



THE SUPREME COURT

[Supreme Court Record No. 2021/56]
[2022] IESC 13

MacMenamin J.

Dunne J.

Baker J.

Woulfe J.

Hogan J.

Between

PADRAIG HIGGINS

Plaintiff/Appellant

-and-

THE IRISH AVIATION AUTHORITY

Defendant/Respondent

JUDGMENT of Mr. Justice Woulfe delivered on the 7th day of March, 2022

1. I have had the benefit of reading a draft of the judgment which MacMenamin J. proposes to deliver herein, and I am happy to gratefully adopt the comprehensive account of the facts, the evidence and the proceedings in the Courts below contained in his judgment. I

have also had the benefit of reading a draft of the judgments of Dunne J., Baker J. and Hogan J., for which I am also grateful.

2. As regards the exposition of the legal principles set out in the judgment of MacMenamin J., I am in broad agreement with same and might just comment as follows on three matters. Firstly, as regards s.13 of the Defamation Act, 2009, I agree with MacMenamin J., and also with what is stated on this issue in the judgments of Dunne J. and Baker J., as to the more limited effect of that provision, for the reasons set out in their judgments. Like my colleagues, I find myself unable to agree with the proposition, as advanced by my other colleague Hogan J. in his judgment, that judicial deference to jury awards in defamation cases has been changed by that provision.

3. I might add that in my opinion there is both compelling logic and common sense underlying such judicial deference. The relevant considerations include not only the fact that the assessment of damages has been “determined by a representative and randomly selected sample of the population, under the guidance of an experienced judge”: as per O’Donnell J., as he then was, in *McDonagh v. Sunday Newspapers Limited* [2018] 2 I.R. 79, at para. 105. There is also the crucial factor, as mentioned by Dunne J. at para. 25 of her judgment in this appeal, that the members of the jury have heard and seen the witnesses, an advantage which members of an appellate Court have not had. This disadvantage facing the appellate Court, in assessing damages by reference to what are often described as “the arid and cold pages of a transcript”, was eloquently described by McKechnie J. in his dissenting judgment in *Leech v. Independent Newspapers* [2015] 2 IR 214, as follows (at para. 102):

“How can a transcript convey the depth of a person’s feelings who has been publicly humiliated; whose sense of esteem and personal worth have been undermined, even shredded in some cases; whose presence even amongst strangers may result in being shunned or rebuffed? How can a cold print give a sense of that person’s hurt, perhaps

touching the essence of who she is, of her character and personality, without which her sense of value could well be shattered? I very much doubt that without observing, assessing or listening to the essential witnesses, in particular the successful plaintiff, and without seeing her perform in the witness box, the members of an appellate court, deprived of such facility, can truly feel the gravity of the injury, of the harm and of the damage for which that plaintiff is fully entitled to compensation. Such is a major handicap of significant proportions.”

4. Secondly, I wish to comment on MacMenamin J’s observations on previous awards, where he states that it seems to him that the case law shows that general damages awards in defamation cases are capable of being located within four general categories or brackets. For my part I would be a little wary of any strict categorisation of defamation cases, as it can be very difficult to compare awards in previous defamation cases, and in that regard I share the doubts as to so comparing as forcibly expressed by McKechnie J. in *Leech* (at paras. 46 – 49 and 76 – 84 of his judgment). However, I note that MacMenamin J. goes on to state that these observations are not written in stone, and that any guidelines cannot be applied rigidly and that much will depend on the various circumstances of each case, and I fully agree with those important words of caution.

5. The European Court of Human Rights commented on the need for flexibility as follows in *Tolstoy Miloslavsky v. The United Kingdom* [1995] ECHR 25 (at para. 41):

“...national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations. A considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case...It follows that the absence of specific guidelines in the legal rules governing the assessment of damages must be seen as an inherent feature of the law of damages in this area.”

6. I might mention that I made a similar point in relation to guidelines and flexibility, in the context of personal injury damages, in my recent dissenting judgment, while sitting in the Court of Appeal, in *Griffin v. Hoare* [2021] IECA 329, as follows (at para. 31):-

“As regards the Book of Quantum, I have had regard to the guideline figures set out in the Book, as required by s.22 of the Civil Liability and Courts Act 2004. However, there are a number of limitations arising in terms of how much the Book can assist me in assessing damages in this case. Firstly, it does not cater for the facts of this individual case... While a guideline may be a useful guide, it is only just that and it remains a valid truism in my opinion that each personal injury case depends to some extent on the facts of the individual case, and on the effect of the particular injury or injuries on the particular plaintiff, having regard to that plaintiff’s particular circumstances and character.”

7. Thirdly, the judgments of MacMenamin J., Dunne J. and Hogan J. all touch upon the constitutional backdrop, whereby the law of defamation is sometimes viewed as the means by which the organs of the State balance two competing constitutional rights, *i.e.* the citizen’s right to a good name, protected by Article 40.3.3, and freedom of expression, protected by Article 40.6.1. In his judgment MacMenamin J. cites the judgment of O’Donnell J. in *McDonagh* which noted that the statement made in that case and alleged to be defamatory was an expression of speech itself in principle protected by the Constitution. O’Donnell J. went on to point out, however, that 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 protective of a wide range of free speech apply.

8. MacMenamin J. then goes on to suggest that if it has been determined that none of the defences such as truth applies, then the words are not in fact subject to the same protection under the Constitution. I am inclined to agree with this approach to the balancing exercise, as

it appears to me consistent with previous statements made by members of this Court, for example the trenchant statement made by Hamilton C.J. in *De Rossa v. Independent Newspapers* [1999] 4 I.R. 432, when he stated as follows (at 456):

“Neither the common law nor the Constitution nor the Convention give to any person the right to defame another person.”

This approach does, however, appear to me to raise questions as to how the balancing exercise has been invoked in some previous cases dealing with awards, and I would prefer to postpone any conclusion on my part to another case where the matter requires to be decided, after full argument.

9. I turn now to the application of the relevant principles to the facts of the present case. The first question relates to the jury award of €300,000 for general damages, and whether that award was so disproportionate, such that no reasonable jury would have made that award in all the circumstances of this case. I am in agreement with Baker J. that this award was not so disproportionate, as to justify appellate interference with same, for the reasons set out by her in her judgment, together with some additional reasons of my own as set out below.

10. As regards the reasons set out by Baker J., I would highlight in particular her view that the jury in this case did have an opportunity to observe Captain Higgins over several days and the jury award must be seen as reflecting the fact that it was most impressed with the character of Captain Higgins, and with the devastating effect that such a serious imputation of unprofessional behaviour had on his character, in the context of the fact that he flew international commercial flights where he could have in his hands the lives of hundreds of passengers.

11. For my own part, I would also highlight the remarks of MacMenamin J. as to the gravity of the defamatory statements, and the conduct of the defendant. As he points out, the status and role of the defendant is surely a profoundly relevant factor in this case, as the Irish Aviation

Authority is the regulatory authority which has responsibility for security and standards in aviation matters. This was no ordinary defendant, but one who held a supervisory role over the plaintiff, and whose decisions could end his career or, at least, place him in the position that even an investigation could put his status with Aer Lingus in question.

12. Overall, I think the jury award of €300,000 for general damages can be viewed on the following basis, that an award proportionate to the harm done by the very serious defamatory statements meant an award of very substantial general damages. It was the function of the jury to put a monetary figure upon what they thought would constitute “very substantial general damages”, and in my opinion an appellate Court should be very slow to interfere with their exercise of their function, and should do so only where it can be clearly established that no reasonable jury would have arrived at that figure.

13. The second question arising relates to the jury award of €130,000 for aggravated damages, and whether this award was so disproportionate to justify interference. I am in agreement with MacMenamin J. that the manner in which the defendant conducted its defence warranted an award of aggravated damages, and I would highlight in particular the letter from the defendant’s solicitors dated the 11th November, 2014, which stated that their instructions were to strongly defend this matter on the grounds, *inter alia*, that the comments made in Captain Steel’s email were justified on the basis that the plaintiff failed to adhere to various requirements in respect of flying his aircraft into Ireland. However, I also agree with MacMenamin J. that the award of €130,000 for aggravated damages was disproportionate in the circumstances, for the reasons set out in his judgment, and I agree with substituting a proportionate figure of €50,000.

14. In the light of the above, I would also set aside the judgment of the Court of Appeal and I would have been minded to substitute an award of €315,000, *i.e.* €300,000 for general damages plus €50,000 for aggravated damages, minus €35,000 being the discount of 10% for

the offer of amends. However, as pointed out by Baker J., the effect of this judgment, in conjunction with the other judgments, would be that no consensus has been reached by this Court regarding the figure to be awarded to the plaintiff in respect of this defamation. As noted by Baker J., the plaintiff was adamant in the course of the hearing of the appeal that he wanted an end to the lengthy litigation, and that he did not want the matter to return for a new jury trial in the High Court.

15. In those circumstances, like Baker J., I also propose agreeing with the figure arrived at by MacMenamin J., for two reasons. Firstly, as with Baker J., I do so in the light of the practical result that this will achieve, so as to enable the plaintiff to finally put an end to this litigation. Secondly, I think the figure arrived at by MacMenamin J. best reflects some level of median figure within the spectrum of different figures arrived at in this Court. I agree with Baker J. that overall it is appropriate to substitute this amount, and that it would not be appropriate to remit this case for a new jury trial in the High Court as that would fail to respect the wishes of Captain Higgins.