THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 225

Appeal No. 2014 No. 116

[Article 64 transfer]

Kelly J.
Irvine J.
Hogan J.
BETWEEN/

MARTIN MCDONAGH

RESPONDENT

AND

SUNDAY NEWSPAPERS LIMITED

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of October 2015

1. In what circumstances can an appellate court set aside a jury verdict in a defamation case on the ground that it is perverse? This is the principal issue which is presented on this appeal from a decision of the High Court (de Valera J. and a jury) of 28th February 2008 where the jury found that the plaintiff had been defamed by a publication in the *Sunday World* on 5th September 1999. The jury awarded the plaintiff the sum of €900,000 in damages.

2. As it happens, this award was more than twice the then existing record for defamation awards which had been established in *de Rossa v. Independent Newspapers plc.* [1999] 4 I.R. 432. (This amount has since been exceeded by a number of other awards, most notably the award of some €1.87m. in *Leech v. Independent Newspapers Ltd.* [2014] IESC 79, a sum reduced on appeal by the Supreme Court to €1.25m.). The defendant has also appealed the amount of this award on the ground that it is excessive and this is the second issue which arises on this appeal. There is also a third issue which I will presently address, namely, the failure of the jury to answer the second question on the issue paper prior to proceeding to assess damages.

3. Before considering any of these questions, it is first necessary to set out the nature of the publication itself.

The nature of the publication

4. The plaintiff, Mr. McDonagh, claims that he was defamed in an article published by the *Sunday World* on 5th September 1999 entitled "Traveller is new drug king." The article purported to narrate the background to the seizure by members of An Garda Siochána of some IR£500,000 worth of illegal drugs (cannabis and amphetamines) in Tubbercurry, Co. Sligo a few days previously on 30th August, 1999.

5. The article identified Mr. McDonagh (although it did not name him as such) as the man behind the drug seizure. He was described as a drug dealer who lived in Sligo and as somebody who had amassed a fortune without any visible means of income. He was also described as an illegal moneylender and a criminal. Details were given (in general terms) regarding his lifestyle, abode and family. The newspaper accepted that he was the person identified in the article.

6. The newspaper contended that the plaintiff did not personally touch any drugs, but that he had flown to London Stansted from Ireland West (Knock) airport with his brother and some accomplices a few days before the drugs were seized by the Gardaí. It was suggested by the newspaper that he had spent the weekend there in the company of a known drug dealer and that he had arranged for the accomplices to bring the drugs back in two holdalls. The accomplices travelled by ferry while he flew back to Knock. The Gardaí then kept the consignment under surveillance and the two accomplices were later arrested in possession of the drugs at a house in Tubbercurry. Although the plaintiff was arrested under s. 2 of the Criminal Justice (Drug Trafficking) Act 1996, and detained for seven days in relation to the seizure, he was never charged with any offence. The two accomplices, Mr. Carthy and Mr. O'Grady, were subsequently convicted and each received a five year sentence.

The proceedings and the issues

7. These proceedings were commenced on 17th January 2000. A statement of claim was delivered on 2nd February 2000. In his statement of claim the plaintiff contended that the article in its natural and ordinary meaning meant:-

(a) that he was a criminal;

(b) that he was a drug dealer;

(c) that he was a tax evader, and

(d) that he was a loan shark.

8. The newspaper delivered its defence in April 2002 and the defences of justification and qualified privilege were both pleaded. At the hearing of the action in February 2008 it was agreed that three questions should be put to the jury, with the first question broken down into four component parts.

9. Question 1 on the issue paper was in the following terms:-

"Has the defendant proved:

(a) that the plaintiff is a drug dealer?

Answer: No.

(b) that the plaintiff was a loan shark?

Answer: No.

(c) that the plaintiff was a tax evader?

Answer: Yes.

(d) that the plaintiff was a criminal?

Answer: Yes

10. The second question actually provided for the contingency where some of the individual components in question 1 would be answered in the affirmative with others in the negative. The second question was in the following terms:

> "Question 2:
>
> If the answer to one or more parts of question 1 is 'no', but the answer to one or more parts of question 1 is 'yes', do the words not proved to be true materially injure the plaintiff's reputation having regard to the truth of the remaining charges?"

11. The jury did not, unfortunately, answer the second question and, indeed, their failure to do so has given rise to a separate ground of appeal. The jury did, however, answer the third question which was in the following term:-

> "Question 3:
>
> If the answer to question 2 is 'yes', assess damages.
>
> Answer: €900,000, plus costs."

12. The defendant originally appealed to the Supreme Court against this verdict. Following, however, the establishment of this Court on 28th October 2014 this appeal was transferred to this Court by direction of the Chief Justice (with the concurrence of the other members of the Supreme Court) on 29th October 2014 pursuant to the provisions of Article 64.3.1 of the Constitution.

The evidence given on behalf of Mr. McDonagh

13. Mr. McDonagh's evidence in chief was to the effect that he had travelled to London for a drinking session with some of his friends. While he stated that he was no "angel", he insisted that he was not involved with drugs. He denied that he had made any admissions to the Gardaí following his arrest and detention.

14. Mr. McDonagh accepted that he had a series of convictions, although he was uncertain of some of them. Although Mr. McDonagh stated in his evidence in chief that apart from a minor matter when he was 14 years of age, he had no criminal record and had not been involved in any fraudulent activities, he accepted in cross-examination that he had been convicted of burglary and larceny in 1981 when he was aged 18 and had received a three months sentence. He was convicted of larceny again in 1982 and received a three month sentence. He received another sentence of three months for larceny in 1984. He also accepted that he had been convicted in 1985 of receiving stolen goods.

15. In cross-examination Mr. McDonagh accepted that he had been arrested on the 3rd September 1999 and that he had spent seven days in custody in relation to the drugs find. He had travelled the previous weekend to London with his brother, Michael, and two friends, Calvin Carthy and Mark Gethins. Mr. Michael McDonagh lives in Spain. Mr. Gethins is Mr. McDonagh's brother in law. While in the UK he went to the flat of a friend of his from Sligo, Graham O'Grady.

16. The plaintiff claimed that he decided to go away on the spur of the moment for a drinking session with his friends. He accepted that in 1999 he was 36 years of age and Mr. Carthy was then about 17 or 18 years of age. When pressed as to whether or not it was usual to be friendly with a person as young as that, Mr. McDonagh said that he was friendly with everybody, young or old. When asked as to why he would want Mr. Carthy to go to England with him, Mr. McDonagh said:

> "It's not that I wanted him to go to England with me. It was just a case that we were drinking and we were drinking for a few days, myself and the boys, and his name just popped up. So we said, right, come on. That was it, there was no set-out to go. It just happened."

17. Mr. McDonagh then said that they had picked up Mr. Carthy "at a roundabout in Collooney", although he said that he had not contacted him and did not know who had. The following exchange then took place:

> "Q. You don't go off for a weekend with somebody without working out who is going and for what reason.
>
> A. That's who we are."

18. When the party arrived at Stansted they met a friend of his brother's, Jimmy McMorrow. Mr. McDonagh stated that he disliked Mr. McMorrow because he had once tried to supply drugs to Mr. McDonagh's daughter. He acknowledged that Mr. McMorrow had a conviction for drugs, but denied that any drugs were present at the premises where he stayed in London. He further denied any involvement in drug dealing.

19. Mr. McDonagh stated that the Criminal Assets Bureau ("CAB") had never accused him of involvement in the drugs trades, but he was obliged to accept that the affidavits filed on behalf of CAB in separate proceedings suggested otherwise.

20. Three other witnesses were called by the plaintiff: Ms. Nathalia Lyons (the eldest daughter of the plaintiff), Mr. Vincent Murray and Mr. Phil O'Rourke. Mr. Murray gave evidence that he was publican who ran a licensed premises in Sligo town from 1985 until 2004.

He denied ever hearing that Mr. McDonagh had ever been involved in drug dealing or loan sharking.

21. Mr. O'Rourke gave evidence that he was a lecturer in economics at the Institute of Technology in Sligo. He denied ever hearing that Mr. McDonagh had been involved in drug dealing.

The evidence given on behalf of the Sunday World
22. The Sunday World led evidence from nine members of An Garda Síochána and a representative from Permanent TSB, Mr. David Curtis. The Garda evidence related principally to the circumstances of the drugs seizure, the detention of the plaintiff and the admissions which he was said to have made in custody. Mr. Curtis gave evidence in relation to the plaintiff's bank accounts.

23. Detective Garda Eddie McHale gave evidence that he was a member of the Garda team that investigated the Tubbercurry seizure. He said that he had interviewed the plaintiff while he was detained on a number of occasions at Manorhamilton Garda Station. Detective Garda Eddie McHale was asked to read into the record the notes of those interviews which he conducted on 4th September 1999. Among the comments attributed to Mr. McDonagh in these notes were the following:

> "When I got to the airport and saw Jimmy [McMorrow] waiting there for [my brother] Michael, then I knew what was happening. It's Michael that should be here and Calvin Carthy. [Mr. O'Grady] was forced to carry the stuff. I know that Jimmy forced him..."

24. Later in the interview Mr. McDonagh reportedly said:

> "Q. Where were the drugs bought?
>
> A. Look you can buy nine bars [of cannabis] in Spain for £25 to £30. You see the [ecstasy tablets] you can buy them in Amsterdam for 20p. That's fact. Jimmy brought that stuff from Spain to England and that's fact. And he didn't use the normal way, he went a roundabout way."

25. Those notes suggested that the plaintiff acknowledged that he knew about the planned drugs shipment and that he had maintained that Mr. O'Grady had been forced to carry the drugs. He also appeared to have stated that Mr. McMorrow bought the drugs in Spain and brought them from there to the UK.

26. Detective Garda Eddie McHale also stated that in the course of his detention Mr. O'Grady was asked whether he wanted to speak to anyone. Detective Garda McHale said that while Mr. O'Grady said that he wanted to speak with his uncle, the person whom he in fact spoke to by telephone was Mr. McDonagh.

27. Detective Garda Eddie McHale was cross-examined as to the circumstances in which the newspaper came to have fairly precise details of the background to the Garda investigation which, Mr. Doyle S.C., counsel for Mr. McDonagh, suggested, could only have come from Garda sources. Detective Garda Eddie McHale accepted that Mr. McDonagh had never been charged or convicted in respect of any drugs offence. While it was also put to Detective Garda Eddie McHale that Mr. McDonagh had "maintained his innocence about drugs, whatever else", the witness responded:

> "Well, I wouldn't go fully with that now...I wouldn't agree 100% because there are parts in [those] statements where he said he did know what was going on in relation to drugs."

28. Garda Vincent McKeown gave evidence that he had investigated Mr. McDonagh in connection with the Tubbercurry drugs find. He gave evidence that he had conducted two interviews with Mr. McDonagh on 2nd September 1999 along with Garda Pauline McDonagh. During the first interview Mr. McDonagh was asked about his trip to the UK including his encounters with Mr. Carthy and Mr. O'Grady. In the second interview Garda McKeown said that Mr. McDonagh agreed to speak for so long as no notes were taken. During that interview the plaintiff was said to have identified Mr. McMorrow as the person who would take the drugs through customs and that his brother, Michael, was one of the persons who financed the deal.

29. Garda Vincent McKeown then conducted a second interview on 9th September 1999 and Garda McDonagh was again present. According to the notes read out in court by Garda Vincent McKeown, the plaintiff stated that he "knew that there was something going on" but that he never dreamt that "there were that quantity of drugs involved." Mr. McDonagh declined to sign the notes and he also denied during these interviews that he was involved in drugs.

30. Detective Garda Vincent McKeown also stated that Mr. McDonagh agreed to speak if no notes were taken. Following that conversation a note was subsequently prepared. That note suggested that Mr. McDonagh stated that his brother, Michael, had financed the operation and that an accomplice of his was to be the person who distributed the drugs in Sligo.

31. In cross-examination it was put to Garda Vincent McKeown that the plaintiff had travelled to London having consumed a vast quantity of alcohol; that he had arrived drunk and that others had to arrange to purchase his ticket to travel from Knock to Stansted. While Garda Vincent McKeown said that he did not know the plaintiff very well prior to the investigation, he accepted that these were not the actions of a top drug dealer who was masterminding a massive importation of drugs.

32. Detective Garda Pauline McDonagh gave evidence that she was present at five of the six interviews conducted by Garda Vincent McKeown and she confirmed that these notes were accurate. While she was briefly cross-examined, nothing was suggested to her that the notes were inaccurate in any way.

33. Garda Thomas Doherty said that he had also conducted an interview with Mr. McDonagh on 8th September 1999. He said that according to his notes Mr. McDonagh admitted that he was a moneylender and that he charged 100% interest. He also said that Mr. McDonagh had denied any involvement with the drugs find. At the end of the examination in chief Garda Doherty was asked:

> "376 Q. Are you confident they are accurate accounts?
>
> A. They are, my Lord, yes, Judge.
>
> 377 Q. You are confident that he said, for instance, that he charged interest rates of 100%?
>
> A. I am, my Lord, yes.

378 Q. You're confident that when you read over the notes to him he said they were correct?

A. That's correct, my Lord, yes."

34. He was cross-examined to the effect that the plaintiff had disputed the contents of all the Garda interviews and that it was possible that he would not have wished to incriminate his brother. The rest of the cross-examination focussed on the circumstances in which the newspaper came to have the details of the story.

35. Detective Garda Michael Carr gave evidence that he had conducted one interview with the plaintiff on 7th September 1999. The interview notes suggested that Mr. McDonagh had denied any involvement with the drugs seizure, but that he accepted that he did loan money. While the cross-examination of Detective Garda Carr was brief, the gist of it was to the effect that the plaintiff denied the accuracy of the notes.

36. Detective Garda John McHale read out the notes of interviews conducted on the 5th September and 6th September in which the plaintiff denied any involvement with the drugs in question. He said that when he was in London he had warned Mr. O'Grady not to get involved in anything to do with drugs. Detective Garda John McHale was briefly cross-examined regarding the details of the newspaper publication.

37. Detective Garda O'Neill gave evidence that he was present when Messrs. Carthy and O'Grady were arrested following the seizure of the drugs at a flat in Tubbercurry. He also stated that he was observing the flat from the rear where he encountered Mr. Gethins who was in the process of parking a car at the rear of the building. While he gave evidence as to Mr. McDonagh's reputation as a drug dealer and a loan shark, he said that he had never actually interviewed Mr. McDonagh in relation to these matters. Detective Garda O'Neill was cross-examined about the circumstances in which the details regarding the drugs seizure came to be published by the newspaper.

38. Detective Garda Oisín McKeown said that he was attached as bureau officer for the Criminal Assets Bureau ("CAB"). He said that the CAB had obtained orders under the Proceeds of Crime Act 1996 which disclosed substantial lodgements of some €665,000 lodged to six accounts under the control of the plaintiff. He said that there did not appear to be any lawful explanation "as to how these monies had made their way to those accounts." He also said that the plaintiff was receiving social welfare payments at the same time. He stated that CAB had reached a settlement with the plaintiff which involved him paying unpaid tax in the sum of IR£100,000. Detective Garda McKeown was not cross-examined.

39. Mr. David Curtis gave evidence that he was a senior manager with Irish Life and Permanent plc. He said that there were three personal accounts along with a company account in the name of Martin McDonagh (Sligo) Ltd. He said that the accounts appeared to be regular and normal, with IR£16,000 being the biggest lodgement.

40. Detective Sergeant Connell Lee gave evidence as to the plaintiff's reputation in the Sligo region. He also detailed the publicity which had surrounded the drugs haul. Detective Sergeant Lee accepted in cross-examination that the newspaper article had much more detail than would have been given out through the Garda press office.

The rule in Browne v. Dunn

41. One of the major issues arising on this appeal was how the evidence of the Garda witnesses should be treated. The newspaper contended that, as the statements allegedly made by the plaintiff while in Garda custody following his arrest are consistent only with guilty knowledge of the drugs which were seized, the jury's verdict to the contrary should be set aside as perverse. As the Gardaí were not really cross-examined as to the contents of the matters of which the plaintiff is supposed to have made admissions, the newspaper contended that the veracity of these statements must be taken as having been established.

42. This raises the applicability of the supposed rule in *Browne v. Dunn* (1894) 6 R. 67. In that case the plaintiff had alleged that the defendant solicitor had libelled him by saying that he (the defendant) had been retained by nine named persons in order to have him bound for breach of the peace. Although the plaintiff contended that the retainer was a sham, six of the nine clients gave evidence that it was legitimate. None of them were cross-examined on this critical issue. In the High Court, however, the jury found for the plaintiff on the defamatory nature of the publication.

43. The English Court of Appeal set aside the verdict on the ground (it would appear) that the verdict was perverse. This decision was affirmed by the House of Lords, with various members of the House dealing with the extent of the obligation to cross-examine. But so far as the verdict itself was concerned, Lord Herschell L.C. said ((1894) 6 R. 67, 71):

> "...the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve their stories, and to come to the conclusion that nothing of the kind had passed. If that is so, there is an end of the case so far as it rests upon the whole of the transaction being a sham...."

44. The application of *Browne v. Dunn* in this jurisdiction was comprehensively examined by Baker J. in her judgment in *Director of Public Prosecutions v. Burke* [2014] IEHC 483. In that case a prosecution witness gave evidence which was exculpatory of the accused and the District Court stated a case for the opinion of the High Court as to whether the court was bound to acquit the accused based on the fact that an important prosecution witness was not cross-examined.

45. Baker J. rejected the suggestion that there was some ex ante rule which compelled the court to treat unchallenged evidence as requiring a particular result. She did, however, lay down important guidelines on this issue at para. 44:

> "(a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination;
>
> (b) *Ipso facto* a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or the jury and is untested.
>
> (c) There is no requirement that evidence be cross-examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and un-contradicted evidence.
>
> (d) Untested and un-contradicted evidence carries greater weight than tested contradictory evidence.
>
> (e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it

has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.

(f) A trial judge or a jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result."

46. Although Baker J.'s analysis of these issues is an extremely valuable one, she was not required in that case to address another dimension of *Browne v. Dunn*, namely, what is the position where the only evidence given is along particular lines and that evidence has not itself been challenged?

47. The Supreme Court examined aspects of this issue in *M v. M.* [1979] I.L.R.M. 160. This was a nullity petition where the wife applied for a decree on the ground of non-consummation. Both husband and wife gave evidence to this effect and in his evidence the husband accepted that the failure to consummate was entirely due to his physical or psychological incapacity. This testimony was entirely corroborated in every particular by the wife's general practitioner, a consultant physician and by a psychiatrist whose report was put in evidence.

48. As Henchy J. put it, each of the witnesses in the case had left court ([1979] I.L.R.M. 160, 161):

"…without any suggestion having been made that their evidence was not truthful or credible. It was not suggested to the husband or wife that they had acted collusively in the matter before the court. Nor was it suggested to the general practitioner or the consultant physician that they (or the consultant psychiatrist) had been misled into a wrong conclusion as to the husband's impotence and, therefore, as to the non-consummation of the marriage. The judge's note of the evidence adds up to an unrebutted and unquestioned case for the grant of a decree of nullity."

49. Henchy J. went on to note that, however, the trial judge had refused to grant the decree saying that he was satisfied that the parties had acted collusively and that they had, in effect, given perjured evidence. Henchy J. held, however, that such a verdict was not open to the trial judge ([1979] I.L.R.M. 160, 162):

"….having regard to the unanimity of the evidence given and the conduct of the case generally it was not open to the judge to refuse a decree of nullity for the reasons given. It is not in accordance with the proper administration of justice to cast aside the corroborated and unquestioned evidence of witnesses, still less to impute collusion or perjury to them, when they were not given any opportunity of rebutting the accusation. To do so in this case was in effect to condemn them unheard, which is contrary to natural justice.

Having due regard to the degree of proof required to be established by a petitioner in a case such as this, I consider that a decree of nullity was the only verdict that was open on the evidence given. If the case were to be sent back to the High Court for rehearing, there is no reason to think that such a rehearing would yield any other verdict."

50. As Henchy J. himself acknowledged, *M. v. M.* represent a classic example of the fair procedures dimension of cross-examination. As that case illustrates, if the decision-maker elects not to accept otherwise unchallenged evidence, notice of this must normally be given either expressly (typically by having matters "put" to the witness) or by implication. But *M. v. M*. is also in its own way an example of the application of another feature of *Browne v. Dunn*: as the unchallenged evidence pointed unanimously in favour of a decree of nullity, that evidence could not have been rejected by the court of trial on the ground that the evidence was not credible.

51. So far as the present case is concerned, it would be hard to say that the fair procedures dimension of the rule in *Browne v. Dunn* was infringed. As Lord Herschell L.C. pointed out in *Browne*, cross-examination is not essential where it is clear that the evidence given or to be given by a particular witness is impeached (1894) 6 R. 67, 71):

"Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakeably given, and the point upon which he is impeached and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

52. These principles were recently applied by O'Malley J. in *AC v. Judge O'Brien* [2015] IEHC 25. In this case the prosecution had first led identification evidence from a Garda implicating the accused in the offence. After the prosecution case had closed, the accused gave evidence denying the offence and he was not cross-examined on that evidence. O'Malley J. rejected the fair procedures argument, saying at para. 58:

"The 'fair procedures' arguments do not appear to me to carry a great deal of weight in the circumstances of this case. There is no doubt but that each side knew the case it would be meeting. It is incorrect to assert that the applicant was not given an opportunity to deal with the evidence of Garda McMahon – his own counsel could have asked him to do that, rather than simply asking him to deny his guilt."

53. The same can be said here. Whatever else might be said about the plaintiff's case, it was at all times made clear that he disputed the accuracy of the statements which he was said to have made while in custody. All the defendant's Garda witnesses must be taken to have known that there was a standing objection to their evidence insofar as it touched on the accuracy of the notes which had been taken of the plaintiff's interviews while in custody. No complaint can, accordingly, really be made on this ground about the failure to put certain matters in cross-examination to the Garda witnesses.

54. It is also clear from the judgment of Baker J. in *Burke* that unchallenged evidence is evidence. Nor, as Baker J. made clear, is there any rule of law which compels the trier of fact to accept certain evidence *simply* because it was not challenged by cross-examination, since, as she pithily put it:

"Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result."

55. There is, accordingly, no rule of law which compelled the jury to accept the Garda evidence *simply* because it was unchallenged. Nevertheless, as Baker J. pointed out in *Burke*, unchallenged evidence carries "somewhat greater weight" than evidence which has been tested through cross-examination. The real question, accordingly, is whether the preponderance of the unchallenged evidence

was such that the jury could not reasonably have found otherwise than for the newspaper.

56. It is to that issue to which I will presently turn.

Freedom of expression and the protection of a right to a good name
57. This case presents once again the question of the appropriate balance to be struck between two fundamental constitutional values, namely, the right to a good name on the one hand (Article 40.3.2) and freedom of expression on the other (Article 40.6.1.i). In passing it may be observed that as this article was published in 1999 and thus ante-dated by several years the subsequent enactment of the European Convention of Human Rights Act 2003. The Supreme Court has held that the 2003 Act did not have retrospective effect (*Dublin City Council v. Fennell* [2005] IESC 33, [2005] 1 I.R. 604), so it is unnecessary, therefore, to consider the potential impact (if any) of Article 10 ECHR might otherwise have had for this case, bearing in mind that this provision does not, in any event, have direct effect in our law: see, *e.g., McD v. L*. [2009] IESC 81, [2010] 2 I.R. 199, 248, *per* Murray C.J. and *MD v. Ireland* [2012] IESC 10, [2012] 1 I.R. 697, 720, *per* Denham C.J.

58. So far as the question of free expression and the law of defamation are concerned, the most recent statement on this issue is that of Dunne J. in her judgment in *Leech* where she stated:

> "It is the case that an award of damages must be fair to the plaintiff and to the defendant. That cannot be gainsaid. However, freedom of expression is not an entirely unrestricted freedom. In the context of defamation proceedings it must be balanced by the provisions of Article 40.3.2 of the Constitution which provides that the State 'shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen'. The matter was expressed trenchantly by Hamilton C.J. in the *de Rossa* case when he stated ([1999] 4 I.R. 432,.456:
>
> > 'Neither the common law nor the Constitution nor the Convention give to any person the right to defame another person.'
>
> Nevertheless it was accepted by Hamilton C.J. in that case….that the existence of the right of freedom of expression and the obligation on the State by its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the good name of every citizen necessarily involves what Hamilton C.J. described as 'a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name'. It is from that balancing exercise that he identified the concept of proportionality. Accordingly, I am satisfied that an award of damages cannot be so disproportionate as to have the effect of not just vindicating the good name of the citizen but of restricting the freedom of expression of a newspaper." [Emphasis Added]

59. It is true, of course, that as Hamilton C.J. said in *de Rossa* and as Dunne J. said in *Leech*, neither the Constitution nor the European Convention of Human Rights gives any right to defame another under the guise of freedom of expression. The converse, however, is also true: if the published words are true in substance or in fact, then the author has a constitutional right by virtue of Article 40.6.1.i to publish these words as part of his or her "convictions or opinions." This is especially true in the case of the media whose "rightful liberty of expression" is a key component of Article 40.6.1 itself.

60. It is clear, therefore, as confirmed by the language of Article 40.6.1 itself, the Constitution ascribes a high value to the discussion by the media of matters concerning serious criminality. The right to educate and to influence public opinion is at the heart of the rightful liberty of expression protected by Article 40.6.1. A publication of the kind at issue in the present proceedings provides the public with further details of the Garda operation whereby high value illegal drugs were seized. It is, accordingly, through information provided in this manner that public opinion regarding matters such as the effectiveness of policing policy, the enforcement of our drugs laws, the level of organised crime in society and other related matters is ultimately formed. As I have just pointed out, this right does not, of course, permit the media to publish defamatory material, since this would breach the proper balance which must be struck between the (potentially competing) constitutional value of freedom of expression (Article 40.6.1) on the one hand and the protection of a good name (Article 40.3.2) on the other,

61. All of this has a relevance, however, to the question of the perversity of a jury verdict and the capacity of this Court to review such a verdict. If it is clear that the article complained of is true in substance and fact, then the media's constitutional right to publish this material cannot be compromised by a jury verdict to the effect that it is defamatory of the plaintiff, the traditional near sanctity of such verdicts at common law notwithstanding. Any other conclusion would mean that the appropriate balance envisaged by the Supreme Court in both *de Rossa* and *Leech* would not have been struck, since the substance of the media's constitutional right to publish material which is in fact true would indeed have been compromised.

62. It is against this background that the evidence in this case falls to be considered. In this regard, the test remains that articulated by Walsh J. in *Quigley v. Creation Ltd*. [1971] I.R. 269,272 when he said:

> "When a jury has found that there has been a libel, this Court would be more slow to set aside such a verdict than in other types of actions and it would only do so if it was of opinion that the conclusion reached by the jury was one to which reasonable men could not or ought not to have come."

63. In addition, however, the test in *Quigley* must be understood in its proper context. It must be recalled that in that case the offending publication consisted of a purely fictitious interview with a noted actor who, it was claimed – again, falsely – had emigrated from Ireland in search of work. Although the publishers did not dispute the falsity of the publication, they contended that the contents were not defamatory of the plaintiff. The jury disagreed, finding that the article was indeed defamatory of the plaintiff. That finding was upheld by the Supreme Court.

64. The comments of Walsh J. accordingly touched on the role of the jury in determining whether the admittedly false words in question ("They've left this Isle") were capable of defaming the plaintiff. It is in cases of that kind (*i.e.*, determining whether the false words in question were, in fact, defamatory of the plaintiff and whether the plaintiff's reputation was actually materially damaged by the publication) where particular weight – almost sanctity – must be given to the jury verdict, because the jurors are, in principle, the ultimate arbiters of community standards, values and tastes. This is what Henchy J. had in mind in *Barrett v. Independent Newspapers Ltd*. [1986] I.R. 13, 23 when he said:

> "The law reports provide many examples of cases where the jury were held entitled to find that the words were not defamatory when the ruling of the judge on the point would have led to the opposite conclusion...The community verdict of a jury is not to be condemned as perverse merely because it does not accord with that of a judge. It is to be deemed

to be perverse only when a jury of reasonable men, applying the law laid down for them by the judge and directing their minds to such facts as are reasonably open to them to find, could have reached the conclusion that the words were not defamatory."

65. Even in that type of case, however, there are limits to the jury's role. A good example is supplied by *Berry v. Irish Times Ltd.* [1973] I.R. 368 where the Supreme Court reversed a jury verdict in favour of the plaintiff (who was the then Secretary to the Department of Justice) where he had been described as a "20th century felon setter". The Court reasoned that it could not be defamatory to say of a very senior public servant that he co-operated with the authorities in suppressing the activities of illegal organisations.

66. The precise issue in the present appeal is a different one, namely, whether the jury could reasonably have found on the evidence that the plaintiff was not a drug dealer or a loan shark. No one doubts at all that such words, if false, are defamatory. The real question is whether, on the evidence, the jury could properly have concluded that these statements concerning the plaintiff were *false.* While very considerable weight will obviously attach to a jury verdict of this kind (see, *e.g.,* the comments to this effect of Denham J. in *Cooper-Flynn v. RTÉ* [2004] IESC 27, [2004] 2 I.R. 72), it is not on that account inviolable. It might also be pointed out that the assessment by the jury of the weight of the evidence in order to determine whether the offending publication is true or false does not involve it acting in its special role as arbiters of community values. As I have already indicated, the jury does not have the right to bring in a verdict to the effect that a particular statement is false when the opposite is, in fact, the case. Any other conclusion would mean that the newspaper would be deprived of its constitutional right to publish material concerning the plaintiff which is, in fact, true.

67. Perhaps the leading case in the common law world on perverse jury verdicts is *Grobbelaar v. News Group Newspapers Ltd.* [2002] 1 W.L.R. 3024. In that case the plaintiff had been the principal goalkeeper of a leading English football club. An individual named Mr. Vincent approached *"The Sun"* newspaper and alleged that Mr. Grobbelaar corruptly had agreed to allow goals to be scored with a view to fixing the result of certain English Premier League football matches in aid of certain Asian betting syndicates. *The Sun* arranged to have the meetings between Mr. Vincent and Mr. Grobbelaar secretly recorded. The tapes of those meetings showed Mr. Grobbelaar accepting bribes to fix matches and talking about specific matches in the past in which he claimed to have either allowed goals to be scored or attempted to let in goals. Details of these tapes were published in *The Sun* who alleged that Mr. Grobbelaar was a corrupt footballer.

68. Mr. Grobbelaar subsequently sued for libel in the English High Court. The plaintiff led evidence from a number of football experts who testified that they could not detect any evidence from watching the video evidence that Mr. Grobbelaar had, in fact, attempted to fix these matches. The plaintiff contended that there was no evidence that he had actually allowed in goals at any of these matches. His explanation for the video evidence was that he was simply trying to trap Mr. Vincent as a fraudster. Not surprisingly, the newspaper called evidence based on the video evidence. The jury awarded the plaintiff the sum of £85,000.

69. The English Court of Appeal concluded that the jury verdict was perverse and allowed the appeal on this ground. While all three members of the Court (Simon Browne, Thorpe and Jonathan Parker L.JJ.) accepted that any appellate court should be reluctant to reverse a jury verdict on this ground, all three judges concluded that the evidence of fraud on the part of the plaintiff was so overwhelming that the jury verdict should not be allowed to stand.

70. The House of Lords in turn (by a majority) allowed the appeal from this decision. It was accepted that if the "sting" of the article was – as the newspaper contended – that Mr. Grobbelaar had taken corrupt payments, then the jury verdict must have been perverse. Delivering the lead judgment for the majority, Lord Bingham stated that the court must strive, where possible, to seek an alternative explanation for the verdict which would avoid the court setting it aside as perverse. The majority concluded that the jury must therefore have accepted the plaintiff's argument, namely, that the sting of the article was to the effect that he had deliberately allowed in goals. The verdict on liability was accordingly restored, as there was no direct evidence that this had occurred. The House of Lords nonetheless reduced the damages to a nominal £1, saying that the evidence showed that the plaintiff had no reputation worth protecting, as he had accepted corrupt payments.

71. The decision in *Grobbelaar* provides another illustration of the reluctance of appellate courts to set aside jury verdicts on the grounds of perversity. It is nonetheless clear that both the Court of Appeal and the House of Lords would have been prepared to quash the verdict on this ground had the article simply been interpreted as being referable to the plaintiff receiving corrupt payments as the evidence that he had received such payments was irrefutable. It was only because the House of Lords considered that the jury could have considered that the sting of the article referred to evidence of actual corrupt play on the football field (of which there was no such evidence) that the original jury verdict was restored. It was for this reason alone that the House disagreed with the Court of Appeal. This was, of course, a purely pyrrhic victory for the plaintiff: as the evidence overwhelmingly pointed to the existence of a corrupt payment, he received simply nominal damages.

72. In the present case it is clear that the article in question is plainly and unambiguously referable to the plaintiff's alleged drug dealing and loan sharking activities. In contrast to the position in *Grobbelaar*, in the present case the offending publication is capable of only one meaning, namely, that the plaintiff had engaged in drug-dealing and loan-sharking.

73. If the evidence clearly established that the plaintiff had engaged in such activities, then the jury verdict cannot be allowed stand because on the evidence it is one that no reasonable jury could have come to.

The drug dealing allegation

74. What is, perhaps, the most striking feature of the evidence adduced in relation to the drugs dealing allegation is that very little of the evidence adduced by the newspaper in support of the drug dealing allegation was actually challenged by the plaintiff. On his own admission the plaintiff accepted that he had travelled by airplane to the UK in the days prior to the drugs seizure with Mr. Carthy and, while there, he met with Mr. O'Grady, both of them who were subsequently convicted of possession of the drugs which were seized in Tubbercurry. While he travelled back by airplane, Mr. Carthy and Mr. O'Grady returned to Ireland by ferry.

75. The plaintiff admitted meeting Mr. McMorrow, a convicted drugs dealer, even though he stated that he was uncomfortable meeting him as he (*i.e.,* Mr. McMorrow) was an individual who previously offered Mr. McDonagh's daughter illegal amphetamines. Mr. McDonagh acknowledged in cross-examination that his own accountant had estimated that at one point he had IR£410,000 in a bank account even though this was at a time when he was receiving unemployment assistance and the circumstances in which he might have legitimately earned this money are far from clear.

76. So far as the Garda evidence was concerned, it was not challenged beyond largely formal and, to some extent, perfunctory denials from the plaintiff that he ever made such statements following his arrest and detention. It must be acknowledged, however,

that none of the Gardaí ever suggested that Mr. McDonagh had made a direct admission of any involvement in drugs during the course of these interviews.

77. Reviewing the evidence as a whole, it is clear that there is (effectively) unchallenged evidence to the effect that Mr. McDonagh was aware that a drugs consignment was being planned; that the drugs had been purchased in Spain by Mr. McMorrow; that the operation had been financed by Mr. McDonagh's brother, Michael, and that the drugs were then taken to the UK by him via Amsterdam. There is further evidence – again, largely unchallenged – to the effect that Mr. McDonagh knew that Mr. O'Grady was pressurised into carrying the drugs and that Mr. O'Grady later telephoned Mr. McDonagh – rather then any member of his family – following his arrest.

78. It should also be noted that one of the Garda witnesses – Detective Garda Oisín McKeown – was not cross-examined at all. Detective Garda Oisín McKeown gave evidence that, according to the calculation of the Criminal Assets Bureau, the plaintiff had a sum of IR£660,000 in his bank accounts at a time when he was claiming unemployment assistance. It is true that there is a difference of some IR£250,000 between the two figures, but even if one takes the lower figure of €410,000 it is still striking that a person with no visible legitimate sources of income (other than social welfare payments) could come to have such a sum in a bank account.

79. Taken as a whole, therefore, the evidence in support of the plea of justification was that:

> (a) Mr. McDonagh had travelled to the UK a few days before the drugs consignment had been detected in the company of one of the two persons (Mr. Carthy) who were later convicted of importing these drugs.
>
> (b) Upon arrival at Stansted he met Mr. McMorrow who has a conviction for drug dealing. He later travelled to the flat of a friend from Sligo, Graham O'Grady. Mr. O'Grady later travelled to Ireland by ferry and he was later arrested in connection with the drugs find. Mr. O'Grady was later convicted of the possession of these drugs.
>
> (c) Mr. McDonagh knew that the drug operation was being financed by his brother, Michael, and that Mr. McMorrow had purchased the drugs in Spain and imported them into the UK via Amsterdam.
>
> (d) Mr. McDonagh maintained that Mr. O'Grady had been pressurised into carrying the drugs by Mr. McMorrow.
>
> (e) Mr. McDonagh could name the person who was supposed to distribute the drugs in Sligo on behalf of his brother.
>
> (f) Mr. McDonagh had at least IR£410,000 in a bank account at a time when he was claiming social welfare payments and had no other visible means of support.

80. Points (a), (b) and (f) are undisputed. Points (c), (d) and (e) emerge from the Garda statements. As I have noted, while Mr. McDonagh denied making these statements, the Garda evidence otherwise went unchallenged.

81. The evidence to the contrary may be summarised as follows:

> (a) Mr. McDonagh had never been charged or convicted in respect of this or any other drugs offence.
>
> (b) Mr. McDonagh denied making the statements to the Gardaí as recorded in the interview notes.
>
> (c) The actions of the plaintiff (e.g., travelling drunk by plane to the UK) were not the actions of a drugs mastermind.
>
> (d) The large sums of money in the bank account could be explained by wholescale benefit fraud in the UK and by activities such as by being engaged in the waste removal business.

Was the jury conclusion regarding the drug dealing allegation perverse?

82. It is clear from the Supreme Court's decision in *Hay v. O'Grady* [1992] 1 I.R. 210 that any appellate court will pay considerable deference to the views of the trial judge who had the benefit of seeing and hearing the witnesses. As McCarthy J. put it ([1992] 1 I.R. 210, 217):

> "If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority."

83. These principles have been routinely applied since they were first stated by the Supreme Court. In *MC v. FC*. [2013] IESC 36 the issue before the High Court was whether FC, a nephew of MC (who was herself a ward of court), had exercised undue influence over her. Feeney J. held that there had been such undue influence and that gifts totalling some €900,000 from the aunt to the nephew should be set aside. In his judgment MacMenamin J. first dealt with the nature of the appellate jurisdiction stating at para. 3:-

> "This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As *Hay v O'Grady* makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence (see also *Pernod Ricard* and *Comrie plc v Fyffes plc*, unreported, Supreme Court, 11th November 1988)."

84. These principles apply a *fortiori* in the case of a jury verdict. In finding that the plaintiff was not a drug dealer the jury must have decided to reject the Garda evidence and prefer the evidence of the plaintiff to the effect that he never made such statements while in Garda custody. Can it nevertheless be said that there was credible evidence to support the plaintiff's case?

85. The basic undisputed facts showed that the plaintiff travelled to the UK on the weekend before the drugs seizure. In the course of that trip one of the persons later found in possession of the consignment of drugs (Mr. Carthy) travelled with him and that, upon arrival in the UK, the plaintiff went to meet another person (Mr. O'Grady) whom he knew and who was later convicted of possession of the drugs that were so seized. During the course of that trip he also met Mr. McMorrow who, it is accepted, has a conviction for possession of drugs and who was waiting for them upon the arrival of the party at Stansted.

86. It is true that this evidence would not in *itself* prove that Mr. McDonagh dealt in drugs: it is perfectly possible – if, perhaps, somewhat unlikely – that an innocent person would travel to London in the company of a person later convicted of possession of drugs and while there would meet up another two individuals who were also subsequently convicted of possession of drugs a few days later.

87. Yet even looking at the evidence regarding the UK trip purely in isolation from any other evidence there are other features of it which tend to negative any innocent explanation which might otherwise have been advanced. When pressed in cross-examination why the plaintiff had sought to bring a much younger man – Mr. Carthy – on what was supposed to be a drinking trip to London, no satisfactory explanation was advanced. Nor was any explanation advanced as to why Mr. Carthy telephoned Mr. McDonagh – rather than any member of his family – following his arrest.

88. The evidence regarding the UK trip cannot, of course, be taken in isolation. There was clear evidence that the plaintiff had a very large sum of money in his account (at least IR£410,000). The fact that the plaintiff had such funds raises questions as to how he was in possession of this amount of money given that, social welfare payments aside, he had no other known sources of income.

89. To this must be added the statements which he made to the Gardai. If these statements were to be accepted as accurate, they would show that Mr. McDonagh was aware that there was to be a drugs shipment, that he had knowledge of the role of Mr. O'Grady in carrying the drugs, that Mr. McDonagh was the person who Mr. O'Grady telephoned while in custody and that he knew of the manner in which the drugs came to be purchased. All of these statements – if admitted to be correct – would lead inevitably to the inference that Mr. McDonagh was, indeed, a drug dealer.

90. It is true that the latter evidence was disputed by Mr. McDonagh, but there was effectively no cross-examination of the Garda witnesses in respect of this evidence, beyond a formal denial that such statements were made. No effort was made, for example, to show that these statements could not have been made or that they were not properly recorded by the Gardaí because the comments attributed to Mr. McDonagh were demonstrably untrue. In these circumstances, the evidence of the Garda witnesses must carry considerable weight even if, as Baker J. pointed out in Burke, this failure to cross-examine did *not in itself compel* the jury to arrive at a particular result.

91. While it is true that the jury had the benefit of seeing and viewing Mr. McDonagh give evidence – which this Court, of course, did not – there are, nevertheless, factors which, viewed objectively, must be taken to have weakened considerably his credibility as a witness. He had, after all, claimed damages at the outset of the trial on a basis which he must have known to have been false, namely, that he was not a criminal or a tax cheat. By the conclusion of the evidence it was, indeed, accepted that he was a criminal and a tax cheat. He also claimed that CAB had never accused him of drug dealing and this was likewise demonstrated to have been false.

Conclusions regarding the drug-dealing allegation
92. Reviewing the evidence as a whole, I find myself coerced to the conclusion that it shows overwhelmingly that the plaintiff was, indeed, a drug-dealer and that the jury's conclusion to the contrary was perverse and cannot be allowed to stand. The unchallenged Garda evidence pointed unambiguously to the plaintiff's deep involvement with the drugs shipment, a conclusion underscored by all the known facts regarding the UK trip which showed the plaintiff travelling with and associating with the persons convicted of possession of the drugs and other persons who were either drug dealers or reputed to be drug dealers. To this may be added the unchallenged evidence of the very large sums lodged in the plaintiff's bank account for which there was no satisfactory explanation.

93. It is true that the plaintiff flatly denied any involvement in the drug dealing, but again viewed objectively, he cannot be regarded as a witness whose credibility was other than compromised.

94. The jury's finding of fact that the plaintiff was not a drug dealer was accordingly one which, in the words of MacMenamin J. in *MC v. FC*. "cannot in all reason be supported by the evidence." The evidence quite clearly showed the contrary, namely, that the plaintiff was indeed a drug dealer. Although the newspaper clearly carried the onus of proving this fact on the balance of probabilities – and it would have been guilty of serious defamation if it could not have done so - it has nonetheless plainly discharged this onus. In these circumstances the defendant had a constitutional right by virtue of Article 40.6.1.i to publish this information concerning the plaintiff.

95. It follows, therefore, that not only must the newspaper's appeal against the jury award in respect of this issue be allowed, but that the plaintiff's claim that he was defamed by reason of the drug allegation must stand dismissed.

The moneylending allegation
96. According to the evidence of Garda Doherty, the plaintiff admitted in his interview of 8th September 1999 while in Garda custody that he was a money lender and that he charged 100% interest on loans. If that evidence were accepted as true, the jury could not reasonably have concluded that the plaintiff was other than a loan shark.

97. No other evidence was called on this issue by the newspaper. The plaintiff denied making the statement to Garda Doherty while in custody. There was, however, no cross-examination by the plaintiff of Garda Doherty to the effect that he could not have made such a statement to him because it was untrue.

98. Given that the evidence adduced by both sides was limited to a claim that the plaintiff made such an admission on the one hand with a denial by the defendant of the making of such a statement (along with a denial by a character witness, Mr. Murray, that he had never heard of Mr. McDonagh being involved in loan sharking), I would hesitate before concluding that the verdict on this issue was perverse. The limited nature of the evidence so adduced was in contrast to the much more detailed evidence which was given in respect of the drug dealing allegation.

99. It is true that there was, effectively, no cross-examination of Garda Doherty on this issue, but as Baker J. noted in *Burke*, this does not mean that the jury were *compelled* to accept that evidence. I am nevertheless persuaded that the verdict cannot stand so far as this issue is concerned. In my view, in view of the failure of the plaintiff effectively to challenge the evidence of Garda Doherty, the jury ought to have been instructed that this evidence necessarily carried considerable weight. It might have been nonetheless open to a jury not to accept that evidence, but it would have to have had a rational basis for doing so. The mere denial of the making of the statement by the plaintiff might possibly have sufficed for this purpose, but here again the jury would have to have been instructed that, viewed objectively, the plaintiff's credibility had been heavily compromised. As no such instructions were given to the jury in these precise terms, I consider that the verdict on this issue cannot be allowed to stand and there must be a re-trial on this issue.

The jury's failure to answer the second question

100. In view of the conclusion I have just reached regarding the loan shark allegation and given that there will be a re-trial on this issue alone, it is appropriate to consider the issue of the jury's failure to answer the second question. The second issue reflected the wording of s. 22 of the Defamation Act 1961 ("the 1961 Act") (a slightly re-cast version of this provision is now to be found in s. 16(2) of the Defamation Act 2009). Section 22 of the 1961 Act provided:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

101. It will be seen that s. 22 of the 1961 Act is essentially a liability defence ("…a defence of justification shall not fail by reason only that the truth of every charge is not proved…"), although it may be assumed that the fact that some of the elements of the offending publication are shown to be true will normally affect the damages award as well.

102. In these circumstances the jury was obliged by law to consider this question before going on to consider the question of damages. Question 2 on the issue paper was couched in mandatory terms and the jury were not free to ignore this question. It is true that, as Mr. Doyle S.C. urged in the course of the appeal, the third question on the issue paper is premised on the assumption that the jury will have answered the second question in the affirmative ("If the answer to question 2 is 'yes', assess damages…"). It is quite possible that the jury well understood this and that by answering question 3 and assessing damages, they were effectively stating that the plaintiff's reputation was nonetheless affected by the publication of the drug dealing and loan sharking allegations even if it was also shown that he was a criminal and a tax cheat.

103. This may well represent what the jury were thinking when they proceeded to answer question 3 without having first answered question 2. The fact remains, however, that it is quite impossible to know how or why the jury failed in terms to answer an essential question which they were required by law to answer. Quite independently of any other consideration this in itself would have been enough to justify the setting aside of the jury verdict, as it cannot be said that the jury returned a verdict in accordance with law or that they gave any consideration to the implications of a defence which the law afforded to the newspaper.

Conclusions

104. Summing up, therefore, my principal conclusions are as follows:

105. First, it is clear that the jury verdict so far as it concerned the drug dealing allegation cannot be allowed to stand. Viewed objectively, the evidence overwhelmingly pointed to the conclusion that the plaintiff was, indeed, a drug dealer associated with the drugs seizure at Tubbercurry. If the allegation was correct, the newspaper had a constitutional right to publish this information by virtue of Article 40.6.1.i and that right cannot be compromised by a jury verdict which was, in essence, perverse.

106. Second, the evidence adduced in relation to the loan sharking allegation was much more limited. It might have been open to a properly instructed jury to find for the plaintiff on that allegation. It would, however, be necessary for the jury to have been told in express terms that the failure by the plaintiff effectively to cross-examine Garda Doherty regarding the loan sharking admissions meant that such evidence carried considerable weight. It is true that the jury might elect to believe that the plaintiff's denial that he made such a statement to Garda Doherty, but it would also have been necessary for the jury to have been warned in appropriate terms that the plaintiff's credibility had, objectively speaking, been compromised. As the jury was not so instructed, I do not think that the verdict on the loan sharking allegation can be allowed to stand.

107. In these circumstances I believe that the Court should allow the appeal of the newspaper against the entirety of the verdict. As the drug dealing allegation has been found to be true, I would also dismiss that part of the plaintiff's claim. It follows that I would direct a new trial on the loan sharking allegation only.

108. It follows that it is unnecessary for me to express any view on the remaining issue, namely, the quantum of damages.