €10 million was excessive and disproportionate. The authors of McMahon & Binchy describe the award, with some understatement, as "strikingly high" (Ch. 34.354). As I have pointed out, *Kinsella* was not substantially relied on in this appeal.

132. I would, nonetheless, make the comment that the defamation in *Kinsella* concerned an incident concerning a plaintiff who was, and remained, a highly successful businessman, whose professional status was affected, but who, in essence, suffered huge embarrassment and humiliation. The defamation was undoubtedly serious and embarrassing. The defendant had claimed the plaintiff had engaged in odd conduct involving walking naked into the company secretary's bedroom while they were on a visit to the company's mine in Mozambique. The jury found that a press release from the company stating the board was to seek the resignation of the plaintiff as Chairman of the Audit Committee implied that the plaintiff had made inappropriate sexual advances on the female secretary. €9 million of the award was for compensatory damages; €1 million for aggravated damages. But the defamation did not put the plaintiff's livelihood and future at risk, in the same way as here. I am not persuaded it is a useful comparator, on facts which are very different.

133. In the Court of Appeal, Binchy J. recorded that, in this instant case, the jury was, for the first time, provided with information regarding damages in other cases, and the fact they

had been informed about the awards in *Leech*, where the award was approximately €1.8 million, reduced to €1.2 million, and *Christie*, where the award of €200,000 was reduced to €60,000 before the application of a discount bearing in mind the offer of amends. The judge recorded that the High Court jury had been informed about the maximum amount payable for general damages in catastrophic injury cases, although the trial judge had pointed out that, in one case, the award had been increased to €700,000.

134. The judgment observed that, while *Christie* had recognised that the defamation there was of the most serious kind, nevertheless there had been a series of mitigating factors that mandated a very significant reduction. The Court identified one feature in the instant case which was not present in *Christie*, which is that, here, it had not had practical career consequences for Captain Higgins, other than worry and distress. In *Leech* and *Christie*, by contrast, the plaintiffs had suffered dreadful consequences.

The Award

135. However, having made these observations, the judgment under appeal also observed that the nature and gravity of the defamation was of the most serious kind for a pilot. What had been written had been exacerbated by the appellant in its subsequent conduct up to the offer of amends, and in particular by the solicitor's letter of the 11th November, 2014. But the judgment held the absence of any practical consequence for the plaintiff was sufficient to conclude that the sum awarded by the jury for general compensatory damages was so unreasonable as to be disproportionate. Were the award allowed to stand, it would be among the highest in Irish legal history, ranking over after *Leech* and *de Rossa.* The judge pointed out that, on no reasonable analysis, did the case come so high as in the rankings of such cases.

136. Binchy J. pointed out that, in *Christie*, Hogan J., in setting aside the award in the Court of Appeal, observed that the High Court judge who had heard the case had identified that there should be a starting point of €200,000. Hogan J. considered that, were that to be a starting point, damages in respect of a deliberate, calculated accusation of serious wrongdoing, where a plaintiff had been mentioned by name, would be "astronomically high". Binchy J. referred to the fact that, in both *Kinsella* and *Christie*, members of the Court of Appeal had expressed concern that, if the awards in those cases were to stand, the knock-on effects for more serious cases would be unsustainable.

Damages

137. In assessing general damages, the Court of Appeal adverted to the fact that counsel for the IAA had submitted that €50,000 would be an adequate sum to compensate the plaintiff.

Binchy J. concluded that would be inappropriate. He held that such a sum would not be adequate, and:-

> "*would not properly reflect the very serious nature of the defamation of the character of the [plaintiff] that the [defendant], through its offer of amends, has acknowledged to have occurred, and as was also recognised in the evidence given by both Captain Murphy and Captain Cummins. It is fortunate that the damage to the [plaintiff's] reputation did not result in any adverse consequences for his career or personal life, but the damages should nonetheless reflect the acknowledged seriousness of the defamation. It is my view that the sum of €70,000 is in all the circumstances of this case an appropriate sum to compensate the [plaintiff] for the damage to his reputation and the ensuing distress and upset caused to him by reason of the publication of the E-mails, which, while limited in distribution, occurred within a sector of crucial importance to the [plaintiff] in his career. To this I would add that the Court has assessed this sum on the basis that the E-mails were not sent with malicious intent. While the [plaintiff] expressed the view in the course of his evidence that there was malice involved, and that a person or persons within the appellant organisation had placed a "target" on his back, the fact remains that the [plaintiff], for good reasons of his own elected not to pursue the plea of malice on the part of the [defendant], and it is not open to him to do so indirectly".* (para. 98)

V Assessment of the General Damages Award in the Court of Appeal

The Scope of Publication

138. There are important areas where I respectfully agree with the Court of Appeal judgment. The defamation in this case was indeed very serious. The limited scope of the publication, even alone, would indeed be sufficient to distinguish this case from *de Rossa*, *Leech* and *McDonagh*, where the publication was in newspapers with wide circulation. In this case, the immediate audience for the defamation was no more than five people. Even allowing for the "ripple effect" to members of the Gardaí, customs officials, or officials in the United Kingdom, the audience must still be seen as a limited one. Thus, this appeal cannot be seen as falling into the same category as those very cases considered by this Court. The judgment under appeal correctly set out the *tests* to be applied; that is whether the award of general damages was such that a reasonable jury could have made the award on the evidence, and that the award of the jury must be just and proportionate. The difficulty lies in how those tests were applied by the jury, in the light of the decided authorities. I deal first with how general damages were assessed.

The Jury Award of General Damages

139. Despite the fact that this was obviously a careful jury, and even allowing for a significant margin of appreciation, I am driven to the conclusion that the total award of €300,000 general damages, even if discounted by 10%, was objectively disproportionate. Such an award would place this case in the same range as *de Rossa* and *Leech*. Under the 2009 Act, a *reasonable jury* must be seen as one which is given adequate information and directions from a judge as to appropriate award levels in damages. This jury did not have that advantage. But, nonetheless, a jury award must be given a very significant margin of appreciation.

140. If, however, a jury radically departs from the appropriate parameters of a case, then it cannot be said that such jury has acted "reasonably" or in accordance with law. The award made in general damages in this case was objectively disproportionate. Later, this judgment considers the parameters of awards. But, even on a preliminary view, this claim is not comparable to those where there was a very serious defamation published to a wide circulation of tens of thousands of people. While the defamation here is very serious, it cannot, therefore, be placed in the very highest range of truly exceptional cases, such as *Leech* or *de Rossa*. Nor does it come within the next highest category or range of very serious defamation published in a wide circulation newspaper. Even if it were located in the next lowest category below that again, and including serious defamation with a limited circulation, it must be said that what was written, albeit within a limited scope of publication, was of a most intensely wounding, and serious kind, affecting the plaintiff's standing in his profession. But nonetheless the general damages award by the jury was objectively disproportionate. The threshold for setting aside an award is nonetheless crossed. This is an exceptional case, where, despite giving respect and weight to the jury's decision, the award cannot stand.

Remittal?

141. Should the case be remitted for retrial on damages? Like *McDonagh* [2018], the defamation was written a long time ago. In this case, the emails were sent in 2013, now almost 9 years ago. Much time has passed. There is the public interest question of finality. A court should not stand in the way of the strong public interest in concluding a case. One of the tasks then, to paraphrase Henchy J. in *Barrett,* is "*to fit the defamation into the scale of defamatory remarks which could have been made regarding the plaintiff*". Granted the publication was limited, but it is worth repeating it is hard to think of more damaging remarks which could have been made about Captain Higgins, in his profession as a pilot with an impressive record and impeccable reputation, occupying a position of public trust where integrity is fundamental. But

there is also an individual factor. In the course of this appeal, the plaintiff, no less than the defendant, expressed the wish for this case to be concluded now.

Issues

142. But I confess to difficulty in discerning why the Court of Appeal concluded that a sum of €60,000 damages might be identified as a "starting point" in this case. It seems to presuppose a scale of damages, beginning with figures which are at variance from the established jurisprudence, both of this, and other superior court authorities. That is not to say there will not be cases with a low starting point. But this was not such a case. While admirably concise, the judgment under appeal did not identify, either, why the sum of €70,000 should be substituted as an end point for the jury award on general damages. I think this was an error in principle. I do not think this case was correctly located in the realm of other material authorities and precedents, where the damages were significantly in excess of those considered in the Court of Appeal judgment.

143. This case was very different indeed from *Christie*, where speedy remedial steps were taken. The Court of Appeal found, correctly, that the defamation here was very serious for a pilot, and that the distribution, while limited, occurred within a sector of crucial importance to Captain Higgins in his career. The court pointed out that malice was not pleaded.

144. I agree, too, that the plaintiff did not suffer long-term adverse consequences to his career. That is not quite the point. The evidence before the High Court was that the nature and gravity of the defamation, caused the plaintiff *himself* to suffer very significant stress and anxiety which affected his relationship with his family, his ability to conduct his work, and created a consequence that he "tended to look over his shoulder", and worry about what he was doing. (See s.31(4)(a) of the 2009 Act). The plaintiff was working in a sector where his reputation was of the most substantial significance in the eyes of the recipients of the defamatory material and others. (s.31(4)(f)).

145. But these were not the only distinguishing features from *Christie*. The defendant contended that some of the emails were sent off as mere instantaneous reactions. It is true that a short time elapsed between the receipt of the original emails from the CAA and the *original* responses. But not so in relation to the defamatory email stating that the plaintiff would not get off "scot free", written 5 weeks later. By then, there had been time for reflection, and research. I refrain from using the term "premeditation". The IAA contend this email was a "mistake".

146. But one question, never satisfactorily answered, is simple, but fundamental. Why was this "mistake" ever made? The fact is that the jury was left with *no* evidence from the defendant which in any way explained why *any* of these emails, which conveyed serious defamation

concerning a person requiring a high degree of trust, and enjoying an impeccable reputation, were sent at all.

147. Nor, it might be said, was there any explanation as to why the CAA was caused to embark on its investigation from the outset. Nor, further, was there any explanation as to why Mr. Webb's email indicating the extent of the CAA investigations which he had by then carried out, should have spoken of "*leaving no stone unturned*". There was no explanation, either, for Mr. Webb's later email, circulated to his CAA colleagues, setting out his reaction to the "scot free" email with an exclamation mark. The seriousness of the defamation, and its source, more than counter-balance the limited circulation.

148. The jury was, too, left with the evidence that Captain Steel's emails to Ms. Gahan, the Secretary of the IAA, were simply incorrect and did not reflect reality. This was particularly significant in light of the apparently mitigatory statement made in October, 2014 that the IAA had "*no concerns*" regarding the plaintiff's professional reputation at any time. Seen with the benefit of hindsight, this statement was simply disingenuous. How could this statement be reconciled with what was subsequently written, after much reflection and legal advice, more than one year later, in the IAA's letter of the 11th November, 2014? Additionally, Captain Steel was a high ranking official who worked in a State body which had a critical function as to the plaintiff's career.

Section 31(3) and (4)

149. But the jury was faced with yet a further issue. One cannot, either, avoid the evidence of what followed on from the defamation. How could what was said in the defendant's emails to the plaintiff in October 2014 have been correct? While no blame attaches to Ms. Gahan for what she was told, the IAA conveyed to Captain Higgins, on the strength of what Captain Steel had said, that it had no other material on record. But how could that be reconciled the statement that the IAA had no concerns about the plaintiff, or with the detailed, and obviously researched, letter of 11th November, 2014, containing material which was different from the original defamation? In this case, more than many others, it is necessary to have regard to *all* the circumstances of the case (s.31(3)). There is no sense in which the defamatory material in *Christie* might have had the effect of ending the plaintiff's career, or the imposition of criminal sanctions. But that was precisely the potential consequence of the defamatory material in this case.

150. The leads on to yet a further consideration of the gravity of the defamation, and the conduct of the defendant. The status and role of the IAA is a profoundly relevant factor. The IAA was established by statute in 1993. It is a *regulatory authority*. It has responsibility for

security and standards in aviation matters. The incontrovertible evidence established that it could impose serious sanctions on a pilot which could end his or her career. There is a sense in which the Authority has a status almost analogous to the supervisory role which the Medical Council has over medical practitioners. That Council is empowered by statute to apply sanctions after appropriate procedures are applied (including procedural and substantive fairness).

151. Not only did the defendant hold a supervisory role over the plaintiff in his profession, but as a result of this its decisions could, potentially, end his career. The evidence was that, even the existence of an investigation could put the plaintiff's employment status with Aer Lingus in question. The stance adopted by the IAA at the outset, and conveyed to its solicitors, reflected the extent to which it was itself the master of the litigation. The fact that it was prepared to stand over the later allegations which were equally career threatening to Captain Higgins is very telling as to how it conducted its defence afterwards.

Misfeasance in Public Office

152. Standing back, it is instructive perhaps to pause for a moment and reflect on the extent to which this case differs from the vast range of claims in this category. Most defamation concerns a publication in a newspaper, or other medium. It is frequently written by a journalist who has received information from another person. But here, by contrast, the conduct and words in question bear some comparison to misfeasance in public office. The acts here were committed by a public official in the conduct of his work. By contrast with misfeasance, there was no pleaded claim for targeted malice, or for conduct with actual knowledge of a known consequence which would injure the victim. Here, one must set aside any question of targeted malice. The IAA was acting within its statutory area of operation. But that does not detract from the fact that these emails which emanated from an IAA official, who would have to be taken to have known of the potential consequences were the claims sustained, and where the IAA was itself a regulator, or supervising authority.

Observations on Previous Awards

153. What follows does not purport to be a set of formal guidelines. Rigid categorisation is not an easy task in defamation law, where the facts are so variable. But I believe some useful observations can be made nonetheless. It is necessary to make one rather fundamental point. There is almost inevitably a tension between the traditional stance of deference to jury awards, and a concern with prolonged litigation. But it is simply not in the interest of any party that there should be an avoidable appeal in a defamation claim. A plaintiff who receives a disproportionate high award will almost inevitably face an appeal. In the event that the appeal

is successful, the damages award will be cut, perhaps, as here, very significantly. A plaintiff may also suffer a serious penalty in a costs award by an appeal court. A defendant whose case succeeds at first instance, likewise faces the prospect of a reversal of a judgment dismissing the case, and an adverse costs award.

154. But another point follows. In the event that a court of first instance has correctly identified the appropriate level of an award, an appeal court must inevitably allow a significant margin of appreciation to such identification. Thus, an appeal court will be slow to interfere with an award by the High Court.

155. What follows, then, should be seen as guidance or indicators, and no more. References to general damages in personal injury cases may indeed be of some assistance, but it must be borne in mind that defamation cases do not lend themselves to such easy categorisation, as a fractured tibia, with no long term aftereffects. Reminders of the value of money are significant, and remarked on in ECtHR jurisprudence. There is a useful summary of a number of awards set out in a table in the judgment of O'Connor J. in the High Court in *Nolan*. I draw from this without an over-detailed description setting out each decision and award. Lawyers with experience in defamation law will also be familiar with the significant number of cases which are settled without ever coming to court. These observations do no more than describe what is well-established.

Categories or Brackets

156. It seems to me that the case law illustrates that, seen broadly, general damages awards in defamation cases are capable of being seen as falling within four *general "categories*", or "*brackets*". Rather than seeking to identify a "*starting point*", it is more helpful to place the case in a range.

157. The first, and lowest, applies to very moderate defamation. Here, awards of 0 to €50,000 have been made.

158. A second band is necessarily wider. It is for a medium "range" of cases where there have been awards of €50,000 to €125,000. In *Ward*, for example, the damages, although suggesting criminal conduct, were in the case of a local newspaper with a limited circulation. McDermott J., a very experienced High Court judge, considered general damages of €120,000 would have been appropriate. There are other cases where the awards were in high five figures. To identify them all is unnecessary.

159. A third category of award deals with seriously defamatory material. The parameters there range from general damages of €125,000 up to €199,000. I come back to this category later.

160. At the top of this *general* scale there are cases at, or in excess of €200,000, but where the courts have very seldom awarded more than €300,000. In *Nolan*, the Court of Appeal awarded general damages of €200,000, as well as making awards under other headings. In *Kinsella*, the Court of Appeal awarded total damages of €250,000.

Exceptional Cases

161. As well as these four general categories, there are cases such as *de Rossa,* (in today's value €460,000), and *Leech,* which must be seen as being truly exceptional. Both involved a court and jury having to assess very real damage to an individual's reputation, where clearly the balance tilted decisively in favour of vindication of good name. In identifying these broad ranges, or bands, I emphasise that these observations are not written in stone. They are, rather, to be seen as what they are: observations which might be of assistance to courts which must chart a course in what is difficult territory. To any hypothetical criticism that these are too broad, I would respond with the truism that, while in law every case depends on its own fact, the observation is particularly valid in defamation.

VI Decision on General Damages

162. In substituting an award, it is worth recording McKechnie J.'s concerns expressed in his judgment in *McDonagh* [2018] 2 I.R. 79 that a re-determination of damages by appeal courts might become routine, that damages awards would inevitably be reduced, and that defamation law would "lose its teeth" (para. 173). Regard must be had to the fact that an award is actually intended to be vindicatory, and that the existence of the laws of defamation are seen as having a dissuasive effect on shoddy, careless, or even vindictive, journalism. But, as already explained, this is an unusual defamation action. While the award was objectively incorrect and disproportionate, I give considerable weight to what the award *conveys* regarding the jury's view of the defendant's conduct.

163. But, against that, justice dictates that this jury award, though deserving of weight and respect, was objectively disproportionate to the extent that it requires to be set aside. That said, however, I am unable to discern from the judgment under appeal how it was that the general damages could be cut from €300,000 to €70,000. I do not think the judgment makes clear why the judge chose €60,000 as a "starting point", or the basis of why that figure should have that description. The reduction is to a figure which is between one quarter and one fifth, of the jury award. Such a reduction does not place sufficient weight on the respect due to the award by the jury, or indeed on what the Court of Appeal rightly described as having been a very serious defamation. To summarise, the defamation was very serious, damaging, and concerned the plaintiff, a pilot in a position of trust and high responsibility, in his profession. It alleged

conduct worthy of loss of career and criminal prosecution, and all the consequences that could go with it for the plaintiff himself and his family. The plaintiff not only held a position of high trust, but also enjoyed an impeccable reputation in a field where reputation was both personally and professionally highly significant. The material emanated from an important public supervisory and regulatory body, which had a powerful role with regard to the plaintiff's ability and qualification to work. An aggravating factor is that the defamation itself fell into two phases. The later emails were 5 weeks after the earlier emails. The matters were brought to the attention of the Gardaí and the Revenue. The "scot free" email, 5 weeks after the first group, must be seen as, in every way as damaging – and revealing – as what occurred earlier. The jury verdict says much as to the view it took of the defendant's conduct.

164. But against that, I agree with the Court of Appeal judgment where it points out that the defamation did not, in fact, damage the plaintiff's career. The publication was to a relatively limited audience. A court must also take into account the offer of amends, but bear in mind this came when the case was called on for hearing, some 6 years after the defamation. Where, in Henchy J.'s words, does this case fit in the realm of awards and experience and knowledge of settlements? Having regard to the authorities, and the observations outlined earlier, I would propose that the gross award in general compensatory damages should be at the higher end of the third "general" category, where the parameters are between €125,000 and €199,000. It is a very serious defamation by a statutory regulatory body to a relatively limited audience. But, against the fact there was a limited audience, its *potential,* as opposed to actual, effect, and its source cannot be disregarded. I think the appropriate figure under this heading is €175,000.

VII Aggravated Damages

165. I turn then to the question of aggravated damages. Section 31(3) sets out that, in assessing *general* damages, a court should have regard to all of the circumstances of the case. But, despite the compendious list of factors to be taken into account in assessing *general* damages, the conduct of the defendant is not identified in s.31(4). Instead, s.32(1) empowers a court to award "*aggravated damages*". Such damages are awarded not for the defendant's conduct, *per se*, but the extent to which the harm suffered by the plaintiff was worsened by the defendant's conduct of the defence. Such damages take the form of aggravated compensatory damages.

166. For clarity, I set out here the words of s.32(1):

"Where, in a defamation action -

(a) the court finds the defendant ***liable to pay damages*** *to the plaintiff in respect of* ***a defamatory statement****, and*

(b) the defendant conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement,

the court may, in ***addition*** *to any general, special or punitive damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as "aggravated damages") of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury. ..."*

(Emphasis added)

The intent of s.32(1) is to avoid double counting between the original defamation and the subsequent defence of the claim. Aggravated damages are not, either, to use the elegant terminology in McMahon & Binchy, be treated as the "poor relation" of exemplary damages, but, rather, designed in terms specifically for the purpose of achieving one of the stated aims of the Act, that is, to clarify the law on defamation and the awards of damages made.

167. There are a number of cases where aggravated damages have been awarded in other areas of law. These include *Shortt v. Commissioner of an Garda Síochána* [2007] 4 I.R. 587, and *Swaine v. Commissioners of Public Works in Ireland* [2003] 1 I.R. 521. Both involved serious misconduct by servants, agents or officers of the State. In *Shortt*, the damages assessed under various headings ran into substantial seven figure awards.

168. But, in this instance, the intent of the Oireachtas is clearly expressed in the 2009 Act. In defamation, aggravated damages are to be awarded *only* when the court awards compensatory damages, and may be awarded *only* when the defendant conducted its defence in a manner which aggravated the injury caused to the plaintiff's reputation. Here, the jury awarded the sum of €130,000.

A robust defence is permitted

169. Here, it is necessary to draw a fundamentally important distinction. A defendant is fully entitled to conduct a robust defence in a defamation action. That fact cannot be seen as being an aggravating factor. Defendants are within their rights to contend that a publication is not defamatory, and the words are incapable of bearing a defamatory meaning. They are entitled to plead that material is mere vulgar abuse. They can plead the plaintiff suffered no, or limited, reputational damage. Defendants are, therefore, entitled to raise all or any of the defences available in law, including privilege, publication on a matter of public interest, or justification.

But what defendants may not do is to conduct the defence of a case in a manner which aggravated the injury of the original defamation.

170. In this instance, therefore, a distinction must be drawn between the defamatory emails, over 5 weeks, and the later conduct of the defence. A number of factors come into play in making this distinction. The letter of the 11th November, 2014, and the other letters to similar effect, prior to the offer of amends, were not referred to in the Statement of Claim as being part of the defamation. In the High Court, the evidence as to *defamation* in the case was confined to the emails. At the hearing, the defendant did not attempt to stand over what was said in the letters. The plaintiff himself gave evidence as to how precisely he had, in fact, satisfied the various legal requirements then raised by way of allegation in that and the other correspondence preceding the offer of amends. The issue did not arise in cross-examination.

171. But, subsequent to the defamatory emails, the IAA, through its lawyers, did raise a series of further claims and issues against the plaintiff. Here, the allegations in correspondence were *distinct* from those in the defamatory emails to the CAA. This later, distinct, correspondence was part of the subsequent *conduct* of the defendant, and which aggravated the injury. *Inter alia*, these allegations referred to lack of authorisation to fly into this State, and the unauthorised use of Rathvilly as a destination. For a commercial pilot, these were very serious. The uncontroverted evidence was that what was alleged in these later letters was without foundation. What was written in the 11th of November letter did not refer to the CAA investigation allegations, where the plaintiff was exonerated, but were separate, albeit to be viewed in light of Captain Steel's statement that the plaintiff was not going to get away "scot free", and in the other correspondence between the initiation of the proceedings and the offer of amends.

172. This evidence established that the conduct of the defence, at least up to May 2015, therefore, did have the effect of aggravating the injury and damage caused to the plaintiff. The CAA investigation had exonerated him. But the plaintiff then had to deal with claims within the IAA jurisdiction, which, on the evidence, increased the hurt and were professionally threatening to him, as the allegations were left hanging over him for two years. This conduct of the defence aggravated the injury caused to the plaintiff's reputation by the original defamatory actions. I would hold, therefore, this would warrant an award of aggravated damages for the conduct of the defence up to the offer of amends.

173. But it seems to me that an award of €130,000 by way of aggravated damages is, by comparison with *Crofter*, again, objectively disproportionate. The concept of aggravated damages does present difficulties (cf. McMahon & Binchy, C.44.77 et. seq.). I again emphasise

that, here, the judgment is addressing "aggravated damages", as the term is to be understood by reference to the 2009 Act. I intentionally make no reference to other constitutional authorities where the issue of aggravated damages has been discussed. By its words, the Act points to a conclusion that, *here*, in this statutory context, the aggravated damages are to be awarded *after* compensatory general damages, and are to relate to the conduct of the defence of the claim.

Contrast: *Herrity v. Associated Newspapers*

174. With that proviso, it is nonetheless useful to refer to one case by way of contrast. In *Herrity v. Associated Newspapers (Ireland)* [2009] 1 I.R. 316, the plaintiff claimed aggravated damages because a photographer had been seen in the company of the defendant's representative. Dunne J., then in the High Court, rejected the claim, pointing out that what had happened was to be seen as an incident of modern day litigation. I respectfully agree.

175. What occurred in this case was not simply an "*incident*" of modern day litigation, as in *Herrity*. It was integral to the conduct of the defence. The IAA, a powerful supervisory and regulatory body, which owed duties, including fairness, actually chose to make a series of further allegations in the correspondence. The conduct described above, and the content of the letters in question were an integral part of the IAA's conduct in *defence* of the defamation action, but were not part of the defamation itself.

Comparison: *Philip v. Ryan*

176. One case bears some comparison. In *Philp v. Ryan* [2004] 4 I.R. 241, this Court awarded aggravated damages of €55,000 in a professional negligence claim, where a doctor had altered medical notes on a key issue, misleading his own advisors and expert witnesses, by making the defence appear strong than it actually was. The Court held there had been a failure to alert the plaintiff to this. By way of distinction from *Herrity*, this conduct which was part of, or integral to, the defence. There is, therefore, that similarity.

177. Here, I wish to emphasise that there is no suggestion whatsoever that the defendant's legal advisors engaged in any conduct which might even be criticised, still less be described as reprehensible. They acted entirely properly throughout on the defendant's instructions. The solicitors were not to know what lay behind the events subsequent to the defamation, any more than before it. Lawyers act on their clients' instructions.

178. I reiterate also that lawyers and defendants are entitled to conduct a robust defence of a defamation claim. There is a robust defence, but there is also counter-attack. The additional allegations concern issues within *this* jurisdiction which the IAA sought to raise *after* what was in the emails was capable of being checked. The plaintiff in evidence rebutted each of the later

claims in that letter without contradiction. This was not simply a question of legitimately putting the plaintiff on proof of the case, but, rather, raising a new and, as it transpired, unsupported line of counter-attack, seeking to deploy allegations which fell within the IAA's jurisdiction. I think what this Court awarded in *Philip v. Ryan* is a reasonably apt comparator on aggravated damages.

Damages not recoverable for vindicating rights

179. I am not persuaded, however, that the plaintiff can be compensated for the fact that the defendant sought to vindicate its claim to have the judge/jury issue determined by the courts, albeit unsuccessfully. A litigant is entitled, *bona fide*, to have its rights determined, although it might be noted that, unlike some other instances where a State body has sought to have the law clarified, this was not a case where the defendant indicated that, even if unsuccessful on the judge/jury issue, the plaintiff would be protected against any adverse costs orders.

VIII Decision on Aggravated Damages

180. The case, therefore, does bear some comparison with *Ryan*, even though, here, the legal strategy of the defendant, as a regulator, is a noteworthy factor. I would substitute a proportionate figure of €50,000 attributable only to the conduct of the defence, from the period from the time the defence began after the initiating letter, up to the offer of amends.

IX Discount for Offer of Amends

181. In this case, the Court of Appeal made a discount of 10% for the offer of amends. In the circumstances, I would not interfere with that apportionment. The constitutional right to good name should, where possible and practicable, be vindicated at the earlier opportunity. (See also *Ward*, earlier, and *Ewins v. Independent Newspapers (Ireland) Ltd.* [2003] 1 IR 583, and the cases referred to in Chapter 10-30 of Cox & McCullough, Second Edition). The defendant accepted that, regardless of whether the damages were to be assessed by a judge alone, or with a jury, it lay within its power to have made application to the court for the approval of the text of the offer, regardless of the question of damages. Yet, the IAA did not do so.

182. The procedure for identifying a discount is set out in case law in the neighbouring jurisdiction, such as *Turner v. News Group Newspapers & Anor* [2005] EMLR 25, though the law in that jurisdiction involves a judge sitting without a jury. In *Bowman v. MGN* [2010] EWHC 895 (QB), the English courts set out a two-stage process whereby, in considering a discount under the (somewhat) analogous English procedure, the assessment will be on the same principles as a defamation action. The usual principles of the elements of compensatory

damages, mitigation, aggravation, and causation, apply. There is no reason why exemplary or special damages should not be awardable in an appropriate case.

183. It seems to me that the most practical approach would be for a court to take into account timing, content of the offer, and the conduct of the defendant, when such an offer is sought on a sliding scale from a minimum of 0 up to a potential ceiling of 50% of a full prospective award.

184. I would, however, commend and endorse the observation of McDermott J. in *Ward*, where, in observing that a court will properly have regard to the timing and content of any apology, he then added:-

> *"The section is not to be abused by the advancement of artfully drawn but nevertheless hollow or ineffectual corrections or apologies accompanied by very low offers of compensation cloaked in the formality and terminology of section 22 to secure a significant reduction in damages for an egregious wrong."* (para. 61)

185. An offer of amends at a late stage will, however, necessarily attract a lower discount than an immediate retraction – as in *Christie*. But it is important to draw a distinction. If there is an inadequacy in the offer process, this in itself goes to the question of discount: it is not to be taken into account in a claim for aggravated damages.

186. A court will, therefore, arrive at a figure which would have been awarded after trial (assuming no mitigation) and then decide as to the extent to which the figure should be discounted to give effect to any mitigation. The fact of an offer is itself a mitigating factor. If an early offer is accepted, and agreed apology is published, then there is bound to be substantial mitigation. There is no standard percentage. Each case will hinge on its own facts. But, here, there was very substantial delay. That reduces the discount very substantially. (See *McNamara v. Sunday Newspapers* [2016] IECA 140; *Tesco v. Guardian News & Media* [2009] EMLR 5.)

187. I would add that the case law envisages that the discount might, potentially, be as high as 50% in an appropriate case – a "gold standard". I would not differ from that approach. In view of the fact that the offer of amends, communicated 6 years later, was substantially diminished in efficacy, I would endorse the Court of Appeal's deduction of 10% to the total award.

188. There must, inevitably, be a sense in which there is a form of "overlap" between an award of aggravated damages and the discount. It seems to me this is an unavoidable outcome in this case, where the offer came so late after the aggravation. But this did not lead to a double-counting of damages; rather, to an unavoidable dual consequence of the sequence of events here where there was substantial aggravation for two years before there was any offer, and a

period of 6 years before the text of the offer was ruled by the High Court. This was far too long for meaningful vindication of the plaintiff's good name.

The Total Award

189. I would substitute a total of €175,000 for general damages, and €50,000 aggravated damages, giving a gross figure of €225,000 for that made by the Court of Appeal. I would then hold that there should be a 10 percent discount, giving rise to a net total award of €202,500.

X Guidance to Juries

A judge's charge on damages

190. This judgment largely focuses the level of damages in defamation cases. In *Reynolds v. Times Newspapers* [2001] 2 AC 127, Lord Bingham gave a general outline of a judge's duty in summing up. It is set out in Cox & McCullough (2nd Ed.), at Chapter 13-291. It is an admirable summary.

191. As to the judge's directions in damages, s.31 of the Act is very specific. It provides:-

> *"(1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.*
>
> *(2) In a defamation action brought in the High Court, the judge* ***shall*** *give directions to the jury in relation to the matter of damages. ..."* (Emphasis added)

192. Section 31(3) and (4) set out the headings to which the court *shall* have regard in making an award of general damages. This places clear duties on the trial judge, so as to ensure the jury will be focused on the matters relevant to damages. When charging a jury, a judge will outline the purpose of damages, and that an award is to be just and reasonable compensation for injured feelings and any reduction in his standing. In *McDonagh v. Sunday Newspapers* 2018] 2 I.R. 79 Denham J. outlined a series of matters which would be appropriate to draw to the jury's attention (para. 63, para. 72). In addressing the issue of quantum, a judge will, I hope, find the observations contained earlier to be of assistance in identifying an appropriate bracket.

193. Prior to charging a jury, it would be advisable for a judge to consult with counsel as to how he or she proposes to formulate the charge to the jury on damages, and then advise the jury to the effect that, in general, there are parameters or guidelines for awards in defamation. The jury might be informed by the judge as to the general parameters of the bands. In charging on general damages, the judge might also illustrate these broad parameters by decided case law on general damages – or, where helpful, by way of appropriate analogy with general damages in personal injury cases. A judge should set out illustrations as to the value of money as proposed by Denham J. The judge might then charge the jury that it is their function to determine where the facts or issues of the case before them fit in within these categories. But, compared to personal injuries where categorisation may be somewhat easier, defamation cases are very fact specific.

194. I re-emphasise, however, that what were described earlier as parameters are simply illustrations. To do justice to both sides, a jury must take into account *all* the circumstances of the case, and the factors identified in s.31 of the 2009 Act. Rigid guidelines cannot be applied in defamation, where much will depend on the evidence, its credibility, the nature of the defamation, the issues as placed before a jury, the identity of the parties, the relationship between them, the status of each party, their individual circumstances, and all the factors, or "circumstances", necessary to do justice. Here, the case relates to a well-resourced State body. Not all defendants will fall into that category. Some will have far greater resources, others may have substantially less. That, too, will be a relevant circumstance.

XI Conclusion

195. I reach these conclusions again noting that the plaintiff has altered his original position, which was that the matter be remitted for trial before a jury. He told this Court he would prefer that, in the event of setting aside the judgment of the Court of Appeal, this Court should itself substitute awards for damages. This case has gone on far too long. If it shows anything, it is that the pursuit of a defamation action can test the limits of human endurance.

196. In concluding, I would wish to specifically thank counsel for the defendant for his helpful, focused, submissions, which served his client well in this and other courts. His submissions and material assisted this Court in reaching its conclusion.

197. It is also necessary to observe that, in this appeal, the plaintiff represented himself. He exhibited an expertise in defamation law which, in a barrister would be seen as unusual, and in the case of a non-lawyer must be something almost unique. His submissions were measured, careful and, it must be said, impressive. This award in judgment must be seen as a total vindication of his good name. The fact that the plaintiff presented this appeal himself, ironically, had the consequence that this Court had the opportunity of assessing his character, demeanour, and approach. Such an opportunity was not available to the Court of Appeal.

198. I would, therefore, set aside the judgment in the Court of Appeal, and, for the reasons set out herein, substitute an award of €202,500.

XII Summary of this Judgment and Outcome of the Appeal

199. This judgment, therefore, holds:-

- That s.13(1) of the Defamation Act, 2009 does not contain clear words which evince a legislative intention to alter the role of appeal courts, or the threshold for an appeal court to substitute its own award of damages for that of a jury in defamation proceedings.

- While the assessment by a jury of damages for defamation is not sacrosanct, it does carry considerable weight, such that appellate courts have been slow to interfere with such assessments.
- That a jury award of damages should be set aside or reversed only if an appellate court is satisfied that the award is so disproportionate to injury suffered that no reasonable jury would have made the award in all the circumstances of the case.
- That, in general, the appropriate order on appeal is for remittal, but this may not be an immutable rule, and may be subject to other factors such as elapse of time or the exigencies of public interest in the finality of litigation which do not serve the interests of any party in an action for defamation.
- That, in the performance of its duties under s.31(2) of the Act of 2009, a judge should give specific guidance to a jury by reference to a range of cases, where possible requesting the jury to place the case within the appropriate range or parameter.
- That reference to damages awards in personal injury cases, and the value of money, may be of some assistance to a jury in assessing damages.
- That an award of aggravated damages can be made only within the constraints laid down by s.31 of the Defamation Act, 2009.
- That a judge should charge the jury to assess separate general and, where appropriate, aggravated damages, and thereafter apply a discount, which will operate on a sliding scale to 50% of the potential value of the claim.
- That s.22 and s.23 of the Defamation Act, 2009 require legislative review on the issue of time limits.
- That, in this case, the substituted award of general damages should be €175,000; the substituted award of aggravated damages should be €50,000, both discounted by 10%, giving rise to a total award of €202,500.

Outcome

200. I have had the advantage of reading the four judgments to be delivered by my colleagues in this appeal. The outcome of the case can, therefore, be summarised that this Court holds:

1. Unanimously (MacMenamin, Dunne, Baker, Woulfe, Hogan JJ.), that the appeal should be allowed, the judgment of the Court of Appeal set aside, and that the principles applicable in awards for damages and discount, are as set out in this judgment.

2. By a majority (MacMenamin, Dunne, Hogan JJ.) (Baker and Woulfe JJ. dissenting), that the award for general damages made by the jury was so objectively disproportionate that it should be set aside.

3. By majority (MacMenamin, Dunne, Baker. Woulfe JJ.), (Hogan J. dissenting), that, as the jury award for general damages is to be set aside, this Court should substitute a proportionate award of €175,000 for the award of €300,000, for general damages. Hogan J. (dissenting) would substitute an award of €100,000 for general damages.

4. By a majority (MacMenamin, Dunne, Baker, and Woulfe JJ.), that the sum of €50,000 should be substituted for the jury award of €130,000 for aggravated damages. Hogan J. (dissenting) would make no award for aggravated damages.

5. Unanimously (MacMenamin, Dunne, Baker, Woulfe, Hogan JJ.), that a discount of 10% on the award of damages was appropriate and proportionate.

As a consequence, the order of the Court will be that the appellant will be awarded a total of €202,500 in general and aggravated damages, having deducted 10% from the gross awards for general and aggravated damages.

201. The parties will be given seven days to make written submissions as to any consequential orders that arise from the judgments.