THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 54

[2015 No. 182]

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Irvine J.
Whelan J.
Baker J.

BETWEEN/

DONAL KINSELLA

PLAINTIFF/RESPONDENT

- AND -

KENMARE RESOURCES PLC AND CHARLES CARVILL

DEFENDANTS/APPELLANTS

JUDGMENT of the Court delivered by Ms. Justice Irvine on the 28th day of February 2019

Introduction and Meaning of Press Release.

Written by Baker J. and adopted by the Court.
1. Following a trial before de Valera J. and a jury in this defamation action which lasted for fourteen days in November 2010 the plaintiff, Donal Kinsella, was awarded the sum of €9m compensatory damages and €1m aggravated damages arising from a press release issued on the 10th July 2007 by the defendants ("the Press Release"), such award of damages to be against the defendants jointly and severally, together with an order for costs. Execution on foot of the judgment was stayed subject to a condition that the defendants would forthwith pay to Mr. Kinsella the sum of €500,000 on account of the damages award.

2. The defendants, Kenmare Resources plc and Mr. Charles Carvill (hereinafter collectively "Kenmare"), have appealed the whole of the judgment and order of the High Court. It should be said that Kenmare and Mr. Carvill have at all times been represented by one legal team, have filed a single Notice of Appeal and have filed one set of legal submissions said to apply to both appellants. The Notice of Appeal seeks an order directing a full retrial in the High Court or in the alternative an order quashing the award of damages and if necessary a consequential order directing that Mr. Kinsella repay the said sum of €500,000 paid to him on account.

3. Mr. Kinsella, by Notice of Cross Appeal dated the 3rd April 2012, cross-appealed the determination of de Valera J. that the publication of the Press Release occurred on an occasion of qualified privilege and that he should not in the circumstances have permitted any question to go to the jury in respect of the issue of malice deriving from that determination. As the result of the trial would have been the same even had the determination on the question of qualified privilege been made in favour of Mr. Kinsella, the Notice of Cross Appeal simply seeks an order granting the cross appeal with costs and affirming the decision of the jury.

4. The grounds of appeal may conveniently be divided into a number of subheadings as follows:

> (a) that the finding of fact by the jury that the publication of the Press Release was defamatory of Mr. Kinsella and that this finding was not open to the jury on the evidence before it (the meanings ground);
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> (b) that the publication of the Press Release occurred on an occasion of qualified privilege (the qualified privilege ground);
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> (c) that the trial judge misdirected the jury regarding the issue of malice (the malice question); and
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> (d) that the damages awarded to Mr. Kinsella were so unreasonable and/or irrational and/or unjustified and/or disproportionate as to be incapable of being upheld on appeal (the damages question).

5. Before considering the grounds of appeal I first set out the broadly undisputed facts.

Background
6. Mr. Kinsella was a founding member and director of Kenmare Resources plc, a public limited company with broad national and international business in the mining industry. At the time of the publication of the Press Release the subject matter of the claim, Mr. Kinsella was a director of Kenmare, its deputy Chairman and Chairman of its Audit Committee.

7. Charles Carvill ("Mr. Carvill") was at all material times the Chairman of Kenmare.

8. The events giving rise to the proceedings commenced on the night of the 8th May 2007 in Moma, Mozambique where Mr. Kinsella and other members of the Board and officers of Kenmare were visiting a mining operation of the company.

9. Present on the evening in question was the Company Secretary, Miss Deirdre Corcoran, who was also Secretary to the Audit Committee of which Mr Kinsella was Chairman.

10. On the night of the 8th May 2007, Mr. Kinsella, who gave evidence that he was prone to sleepwalking and had consumed an amount of alcohol, presented himself naked on three occasions at the bedroom door of Miss Corcoran. Mr. Kinsella accepted that what had occurred constituted "misbehaviour" on his part and he apologised to Miss Corcoran for any embarrassment or upset caused by the incident. An independent investigation conducted by Mr Norman Fitzgerald of O'Donnell Sweeney Eversheds, a Dublin based firm

of solicitors of repute, found the actions of Mr. Kinsella to be "irresponsible" but that no sexual impropriety had occurred.

11. However, following the incident Miss Corcoran made it clear to Kenmare that she did not feel comfortable in her role as Company Secretary and Secretary of the Audit Committee working with Mr. Kinsella on an individual basis. Consequently, Kenmare requested that Mr. Kinsella retire from his role as Chair of the Audit Committee, although he was not asked to vacate his role as a member of the Committee or other offices he held in Kenmare.

12. A dispute arose between Mr. Kinsella and Kenmare following the request that he step aside from his role as Chair of the Audit Committee. Mr. Kinsella enlisted the help of a journalist friend, Mr. John Kierans, whom he invited to contact Ms. Corcoran in the hope that the threat of publicity would bring an end to the internal issue and that the likely publicity would encourage Ms. Corcoran and Kenmare to change their stance.

13. Mr. Kierans, the then editor of the Irish Daily Mirror newspaper, contacted Kenmare and, under threat of apprehended publicity, Kenmare issued the Press Release the subject of the proceedings. Kenmare has at all times maintained that the Press Release was issued on advice and in order to protect the interests of Kenmare and its shareholders.

14. The Press Release was issued through a firm of public relations consultants on the 10th July 2007 and reads as follows:

> *"Kenmare Calls Special Board Meeting*
>
> The Chairman of Kenmare, Mr. Charles Carvill has convened a special meeting of the Board of Directors to be held tomorrow, Wednesday 11th July. The purpose of the meeting is to consider a motion to remove Mr. Donal Kinsella as Chairman of the Company's Audit Committee. Mr. Donal Kinsella is Deputy Chairman and a director of Kenmare.
>
> There was an incident on 9th May 2007 at Kenmare's Moma Titanium Minerals Mine in Mozambique. On foot of this incident, a complaint was made by the Company Secretary, Miss Deirdre Corcoran, against Mr. Donal Kinsella. Mr. Charles Carvill requested that the Company's solicitors, O'Donnell Sweeney Eversheds, conduct an investigation and prepare a report on the incident for his consideration. This report was completed and presented to Mr. Charles Carvill on the 20th June 2007.
>
> Mr. Carvill then sought and received a written apology from Mr. Donal Kinsella to Miss Deirdre Corcoran. The incident made it impossible for Miss Deirdre Corcoran, as Secretary to the Audit Committee, to work effectively with Mr. Donal Kinsella as Chairman of the Audit Committee. Mr. Charles Carvill therefore asked for Mr. Donal Kinsella's resignation as Chairman of the Audit Committee.
>
> Mr. Donal Kinsella's voluntary resignation from the Audit Committee has not been forthcoming.
>
> The Chairman has now called a special meeting of the Board at which Mr. Donal Kinsella's removal as Chairman of the Audit Committee will be proposed."

15. Following legal argument, the trial judge concluded that the Press Release had been published on an occasion of qualified privilege. Thereafter, the jury found that the Press Release was defamatory and had been published maliciously with the result that it made the award in favour of Mr. Kinsella in the total sum of €10m apportioned as outlined above.

MEANING

16. Mr. Kinsella pleaded that the Press Release meant or suggested that he had been guilty of inappropriate sexual behaviour towards Ms. Corcoran. One question was proposed to the jury concerning the meaning of the Press Release:

> "QUESTION 1: Did the Press Release of the 10th July 2007 state or infer that Donal Kinsella had made inappropriate sexual advances to Deirdre Corcoran?"

17. The jury was told that if the answer to that question was "No" to proceed no further.

18. Kenmare argues that the Press Release was not capable of bearing the meaning determined by the jury with the result that the jury's decision ought to be set aside as being irrational in the circumstances.

19. The starting point with regard to this ground must be respect for the role of the jury in a defamation action. Walsh J. in *Quigley v. Creation Ltd.* [1971] I.R. 269 explained the unique importance of the jury in a defamation case at p. 272:

> "In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of. In determining this matter, the judge will construe the words in accordance with a fair and natural meaning such as would be given to them by reasonable persons of ordinary intelligence in our own community; and that necessarily involves a consideration of the standards of the community and the position of the plaintiff in that community."

20. This recognition of the importance of the role of the jury means that the court will set aside a finding by a jury only if, in the words of Walsh J., it is one "to which reasonable men could not or ought not have come".

21. This approach has found acceptance in a large number of judgments of the Irish courts and those of England and Wales. By way of example, in *McDonagh v. Newsgroup Newspapers* [2015] IECA 225, Hogan J. stated at para. 64 of his judgment that "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". The description sometimes used is that a jury decision will be set aside only if it is "perverse" or if there is "no rational explanation for it", see for example *Grobbelaar v. News Group Newspapers Limited* [2002] 1 WLR 3024, a decision of the House of Lords on which Mr. Kinsella relies on the appeal.

22. Gatley in the 12th Edition of his authoritative text describes at para. 36.19 the position of the jury on issues of meaning as "uniquely important" and states as follows:

> "An appellate court ought not to find the verdict of a jury on liability to be perverse unless there was no rational

explanation for it. An inference of perversity should not be drawn lightly."

23. However, appeals regarding matters such as the correctness of the charge of the trial judge or whether a jury's finding was or was not supported by the evidence may be interrogated by an appellate court.

The size of the award as a factor in this ground
24. The first argument made by Kenmare on the appeal is that the size of the jury award must shake the confidence this Court would have in the reasonableness of the jury, and that the level of the award was at such an "absurd and irrational level" that it calls into question the jury's verdict on all matters before it.

25. This argument was firmly rejected by the Supreme Court in *McEntee v. Quinnsworth* (Unreported, 7th December 1993) where Finlay C.J. said:

> "Either a jury has in regard to a question before it proper material upon which it can make a finding in favour of either of the parties or it has not. If it appears to assess damages in a sum which could be considered as being wholly incorrect and in that sense perverse, I can find no requirement of justice or principle of law which would permit that fact to be taken into consideration in assessing the validity of a finding by the same jury of an issue of fact regarding liability."

26. The House of Lords also rejected the argument that an appellate court was entitled to look to the level of damages to support the proposition that a finding of liability made by a jury was perverse. In the decision of *Grobbelaar v. News Group Newspapers Ltd.* [2002] 1 W.L.R. 3024 at para. 50, it was said in response to a similar argument:

> "This reasoning is remarkable. It reasons that because the jury has gone wrong in verdict No 2, it has gone wrong in verdict No 1 - perversely wrong. This is simply a non sequitur. Verdict No 1 is not dependent upon the correctness of verdict No 2."

27. I agree with the description by Lord Hobhouse of Woodborough that to assess the question of reasonableness by reference to the quantum of the award of damages is neither logical nor rational and the correctness of one verdict is not dependent on the correctness of the other.

28. Thus the authorities establish that the size of the damages award, even if it is considered by an appellate court to be excessive and disproportionate in all of the circumstances, is not a factor to be considered when it comes to assessing the validity of the jury's finding on liability.

29. Further, in the present case this argument fails to recognise that the jury had before it an issue paper which set out in numbered and lettered paragraphs the steps it was to take in coming to its final assessment. The first question, the meanings question, was clearly distinguished from the other questions, those of malice and damages, and the assessment of the reasonableness of the jury decision must examine each individual element of the decision having regard to the fact that the jury itself was asked to separately assess and make a determination in identified steps.

The finding was not supported by the evidence
30. Kenmare argues that the finding of the jury that the Press Release was defamatory of Mr. Kinsella was contrary to the evidence and was not supported by the actual wording of the Press Release.

31. Kenmare had contended at trial that the Press Release did not convey any meaning of sexual impropriety of the type alleged by Mr. Kinsella and that the words used were circumspect and careful in stating only that it was not possible for Miss Corcoran to work efficiently with Mr. Kinsella. It was argued that that statement did not in itself mean that any incident of a sexual nature was to be inferred and that the jury's finding must have been influenced by matters external to the language of the Press Release itself. The jury must have impermissibly taken into account references to the incident in Mozambique as something "juicy in the jungle", or that an incident had occurred in "an exotic place" from accounts of the event in other publications.

32. Kenmare argues that the jury was also clearly influenced by questions put in cross-examination by Mr. Kinsella's counsel regarding, for example, the fact that the story that Mr. Kinsella was sleepwalking without his pyjamas "had gone all over the world". It is argued that a salacious meaning or one with sexual or exotic undertones does not flow by reasonable inference from the words of the Press Release and that the jury must have been influenced by extraneous factors given that the words of the Press Release in their ordinary meaning could not, on any rational reading, have been libellous

The charge regarding meaning
33. After giving his charge to the jury de Valera J. was requisitioned by counsel for Kenmare to clarify the task of the jury regarding the determination of meaning, and the sources from which that meaning was to be derived as it was argued that evidence of what had appeared in other publications had been given in the course of the trial and it was argued that the jury needed to be cautioned as to the correct approach to that evidence.

34. I have read the requisitions made to de Valera J. after he gave his first charge to the jury. On Day 6, Kenmare requisitioned the trial judge to recharge the jury with respect to the difference between the Press Release and the additional material not contained therein, what became known as the "wider story" which Mr. Kinsella said had come to be circulated and which he claimed had brought ridicule upon him.

35. I have also read the arguments on the first day of trial regarding the connection between the alleged ridicule said to have been visited upon Mr. Kinsella and what is argued to be the constrained language of the Press Release. I note also the submission made in the course of trial and on Day 6 in particular that the trial judge had erroneously commented on the fact that Kenmare had not called certain witnesses, including Miss Corcoran and Mr. Carvill (although his son Mr Michael Carvill was called), while making no reference at all to those possible witnesses that might have been called by Mr. Kinsella in support of his claim.

36. Kenmare also argues that the trial judge unduly focussed on the evidence of Mr. Kinsella in his charge and that the level of error was sufficient to justify this Court directing a new trial.

37. I have for the purpose of that argument examined the contents of the charge and the description of Mr. Kinsella's conduct in making contact with his friend, the editor of the Daily Mirror which de Valera J. described as the act of calling "up his reserves", an expression Kenmare had argued was unduly benign and failed to have regard to the fact that Mr. Kinsella himself in evidence had accepted that the purpose of what he called his "strategy" was to pressurise both Miss Corcoran and Kenmare into dealing with him

favourably. Mr. Kinsella had admitted under cross examination that his purpose in contacting the editor of the Daily Mirror was to "cause upset to Miss Corcoran" (Day 3), and to threaten Kenmare and Miss Corcoran with the adverse publicity that was likely to attach to this story.

38. I also note that the trial judge did say to the jury in his charge that Mr. Kinsella had not been "directed to" make a written apology to Miss Corcoran but had chosen to do so, and I consider that he failed to adequately recharge on this point in the light of Kenmare's contention that he had been overly benign in his description of Mr. Kinsella's motives. I will deal with the consequence of this inadequacy later in this judgment.

39. Before de Valera J. recharged the jury he expressed a view that an attempt to summarise the evidence might lead to an argument that he was "putting [his] gloss on it" and that it was not, in his view, a good approach for him to summarise all of the evidence in giving a charge in a defamation case. This was the approach he stated he favoured and he was not further requisitioned in regard to the correctness of giving a short summary.

40. Having read the charge and the recharge by de Valera J., I note in particular the number of occasions where he stressed to the jury their particular role in making findings of fact. He explained that his role was to point out certain matters to them, that he was not inviting them to draw any conclusions and that the conclusions were matters entirely for them. Many times he used expressions such as "it is a matter for yourselves", "if you wish you may consider it is of no relevance", "it's a matter entirely for yourselves".

41. I also note that he expressly directed the jury to "take out that press release and examine it".

42. I consider in the circumstances that the charge and recharge to the jury were sufficiently clear regarding their primary role of finding the meaning of the Press Release. I am further of the view that de Valera J. identified the approach to the evidence that he favoured, viz. that he would not attempt to summarise it having regard to its relative lack of complexity, and as that was not the subject of an express requisition or objection, it may not form the basis of an appeal.

43. In my view de Valera J. was entitled not to give a fuller summary of the evidence where as he himself put it "the jury had just finished hearing a six-day case, and where the issues and facts were broadly speaking not in contest, and where there was no factual complexity".

44. Overall, I am satisfied that there was nothing included in or omitted from his charge that would cast in doubt the jury's understanding as to its role in relation to the meanings question.

Hearsay evidence

45. Kenmare also makes the argument on appeal that de Valera J. failed to recharge the jury in regard to the fact that hearsay evidence was not admissible and that it should disregard any hearsay evidence or any evidence of the contents of other publications when it came to consider the meaning of the Press Release and whether it was defamatory in itself.

46. Kenmare submits that in the circumstances the trial judge failed to direct the jury correctly on the importance of not having regard to hearsay evidence and extraneous matters when coming to its conclusion regarding the meaning of the Press Release.

47. Gatley states a clear proposition that regard cannot be had to hearsay for the purposes of ascertaining the meaning of an alleged defamatory article and at para. 32.26 makes the point as follows:

> "Where the claimant is relying on the natural and ordinary meaning of the words complained of, no evidence of their meaning is admissible or of the sense in which they were understood, or of any facts giving rise to inferences to be drawn from the words used."

48. I accept that the jury was not charged in a sufficiently clear way regarding the fact that its function was to come to a view as to the meaning of the Press Release without a reliance on other extraneous and more salacious matters heard in the course of the trial. But the question remains whether the trial judge's error is one that ought to lead this Court to set aside the verdict on meaning. I turn now to consider the correct approach in light of this conclusion

Discussion on the charges

49. In my view it would be wrong for this Court to unnecessarily interfere with the considered approach of a trial judge regarding how best he or she could properly summarise the evidence heard over a long trial.

50. O. 58, r. 7(2) of the Rules of the Superior Courts 1986 makes express provision for the grant of a retrial of a matter heard by a jury:

> "(2) A new trial shall not be granted on the grounds of mis-direction or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Supreme Court some substantial wrong or miscarriage has been thereby occasioned in the trial…"

51. The Supreme Court in *Cooper-Flynn v RTE* [2004] IESC 27 took this as its starting point and Keane C.J. referred to the judgment of Henchy J. in *Kelly v. Board of Governors at St. Laurence's Hospital* [1988] I.R. 402, a medical negligence case, wherein it was stated that the rule applies where there has been a wrong or miscarriage "in the trial", as distinct from the results of the trial. In his judgment Keane C.J. stated at para. 39 that:

> "It would follow that the verdict of the jury should not be allowed to stand where the direction or ruling found to be erroneous was of such a character as to render the trial itself unfair or to give it the appearance of lack of fairness."

52. The Supreme Court took the view that it might have been "preferable" if the trial judge had given a particular direction to the jury in strict compliance with statute, but that whilst that argument might be sufficient in certain circumstances to require a retrial it could not result in a direction for a retrial where the directions were "acquiesced in without reservation by the party who now argues they were incorrect", unless the court is "satisfied that a substantial wrong or miscarriage resulted from the directions given" (para. 76).

53. Counsel for Kenmare argues that the correct approach is that identified by Fennelly J. at para. 221 of his judgment where he says:

> "The wrong or miscarriage is not, therefore, unconnected with the result of the trial. It must be something liable to contribute to a miscarriage in the result."

54. That approach properly respects the primacy of the role of jury but also identifies the important role that the trial judge performs in his or her charge to the jury. It is consistent with the old decision of the Supreme Court in *Campbell v. Irish Press* [1956] 90 ILTR 105 where Maguire C.J. said that a new trial should be awarded "if some substantial wrong or miscarriage had been occasioned", and that this was so whether the point was taken at the trial by counsel or not (at p. 9).

55. A trial judge will give a direction to the jury based on his or her own observations of the jury and of the evidence in the run of the trial and an appellate court is singularly disadvantaged in regard to each of these factors which bore on the approach of the trial judge. Thus while arguments can and have been made by both Mr. Kinsella and by Kenmare regarding the inadequacy of the charge and recharge to the jury, the case law would suggest that it is only in exceptional cases and only when the appellate court can come to a view that errors or omissions in a charge would lead to a gross injustice that it would interfere.

56. Of more consequence however is the fact that the questions on the issue paper were the subject of submissions and argument before the trial judge. The first question was the only one relevant to meaning and did not include the different question of whether the Press Release was ever capable of bearing a defamatory meaning. Counsel for Kenmare had submitted that the correct question regarding meaning was whether the ordinary and natural meaning of the words was that Mr. Kinsella was "guilty of *serious* sexual impropriety" as opposed to "guilty of sexual impropriety" (Day 5, p. 58). What was not argued by Kenmare was that there was no question to put to the jury as to meaning in circumstances where the Press Release was clearly incapable of bearing *any* defamatory meaning. I accept in that context the argument made by Mr. Kinsella that Kenmare by permitting question 1 to go to the jury in the way in which it was formulated, accepted that the Press Release was at least capable of bearing the meaning for which Mr. Kinsella contended. No argument was made in the course of the trial that the jury ought to have been asked whether the Press Release was capable of bearing the meaning for which Mr. Kinsella contended, whether as a separate question or part of the question as formulated.

57. This point may therefore be answered as is contended by counsel for Mr. Kinsella in the light of the judgment of the Supreme Court in *McEntee v. Quinnsworth*, as being incapable of reversal by an appellate court given that the issue had not been raised or decided in the court below.

58. As to the argument that the jury must have been confused on meaning as a result of the hearsay evidence given by Mr. Kinsella, or because the jury did not have the evidence as to what was carried by the newspapers following the press release, a number of observations must be made. The hearsay evidence which was challenged was evidence given by Mr. Kinsella as to what others had said to him regarding the incident in Mozambique. Evidence of this nature is not evidence as to the truth of what those persons are alleged to have said, and is admissible as evidence of the effect of an alleged defamatory statement on the reputation of Mr. Kinsella. It is not admitted as evidence of meaning.

59. Gatley says at para 32.53 of his text that such evidence may be called because evidence from witnesses in whose estimation the reputation of a plaintiff is said to have been diminished is often not available. He gives as an example evidence that a plaintiff has been called names as a result of a libel found in the old decision of the Court of Appeal for England and Wales of *Garbett v. Hazel Watson* [1943] 2 All E.R. 359.

60. Mr. Kinsella relies on that statement and also on the judgment of the Supreme Court in *Bradley v. Independent Star Newspapers Limited* [2011] 3 I.R. 96 where Fennelly J. quoted the 11th Edition of Gatley at para 34.50 regarding the class of evidence that may be admissible and held that a claimant can give evidence about persons who made contact with him and by their conduct or statements had indicated they had identified him as the subject of the libel, or evidence that he had been the subject of ridicule and laughter at a public meeting.

61. Fennelly J. held that such evidence was admissible, not as constituting a form of exception to the hearsay rule but for the reason he explained at para. 123 as follows:

> "Evidence is given of comments, remarks often insulting, made by third persons (not witnesses) saying or implying that they thought the article referred to the plaintiff. I do not think that it should be considered as [an exception to the hearsay rule]. The question is whether the plaintiff in a defamation action is identified in the article of which he complains. If he can show that persons, who have read the article, have identified him, that is evidence of that objective fact, which can be admitted for consideration by the jury."

62. It seems to me that the trial judge did not fall into error in not expressly advising the jury in regards to the "hearsay" evidence as to the reaction of others to Mr. Kinsella following the publication of the Press Release. The evidence was not "hearsay" evidence in the sense that it was inadmissible. It is also of note, and perhaps a matter of some curiosity, that Kenmare had objected to the production by counsel in his opening statement to the jury of the newspapers which had reported the Press Release and where other and perhaps more salacious comments were contained. There was, nonetheless, some evidence as to the content of the newspaper articles given by Mr. Kinsella. Kenmare and Mr. Carvill did not later adduce the newspapers in evidence and cannot now, on appeal, argue that the jury might have been confused and might have in some way misunderstood the meaning of the Press Release on this account. Again, this is an example of an impermissible approach to an appeal.

Conclusion

63. I accept the proposition stated by Eady J. and repeated and praised as an "impeccable synthesis" by Lord Phillips M.R. on appeal in *Gillick v Brook Advisory Centres* [2001] EWCA Civ. 1263 at para. 7:

> "The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts…. The court should certainly not take a too literal approach to its task."

64. The trial judge took a sensible and nuanced approach to the directions he gave to the jury regarding its role to find the meaning of the Press Release and it could not be said, having regard to the evidence that was before the jury, the content of the charge and recharge by De Valera J., and the submissions made by counsel for both sides to the jury, that the jury was liable to be confused, but more especially that this Court could come to a conclusion that the jury was confused or must have been confused in coming to the finding that it did regarding the meaning of the Press Release.

65. Put simply, the Press Release was held to be capable of bearing the meaning it did, and, in fact, as having a meaning for which

Mr. Kinsella contended. That was a finding of a jury, and it is not apparent that it was arrived at following any error in the charge.

QUALIFIED PRIVILEGE (Cross-Appeal).

Written by Whelan J. and adopted by the Court.

66. This aspect of the judgment concerns Mr. Kinsella's cross appeal in relation to the issue of qualified privilege.

67. Mr. Kinsella, in his Notice of Cross Appeal dated the 3rd April 2012, seeks to set aside that part of the ruling of the High Court judge delivered on the 17th November 2010 which determined that the Press Release was published on an occasion of qualified privilege. This in turn is reflected in the presence on the issue paper of question 2 and the answers given by the jury to that question on the 17th November 2010, which determined that the publication at issue was motivated by malice.

68. The grounds are pleaded as follows in the Notice of Cross Appeal:-

> "(1) The Learned Trial Judge erred in law and in fact in determining the publication was an occasion of qualified privilege and in allowing any question to go to the Jury except Question 1 (on meaning) and the question on damages;
>
> (2) Without prejudice to the aforesaid, the Learned Trial Judge erred in law and in fact in determining … the publication took place on an occasion of qualified privilege, without first obtaining the determination of the Jury on disputed issue [sic] of fact relevant to his determination".

69. The second of the aforementioned grounds of appeal was not pursued on behalf of Mr. Kinsella in the course of the oral submissions and for that reason will not be further addressed. Given that the parties were agreed that it was for the trial judge to conclude whether or not the Press Release issued by Kenmare was published on an occasion of qualified privilege, the question for this court is whether de Valera J. answered that question correctly in light of the evidence and the prevailing legal authorities.

The Argument

Mr Kinsella's stance
70. Counsel on behalf of Mr. Kinsella argued at the original trial, as he did in the course of this appeal, that there was, on the evidence, no conceivable legal basis upon which the publication of the Press Release could be thought to have occurred on an occasion of qualified privilege, as qualified privilege was predicated on an attack having been made on the character or conduct of the party who seeks to rely on it in defence, and there had been no such attack at the time the Press Release issued.

71. Counsel for Mr. Kinsella further submits that the trial judge erred in finding that the Press Release could attract qualified privilege in circumstances where the attack to which it purported to respond was merely anticipated, but had not materialised. The facts of this case were, it was submitted, wholly distinguishable from those in *Oliver v. the Chief Constable of Northumbria* [2003] EWHC 2417 and the High Court judge erred in law in relying upon that decision to support his conclusion. Counsel also relied on the decision of Bean J. in *Bento v. Chief Constable of Bedfordshire Police* [2012] EWC 1525, to argue that qualified privilege was not to be afforded to a person or entity such as Kenmare who, believing it was about to be criticised, had decided "to get their public retaliation in first".

72. It was contended on behalf of Mr. Kinsella that the facts of this case did not fall into the well-known rubric described in Gatley and that it would be an extension without any justification of that principle to find qualified privilege where the evidence arguably demonstrated that Kenmare was not of the view that an attack was to be made in the newspaper on the following day. In this regard reliance was placed on the evidence given by Mr. Michael Carvill.

73. It was argued:-

> "If there is qualified privilege for this…press release, then there is qualified privilege for every press release."

There was, according to counsel, no distinction between the facts in this case and any case in which a Defendant or entity, believing that the press might publish something about it the following day, decided to issue a press release. Protection for that press release, on the grounds of qualified privilege, was wholly without authority.

74. Counsel for Mr. Kinsella also argued that there is no qualified privilege for excessive publication, namely publication to individuals who did not have a reciprocal duty or interest and that that had represented the law prior to the *Reynolds* decision. The onus was on Kenmare to show that it had an interest or a duty to make the statement it did and that the persons to whom it was made, namely the readers of the newspapers to whom the Press Release was circulated, had a corresponding interest or duty to receive it. According to Mr. Kinsella, this reciprocity would not normally be found in a publication made to the world at large, as was effectively the case here.

75. Finally, on behalf of Mr. Kinsella it was contended that, as the Press Release was not published on an occasion of qualified privilege, no finding of fact by the jury on malice was ever warranted or required.

Kenmare's stance
76. The position of Kenmare at trial was that the Press Release had issued on an occasion of qualified privilege. This contention, it maintained, was supported by the evidence of its media expert Mr. Milton. He had supplied media advice to the company after having had discussions with a journalist whom he believed "had the makings of a story." The witness indicated he anticipated that there would be an article published and that "if there was to be an article…I was told it was of a sexual nature." Mr. Milton expressed the view that this would set the agenda for any subsequent coverage which might follow such an article. He stated: "because Kenmare was a PLC I thought it important, at the same time as I gave the information to the *Daily Mirror*, that we would give it to the business editors of Irish newspapers that regularly follow the affairs of Kenmare." He expressed his advice as having been that the "response statement" should be provided not alone to the *Daily Mirror* but also to business journalists of newspapers that regularly cover the affairs of the company.

77. In offering an explanation as to why he believed it necessary to ensure that the Press Release was released to coincide with the anticipated story in the *Daily Mirror*, Mr. Milton's evidence was that "media and news is in real-time." He considered it would be difficult when the agenda was set to try to recapture the facts of what was going on. He stated: "we believed that the response statement we issued to the *Daily Mirror*, we couldn't depend or reasonably expect that the *Daily Mirror* would reflect what we

thought were the important points." Mr. Milton stated he had anticipated that a fairly lurid story involving an incident of a sexual nature would be published.

78. Kenmare also sought to rely upon the evidence of Mr. Michael Carvill who gave evidence that the company was "extremely vulnerable to adverse publicity" at the time in question as it needed to raise finance. He stated that "we knew full well that the matter had already been released to the press and we were simply putting some clarification notes down in terms of a press release".

79. According to counsel for Kenmare, the apprehended attack facing the company was akin to the anticipated attack faced by the Northumbria police force in *Oliver v. the Chief Constable of Northumbria* and that decision was good authority to support its argument that the Press Release was issued on an occasion of qualified privilege.

80. The argument advanced by Kenmare was that the company was entitled on the general facts that pertained to make the communication and was motivated by protecting the company's own interests.

81. Extracts from Gatley were cited on behalf of Kenmare as authority for the proposition that if a party is repelling a charge or attack, the answer is given on an occasion of qualified privilege provided it is published for the purpose of repelling the charge and that it is proportionate to the necessity of the occasion

The Ruling
82. The trial judge approached the issue of qualified privilege on the basis that *Oliver v. the Chief Constable of Northumbria* was a good precedent in the matter. At p. 120 of the transcript day 5 he states:-

> "….It seems to me that it was reasonable for the company to apprehend that an attack of some kind was going to be made on it. If someone is coming towards you with a rifle you don't have to wait for them to pull the trigger. When they start pointing it at you that is the time to start worrying. I think the phone call was the pointing of the rifle in this case."

83. The trial judge continued:-

> "…I think that there was a potential perceived attack on the company."

He found that it was "reasonable for the company to take the view that [the imminent news report] might be damaging to it" in the sense that "its financial base might be affected."

He continued that:

> "We are told, and it wasn't contradicted in cross-examination… that it was a sensitive time for the company and I think, therefore, that the company needed to respond to the perceived attack. It is not for me to say whether the response …….that's a matter for the jury,…was defamatory or not, but I think certainly it was made on an occasion of qualified privilege."

84. Thus it was that the Court, with the assistance of counsel, crafted Questions 2 (a),(b) and (c) in order that the jury might determine whether or not the defence of qualified privilege, might nonetheless be defeated by the motivation of Kenmare at the time it issued the Press Release.

Was the trial judge correct in his determination that the press statement was published on an occasion of qualified privilege?

Statement in rebuttal of attack/anticipated attack.
85. Kenmare seeks to rely on the dicta of Bean J. in *Bento v. The Chief Constable of Bedfordshire Police* [2012] EWHC 1525 (QB), where the court considered the extent of qualified privilege in a press release as a reply to an anticipated attack. To the extent that qualified privilege may exist where an attack is merely anticipated, it would appear from this decision that is confined to a limited category of cases. Bean J. stated that it could only exist where the defamatory statement was:

> (a) in reasonable anticipation of an imminent attack on the conduct of the maker of the statement; and
>
> (b) limited to a proportionate rebuttal of the anticipated attack.

86. Before considering whether the first of these conditions was met in the present case, a consideration of the facts in Bento is warranted. In 2006 the body of a woman was found in a lake in Bedford. The claimant was arrested and charged with her murder. Following a trial by jury, he was convicted in July 2007 by unanimous verdict. A crucial part of the Prosecution's case was the evidence of a forensic video analyst who expressed his opinion that in CCTV footage of the deceased she could be seen carrying a particular handbag. No contradictory expert evidence was adduced by the defence at the trial.

87. On appeal, fresh evidence was allowed which contradicted that of the forensic video analyst and the conviction was quashed. The Crown sought and obtained an order for a retrial. Thereafter in July 2009, the Crown Prosecution Service decided not to proceed with the re-trial. Bedfordshire Police strongly disagreed with this course of action, issuing a press statement outlining the unanimous verdict of the jury in the original trial which had resulted in Mr. Bento's conviction. Mr. Bento claimed that the press statement was defamatory of him. The Chief Constable resisted the claim on the alternative bases of justification and qualified privilege. His main argument on qualified privilege was that the press release was issued in pursuance of a duty of the police to provide information regarding the status of an investigation and the right and interest of the public to receive that information. It was conceded that any such duty and right had to be balanced against Mr. Bento's right to his reputation. Whilst he had been convicted of the crime he had subsequently had that conviction set aside. Bean J. did not accept that the public interest was served by the Chief Constable issuing statements to the effect that a decision not to pursue a prosecution was wrong or which bore the meaning that the individual concerned was or was probably guilty.

88. In his judgment Bean J. noted at para. 99 that the defendant could readily have issued a statement stating that:-

> (a) The police had pursued a thorough investigation in the case.
>
> (b) A jury had convicted Mr. Bento of her murder.

(c) The conviction had been set aside on appeal for reasons that did not involve any criticism of the police.

(d) The police were not involved in the decision as to whether a retrial should take place.

(e) No other suspect had ever been identified but that the real issue was whether the deceased was killed or had committed suicide.

(f) The police were disappointed for her family that there had been no resolution of the question of how she died.

(g) The police files would remain open.

89. Bean J., in considering the defence that the publication was made in rebuttal of an anticipated attack in the media about the police's handling of the investigation into the death, considered the decision in *Bhatt v. Chelsea and Westminster NHS Trust* (Unreported, 16th October 1997) where Sir Maurice Drake held, in the course of an interlocutory appeal against a Master's refusal to strike out a claim, that this form of qualified privilege extends to a statement in rebuttal of an anticipated attack:-

> "The defendant trust's press officer issued information to the press which was defamatory of the claimant in response to inquiries from the press indicating that articles based on the claimant's criticisms of the trust were about to be published.
>
> Sir Maurice observed (at p. 7) that it would be bad law to treat a response to an attack as privileged but not 'a pre-emptive press release intended to stop the mischief which would be done by publication.'"

90. Bean J. noted that as at the hearing of the *Bhatt* case in October 1997:-

> "No case has been found in which the courts held that a response to an *anticipated* attack may be covered by qualified privilege" (emphasis in original).

He also noted that there was no record of any case so holding since 1997 either. Bean J. expressed that he "very much doubted whether the decision is correct"

He continued:-

> "I see no policy reason to extend qualified privilege to people who believe they are about to be criticised and decide to get their public retaliation in first."

91. Bean J. continued at para. 104 of his judgment to state that, if *Bhatt* was correctly decided, qualified privilege had to be confined to cases which fell within the confines identified at para. 84 above, namely that the defamatory statement was:

(a) in reasonable anticipation of an imminent attack on the conduct of the maker of the statement; and

(b) limited to a proportionate rebuttal of the anticipated attack.

92. In my view, the approach of Bean J. has much to commend it.

93. With respect to the first of the conditions which he identified, a question is immediately raised as to whether the "attack" which was anticipated in the present case was truly one which went to the character or conduct of Kenmare. In Gatley, the form of the attack envisaged by the law was described similarly, with the authors at 14-51 stating that qualified privilege could be extended to a situation where a person's "character and conduct" had been attacked, but not where someone had merely provoked controversy without making an attack. In circumstances where, as described above, there was significant uncertainty as to the angle which was to be taken by the anticipated report in the *Daily Mirror*, I am not satisfied that it was open to the court to conclude that an attack on the character or conduct of Kenmare was imminent. The anticipated story could have taken a number of approaches, many of which might not have impugned the conduct of Kenmare specifically. Mr. Carvill himself conceded that the officers of the company had no idea if something negative was to be said about Kenmare. It was insufficient for Kenmare to seek to rely upon the fact that Mr Milton drew the conclusion that the anticipated story would be "lurid" and "sexual".

94. It seems to me that Kenmare, in order to benefit from an occasion of qualified privilege, was obliged to prove that it anticipated something which in a rather more concrete way attacked its character or conduct. Instead, what seems to have occurred is that Kenmare, fearing that it would lose control of a story which could generate negative publicity for the company, sought to get its retaliation in first, and published the Press Release in precisely the same manner as was criticised in *Bento*. I cannot conclude that the law in respect of qualified privilege was intended to entitle Kenmare to "set the agenda" on a potentially controversial news item by issuing a defamatory statement concerning Mr. Kinsella so long as it could establish that it had not act maliciously in so doing.

95. It is also clear from the second limitation identified in *Bento* that before Kenmare could seek to cloak its action of publishing the Press Release with qualified privilege it was essential that it demonstrate it acted in a proportionate manner. This was all the more important in circumstances where it engaged in publication in anticipation of what it considered might be published the following day in the *Daily Mirror*. In evaluating whether Kenmare acted proportionately in such circumstances, both the fairness of its conduct and the extent to which it had ensured that the recipients of the contents of the Press Statement had a reciprocal duty or interest in receiving it are required to be taken into account. I will return later to consider the existence or absence of such a reciprocal interest or duty.

96. Contrary to the contentions of Kenmare, a material element in the hinterland of fact leading to the issue of the Press Release on the 10th July 2007 was the report which had resulted from the inquiry commissioned by Kenmare in June 2007 and carried out by Norman Fitzgerald. That report, in the compilation of which Mr. Kinsella had fully co-operated, had exonerated him and this was repeatedly reiterated to the jury. Concerning Mr. Kinsella, Mr. Fitzgerald concluded "on the balance of probabilities, I am satisfied that Donal Kinsella was sleep walking that night and that he did not consciously or deliberately attempt to enter Deirdre Corcoran's room. It follows that I find that Donal Kinsella did not have an improper motive in opening Deirdre Corcoran's door."

97. The Press Release as issued omitted the central finding of Kenmare's own report. In evaluating the reasonableness or otherwise of Kenmare's conduct, a central consideration is the omission from the Press Statement of the crucial fact that an independent investigation requisitioned by Kenmare had wholly exonerated Mr. Kinsella. Irrespective of what Kenmare anticipated the expected *Daily Mirror* article might contain, no valid justification was advanced for the omission. The exclusion was both unfair to Mr. Kinsella

and presented a fundamentally inaccurate picture of his conduct. Accordingly, even if the aforementioned facts might be considered to be of more relevance to the issue of malice, they also, in my view, serve to demonstrate that Kenmare did not act in a proportionate manner in publishing the Press Release which it did, and for that reason also the trial judge should have rejected its claim of qualified privilege.

98. Finally, on the issue of proportionality, I am also satisfied that the issue of the Press Release to the mass media amounted to excessive publication such as to disentitle Kenmare from seeking to cloak that statement with qualified privilege. This is because the vast bulk of recipients to whom it was likely to be published had no legitimate common interest in its receipt, a matter to which I will now refer in greater detail.

Reciprocity of duty and interest.
99. Qualified privilege is defined in the form of a bilateral interest/duty test that connects the maker of a statement with its recipient(s). A publication may attract qualified privilege if its maker had an interest or a legal, social or moral duty to communicate information and could demonstrate that its recipients had a corresponding duty or interest to receive it. The requirement of reciprocity is essential. The conditional and limited quality of the immunity afforded by qualified privilege was not, in my view, adequately addressed by the trial judge in his ruling. Whilst there was evidence that the company had shareholder and investor interests to protect, the burden fell to Kenmare to establish that it was under a duty to communicate the content of the Press Release to the public at large and that the public, as the recipients of that information, had a corresponding duty or interest to receive it.

100. McMahon & Binchy, in their analysis of qualified privilege in *Law of Torts*, (4th ed.) at 34.193 state: "The key concepts in the defence are a duty to receive or interest in receiving the information and a reciprocal duty or interest in the person who publishes the statement to give it."

101. On day 5 of the hearing at p.75 of the transcript, it was contended on behalf of Kenmare that the class of persons who had an interest in receiving the Press Release was "…primarily the business community, investors, potential investors and shareholders. But in practical terms, that is almost the domestic public at large". However, the duty to publish under the traditional qualified privilege rubric is ordinarily confined to an individual or group of individuals who are likely to be directly affected by the information communicated, which in the present case was the shareholders, investors or employees of the company.

102. Kenmare, in this regard, sought to rely on the decision of *Oliver v. Chief Constable of Northumbria Police* [2003] EWHC 2417 where at para. 40 Gray J. stated:

> "I accept that dicta can be found in the cases which can be read as suggesting that other factors come into play when determining the existence of privilege. Perhaps the best example is the statement of Lord Buckmaster in *London Association for the Protection of Trade v Greenlands* at p.23, where he states that it is necessary to take into account 'every circumstance associated with the origin and publication of the defamatory matter in order to ascertain whether the necessary conditions are satisfied, by which alone protection can be obtained.' But, in my view, it is well established by subsequent authorities that matters such as the relevance of what was communicated, the reasonableness or fairness of what was communicated and whether the defendant could have honestly believed in the truth of what was communicated all go to the question of malice and not to the anterior and distinct issue of whether the occasion was privileged."

103. The judgment of Gray J. continues: –

> "As to the dictum of Lord Buckmaster quoted earlier, Simon Brown L.J. explained in *Kearns* that what Lord Buckmaster was saying was that 'every circumstance has to be considered which bears on the question whether the necessary conditions for invoking privilege are satisfied.' In other words, he was confining himself to the existence of the conditions for invoking privilege and not with any broader question. Moreover, I am satisfied that, when Lord Atkinson spoke in *Adam v. Ward* at p.339 of having regard to all the circumstances and the existence of reasonable grounds on the part of the commentator for belief in the truth of what was published, he was addressing the issue in what circumstances a communication made on a privileged occasion will lose the protection of the privilege by reason of the excessive language used. So much is clear from the paragraph commencing at the foot of p.334."

104. The decision in *Adam v. Ward* [1917] A.C. 309 was cited with approval by the Supreme Court in *Green v. Blake & Ors* [1948] 1 I.R 242 at p. 253-254, where Maguire C.J. stated:

> "The question whether the occasion was privileged is to be tested by the criteria laid down by Parke B. in *Toogood v. Spyring*:-
>
> > 'If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.'
>
> It is the occasion on which a statement is made which is privileged. In my opinion the earlier actions of a defendant which lead up to the making of the statement can only be enquired into for the purpose of showing, by affirmative evidence, in the words of Parke B., that there was 'malice in fact –that the defendant was actuated by motives of spite or ill-will independent of the occasion on which the communication was made.'"

105. Lord Atkinson in *Adam v. Ward* states at p. 334 of the judgment:-

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication - a phrase often used loosely to describe a privileged occasion and vice versa - is a communication made upon an occasion which rebuts the *prima facie* presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact: per Parke B., *Wright v. Woodgate 2* C.M. and R. 573 at 577. Nor that the question of whether the occasion is a privileged occasion or not is, if the facts be not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believed the statement made to be true, his bona fides being in such a case always presumed…"

106. It is clear from the aforementioned jurisprudence that a defence of qualified privilege is only available in respect of private communications and does not generally extend to mass media publications due to the fundamental requirement of reciprocal duty and interest.

107. The common law recognised that only in exceptional circumstances could publication to the world at large be protected by qualified privilege. Such a contention was advanced in *Reynolds v. Times Newspaper Ltd* [2001] 2 A.C. 127 based on the proposition that an incremental development of the common law was warranted by the creation of a new category of occasion that would be privileged on the subject matter alone - mainly political information. This argument was in turn closely based on the High Court of Australia decision in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 where that court held that qualified privilege would exist for all publications of political information subject to the publisher proving reasonableness of conduct.

108. It is clear on the facts as proven in the present case that the necessary conditions for invoking qualified privilege are not satisfied. However, the publication of the Press Release to the mass media was an excessive publication not within the class of publications to which the exception applies since the vast bulk of recipients had no legitimate common interest in its receipt. This deprived it of the essential prerequisite of reciprocity of duty and interest as between the publisher and the recipient of the information. The contentions advanced by counsel on behalf of Kenmare at the trial failed to establish that the general public had a reciprocal or any interest in receiving it.

109. The decision of the Supreme Court in *Hynes-O'Sullivan v. O'Driscoll* [1988] 1 I.R. 436 is authority for the proposition that the defendant's mere honest belief that the party addressed had an interest or a duty to receive the publication in issue could not render the occasion privileged.

110. There is some validity in the contention advanced on behalf of Mr. Kinsella that the decision in *Oliver v. the Chief Constable of Northumbria Police* [2003] EWHC 2417 is distinguishable insofar as, in the latter case, the Northumbria Police were aware that a television programme was due to be broadcast that same evening based on the allegations contained in the leaked Oliver report. By contrast, the transcript of the cross-examination in particular of Mr. Michael Carvill suggested that at least on his part, beyond surmise, submission and conjecture, he did not have specific information that the Daily Mirror was going to attack Kenmare. In the course of cross-examination Mr. Michael Carvill stated in the presence of the jury:-

> "We just wanted to put out the basic facts in a manner that … we could point them and say those are the facts, but we don't want to comment further."

111. The evidence of Mr. Milton, the media expert retained by the company, was that, based on his conversation with the journalist, Mr. Kierans, the allegations would be "sexual in nature." Kenmare was in the position that it did not know that there would be an attack. At best it anticipated an attack and in that respect the evidence did not establish that it would concern the character and conduct of Kenmare. It was in these circumstances that Mr Milton crafted a press statement for release to the wide world.

112. Another feature that distinguishes the facts under consideration on this appeal from those in *Bento* and *Oliver* is that in both what the court was concerned with was a police force, a body that exercises in important public function and which is both accountable to the public and reliant on its trust. Given this context, it may be the case that anticipated attacks on the police or analogous institutions may justify particularly speedy responses which strongly defend those institutions, and therefore run the risk of defaming an innocent party. It can hardly be said that this logic can apply to the present case, where the party in question was a company, albeit a public limited company, which exercises a purely commercial function.

113. Even if it had been established, which it was not, that Mr. Milton anticipated, as a result of his conversation with Mr. Kierans, a direct attack on the character or conduct of Kenmare, the Press Release published to the world as a whole was, in my view, on the facts and in all of the circumstances, not proportionate. The fundamental requirement of reciprocity of duty and interest was fatally absent. Kenmare failed to make out any valid basis in law for the proposition that the world at large had a recognised duty or interest in receiving the publication. It is unclear what interests of the business community, including shareholders and investors in the company, could have been served by the issuing of the Press Release. After all, those responsible for the Press Release were unaware of the nature of the media coverage which they feared, and therefore it is difficult to say what they sought to respond to or clarify by publishing it. In my view, the dissemination was wholly excessive and the vast preponderance of recipients lacked any recognised interest in its receipt.

114. The trial judge, in my view, failed to have any or any adequate regard to the lack of objective justification on the part of Kenmare for unfairly and irresponsibly publishing the Press Release to the world at large in circumstances where the general public did not have a reciprocal duty and interest in its receipt.

115. Accordingly, Kenmare failed to objectively justify the Press Release and its contents as being fairly warranted. Whilst these last mentioned issues would be relevant to the jury's assessment of the existence or absence of malice, the question is whether and to what extent in the circumstances arising in this case do they also go to the question of whether the occasion of publication of the Press Release was privileged. To seek to bring anticipated publications, the material substance of which is not actually known to the publishing party, within the ambit of the defence of qualified privilege necessarily involves a mixture of both conjecture and retrospective rationalisation.

For all of the reasons earlier set forth, I am satisfied that the Press Release was not published on an occasion of qualified privilege and that the trial judge erred in finding that it was. That being so it is not necessary to consider whether the trial judge misdirected the jury on the question of malice, malice being relevant only in the event that publication occurred on an occasion of qualified privilege.

116. Finally, Mr. Kinsella concedes that the result of the action would have been the same even without the presence on the Issue Paper of question 2 (in relation to malice) with the result that the relief sought by him is confined to a claim that the cross appeal be allowed and that an order be made providing for his costs of that appeal. In light of my earlier findings I would allow the cross appeal and propose that the costs in relation thereto be postponed for further legal argument.

DAMAGES

Written by Irvine J. and adopted by the Court.

117. This aspect of the judgment concerns the nature and quantum of the damages awarded to Mr. Kinsella by the High Court jury. As already stated, he was awarded damages of €9m in respect of the libel complained of and was awarded a further sum of €1m in respect of aggravated damages.

118. In the Amended Notice of Appeal, Kenmare maintains, *inter alia*:

> (a) that the jury's verdict on damages was so unreasonable and/or irrational and/or unjustified and/or disproportionate that it renders the entire of the jury's verdict unsafe to the point that the entire verdict, including the jury's verdict on liability, should be set aside and
>
> (b) that the amounts awarded were so unreasonable and disproportionate to the damage caused to the plaintiff's reputation that they should be set aside.

119. In the course of its submissions, Kenmare argues that, if it is unsuccessful in relation to the first of the aforementioned grounds of appeal, but successful in relation to the second, this Court should reassess the damages in accordance with what it considers proportionate to award Mr. Kinsella having regard to the injury sustained. Alternatively, it submits that the action should be remitted to the High Court for a full rehearing rather than for a rehearing confined to the issue of quantum.

120. In order to consider the validity of the grounds of appeal advanced by Kenmare in respect of the awards of damages made by the jury, it is necessary, first, to consider the function of awards of damages in defamation proceedings, second, the circumstances in which an appellate court should interfere with an award made by a jury, third, the guidance available to an appellate court when asked to set aside an award of damages as disproportionate and, fourth, the factors in that assessment.

Function of an award of damages in defamation proceedings

121. An award of damages in a defamation action is intended to serve a different function to an award of damages in other types of litigation. Its primary function is to vindicate the plaintiff's reputation, but it also intended to compensate for any injury sustained as a result of the defamation. The amount of compensation must be sufficiently large such that if disclosed to a bystander it would readily convince them of the baselessness of the allegation complained of. Further, insofar as an injury to a person's reputation can be compensated for by an award of damages, the damages must be great enough to achieve that objective. In this regard, it is important to remember that damage to a plaintiff's reputation can have far-reaching consequences, a fact emphasised in many of the leading texts on the law of defamation. It may result in a plaintiff being ostracised and rejected both socially and in the workplace and this is but one of the reasons that injury caused by defamation is not easy to value in monetary terms. Accordingly, it can be stated that not only is the function of an award of damages in a defamation action different, for example, to that in a personal injury action, but the injury inflicted is much more difficult to value because of its often highly subjective nature.

122. As with awards of damages in personal injury cases, any award made in respect of damages for defamation must be fair to the plaintiff and the defendant and should not be excessive. An award should certainly not be large to the point that it will not only have the effect of vindicating the plaintiff's good name, but also of restricting freedom of expression, particularly that enjoyed by the media as guaranteed by Article 40.6.1 of the Constitution. In *Dawson v. Irish Brokers Association* (Unreported, Supreme Court, 27th February 1997) the following guidance is provided by O'Flaherty J. at p. 700:

> "defendants in defamation cases should never be regarded as the custodians of bottomless wells which are incapable of ever running dry. The opposite has proved true in the publishing sphere in this and other countries – with sad consequences for those who lost employment as a result of untoward awards. Further, unjustifiably large awards, as well as the cost attendant on long trials, deals a blow to the freedom of expression entitlement that is enshrined in the Constitution."

123. The potential for defamation awards to restrict freedom of expression received some attention from the ECtHR in *Independent Newspapers (Ireland) Ltd v. Ireland* (App No. 28199/15) (2018) 66 E.H.R.R. 23. The issue before the court was whether the safeguards in Irish domestic law both in principle and as they were applied in the proceedings were adequate and effective in preventing disproportionate awards of damages. The court found that a defamation award of €1.25m against the newspaper which was fixed by the Supreme Court following an appeal against the jury's award of €1.872m. (see *Leech v. Independent News and Media* [2014] IESC 79) constituted a restriction of its right to freedom of expression as protected under Article 10 of the European Convention on Human Rights, which in the circumstances had not been justified. It emphasised that, especially where the media is concerned, unpredictably high damages in defamation cases are capable of having a chilling effect and "they therefore require the most careful scrutiny and very strong justification." The court did not, however, speculate as to the likely outcome of the proceedings had there been no violation of Article 10 and therefore rejected the newspapers claim for payment of €1.05m., that sum representing the difference between the final award of damages made by the Supreme Court and the newspaper's own assessment of an appropriate amount of compensation for Ms Leech of €175,000.

124. One might observe in passing that the ECHR does not, of course, have direct effect in this State and, insofar as it forms part of the law of the State, it is only by reason of the specific provisions of the European Convention of Human Rights Act 2003. As s. 3(1) of the 2003 Act makes clear, the duty to perform functions "in a manner compatible with the State's obligations under the Convention provisions" applies only to "organs of the State." As the courts are excluded from the definition of "organ of the State" by s. 1(1) of the 2003 Act and as the defendants are plainly not such an entity, the 2003 Act has, in strictness, no application to the present case, save for the interpretative obligation imposed on this Court by s. 2(1). This provision states that:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

125. For the reasons set out elsewhere in this judgment, I consider that the common law principles governing the award of damages in defamation cases can, where necessary, be accommodated to the requirements of Article 10 of the ECHR by means of the interpretative principle contained in s. 2(1) of the 2003 Act. It is, in any event, clear from Supreme Court decisions such as *Dawson* that damages awards in defamation cases must meet proportionality standards if constitutional guarantees in respect of free expression in Article 40.6.1 are not to be compromised by the chilling effect of disproportionately high awards. This is a point which this Court has, in any event, recently affirmed in assessing the quantum of damages in defamation cases: see *Christie v. TV3 Television Networks* Ltd. [2017] IECA 128.

126. Finally, an appellate court must act with a degree of caution when determining whether an award of damages for libel made by a jury in a particular case should be considered disproportionate by drawing a comparison with awards set aside as excessive in other defamation cases, not only by reason of the differing facts, but also because of the passage of time between the claims.

Aggravated and Exemplary Damages

127. In circumstances where the jury in the present case awarded a sum of €1m in respect of aggravated damages, it is also

important to briefly refer to the circumstances in which a jury is entitled to make such an award of aggravated damages.

128. In *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305, Finlay C.J. described the damages that might be awarded in a case such as the present one in the following manner:

> "In respect of damages in tort or for breach of a constitutional right, three headings of damages in Irish law are, in my view, potentially relevant to any particular case. They are:-
>
> 1. Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.
>
> 2. Aggravated damages, being compensatory damages increased by reason of:-
>
> (a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or
>
> (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or
>
> (c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.
>
> Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.
>
> 3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered."

129. Of some further assistance in relation to the purpose of an award of aggravated damages in a defamation action is the following brief but helpful statement of Eady J. made at para. 7 of his judgment in *Henry v. News Group Newspapers Ltd*. [2011] EWHC 1058 (Q.B.):

> "The purpose of aggravated damages is to compensate the claimant for any salt that the relevant defendant has rubbed in the wound over and above the injury caused by the defamatory publication(s)."

130. Whilst aggravated damages are now dealt with under s. 32(1) of the Defamation Act 2009, at common law any adverse conduct on the part of a defendant between publication and trial that increased the harm suffered by the plaintiff might result in an award of aggravated damages. Relevant in this regard is the motive and conduct of the defendant. If there is evidence of malice or evidence to show that the defendant acted in a high-handed or malevolent manner with the result that the plaintiff's self-esteem was further damaged, then aggravated damages may be awarded. An award of aggravated damages may also be justified if the plaintiff is subjected to an unduly prolonged or hostile cross-examination or if the trial is managed by the defendant in a manner calculated to attract further widespread publicity to the detriment of the plaintiff. These are but a few examples of the type of circumstances that may attract an award of aggravated damages.

131. Of particular importance is the fact that an award of aggravated damages is intended to be compensatory in nature. It is meant to compensate the plaintiff for some additional injury sustained as a result of the motivation or conduct of the defendant. And, because aggravated damages are compensatory in nature, the defendant's means should not be taken into account by the jury when assessing the amount to be awarded. As is stated in Cox & McCullough, *Defamation: Law and Practice* (Clarus Press, 2014) at para. 11-66:-

> "properly understood, therefore (and whereas there is a clear punitive element to such an award), the focus in making such awards should not be on the defendant's conduct but on the extent to which the harm suffered by the plaintiff has been worsened or aggravated by such conduct."

132. Finally, the overall damages figure awarded by the jury should reflect the harm suffered as a result of the initial wrongful act and also the extent to which that harm was aggravated by subsequent actions of the defendant.

133. Thus, aggravated damages must be distinguished from exemplary damages which are intended to punish a defendant for the wilful commission of a tort or to teach the wrongdoer that tort does not pay. Accordingly, by way of example, if a newspaper, without any genuine belief in the truth of some article it intends to publish, proceeds with that publication for the purpose of making a significant financial gain, then its conduct may be considered reprehensible to the point that an award of exemplary damages would be warranted. However, it is important to state that exemplary damages are exceptional and should only be awarded if the sum of compensatory damages and aggravated damages, when taken together, are considered inadequate to achieve the objectives of punishment, deterrence and disapproval.

134. One of the unique features of an award of exemplary damages is that, in fixing the amount of such damages, the jury may have regard to the means of the defendant. The means of a defendant is not relevant to compensatory or aggravated damages. It is important to make this point at this juncture as it was submitted by counsel on behalf of Mr Kinsella that the means of Kenmare in this case, a company having a value of some £650,000,000 Stg at the relevant time, was a factor which the jury was entitled to take into account when assessing damages. However, as is clear from the transcript of the within proceedings, the jury was not asked to make any award in respect of exemplary damages. Accordingly, the means of Kenmare could be of no possible relevance to the award made.

When should an appellate court set aside an award made by a jury as disproportionate?

135. Whilst there is no doubt as to the jurisdiction of this Court to substitute its own award for that made by a jury (see s. 48 of the Courts (Supplemental Provisions) Act 1961 and also the decision in *Holohan v. Donohue* [1986] I.R. 45), the relevant authorities universally advise that determinations of juries in defamation cases should only be set aside after the exercise of great caution.

136. In *Barrett v. Independent Newspapers* [1986] I.R. 13, Henchy J. warned against the temptation of an appellate court to condemn as perverse a jury verdict "merely because it does not accord with that of a judge". A jury verdict is, he said:

> "to be deemed perverse only when no 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."

137. Denham J. in *Cooper Flynn v. RTE* [2004] IESC 27 described the role performed by the jury in a defamation action as "pivotal".

138. In *Barrett*, the Court emphasised the weight and importance to be attached to the award of a jury in a defamation action in the following terms:

> "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."

139. The approach of Henchy J. in *Barrett* has, perhaps unsurprisingly, been approved of in many of the more recent decisions of the Supreme Court concerning defamation awards. By way of example, the following is what was stated by O'Donnell J. concerning the value of the jury's assessment of damages in *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 59:-

> "The reputation to which an individual is entitled, and whether any publication is defamatory, and the impact of any such defamation on an individual within the community, perhaps particularly when contained in mass circulation in newspapers or media organs with wide popular access, are all matters which members of the public who after all are the target audience of such publications, are well placed to gauge. Furthermore, the purchasing power of money and the value in real terms to the life and lifestyle of an individual is something which a jury composed of persons drawn from different social groups and having different life experiences, can collectively gauge and judge."

140. I will pause here to observe that it appears to me that a party who seeks to have an award in a defamation action set aside as disproportionate, faces a more uphill battle and perhaps must reach a higher or different threshold to that which must be achieved by a party who seeks the same relief in an appeal against an award of damages in a personal injury action. In a personal injury appeal the appellate court will form its own assessment of what it considers would have been a just, fair and proportionate award of damages. As a somewhat general rule, if its own assessment is more than 25% above or below that awarded by the High Court, it will usually substitute its own award for that of the trial judge (see judgment of McCarthy J. in *Reddy v. Bates* [1983] I.R. 141 at 151). However, having regard to the sanctity of the role of the jury in defamation actions and the often highly subjective nature of the injury inflicted, upset and hurt being injuries that are not easily assessed by reference to what are often described as the arid and cold pages of a transcript, it seems to me that the appellate court in a defamation action would not necessarily interfere with an award made by a jury based on a similar type of assessment.

141. Notwithstanding the strong emphasis in many of the leading defamation judgments concerning the importance of the role of the jury and the sanctity of their awards, the fact of the matter is that in a very high percentage of appeals, the award of the jury may and will be set aside if it is considered disproportionate. I venture to suggest that in large part, given that most of those appeals relate to proceedings which predate the 2009 Act, this is due to the fact that the judges in those cases were limited in the directions they might give to the jury concerning how they should assess damages, an approach somewhat acerbically described by Sir Thomas Bingham M.R in *John v. M.G.N. Ltd.* [1997] Q.B. 586 as one which leaves the sheep without their shepherd:-

> "Whatever the theoretical attractions of this approach, its practical disadvantages have become ever more manifest. A series of jury awards in sums wildly disproportionate to any damage conceivably suffered by the plaintiff has given rise to serious and justified criticism of the procedures leading to such awards. This has not been the fault of the juries. Judges, as they were bound to do, confined themselves to broad directions of general principle, coupled with injunctions to the jury to be reasonable. But they gave no guidance on what might be thought reasonable or unreasonable, and it is not altogether surprising that juries lacked an instinctive sense of where to pitch their awards. They were in the position of sheep loosed on an unfenced common, with no shepherd."

142. That view was one which was not shared in this jurisdiction at the time. Hamilton C.J. in his judgment in *De Rossa v. Independent Newspapers* [1999] IESC 63, [1999] 4 I.R. 342 stated that it would be an invasion of the province or domain of the jury if it was to be buried with figures suggested by the parties or the judge or with figures emanating from other defamation or personal injury actions.

143. One would certainly hope that the effect of s. 31 of the 2009 Act, which not only allows the parties make submissions to the Court in relation to the matter of damages in a defamation action, but which also requires the trial judge to give directions to the jury in relation to the matter of damages, will in early course result in the making of awards which are not only proportionate to the injury sustained in any individual case but which will also be proportionate when considered in the context of awards of damages in other proceedings including personal injury actions.

Guidance available to an appellate court

144. It is clear from the decisions of the Supreme Court in cases such as *O'Brien v. Mirror Group Newspapers* [2001] 1 I.R. 1, *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 59, De Rossa v. Independent Newspapers Plc [1999] 4 I.R. 342 and *Leech v. Independent Newspapers Ltd.* [2014] IESC 79, that an appellate court, when considering whether or not a jury award was disproportionate may, for the purposes of guidance, have regard to previous awards made or endorsed by the Supreme Court as a test for the validity of the jury's award.

145. An example of this approach is to be found in the judgments of Dunne and O'Donnell JJ. in *McDonagh*. The plaintiff in that case, Mr. McDonagh, sued in respect of a newspaper article entitled "Traveller is New Drugs King", which he claimed to mean that he was a drug dealer, a loan shark, a tax evader, and a criminal. Although the newspaper successfully persuaded the jury of the truth of the latter two meanings, namely that Mr. McDonagh was a tax evader and criminal, it failed to prove that he was a drug dealer or a loan shark, in respect of which allegations the jury awarded damages of €900,000. In the Supreme Court, Dunne J. contrasted the award

of €900,000 with other libel awards. In the course of her judgment she referred to the award as being one of the highest ever made by a jury in the history of the State. That being so, the court was, she concluded, required to consider whether the defamation which had led to such a high award was one of the most serious ever to have come before the courts. In other words, Dunne J. would appear to have taken the view that it was necessary to consider whether the award was not only proportionate to the injury to Mr. McDonagh's reputation, having regard to the factors to which I will later refer, but also proportionate to the awards of damages made and/or upheld by the Supreme Court in other defamation cases.

146. In her judgment, Dunne J. acknowledged the clear difficulty of making any direct comparison between different defamations because of "the variety of factors that may be at play, such as the nature of the defamation allegation, the character and reputation of the person defamed, the extent of the publication and the impact on the person concerned, to name but a few". Regardless, she concluded that the defamation in *McDonagh* was nothing close to as serious as that which had taken place in Leech. Like O'Donnell J., she concluded that, even if Mr. McDonagh had been a person of impeccable character and reputation, the award would have to have been considered excessive, it being "far larger than is necessary to put right the wrong done to the plaintiff's reputation."

147. As to the possibility of measuring or comparing the significance and gravity of differing wrongful acts of defamation in different cases, the following is what O'Donnell J. stated at para. 46 of his judgment in McDonagh:

> "There is no market for defamatory publications and no reasonable proxy to provide a separate basis for assessing an award in a defamation case. Some guidance can be obtained from other substantial awards in defamation cases, particularly those which have been upheld on appeal, and to the extent where the Court of Appeal or Supreme Court substitutes its own award, then these may also provide some guidance. However, a note of caution is appropriate here too. While the monetary amounts awarded are readily comparable and can be placed on a scale, it is a much more difficult task to compare defamations than it is to compare personal injuries. A clean break may be less serious and may heal more quickly than a comminuted fracture. A fracture which enters an articular joint and gives rise to a risk or probability of future arthritis is more serious than one which does not. An injury to a young and active person may be different to the same injury sustained by someone older with a more sedentary lifestyle. These relativities should be reflected in awards. It is however more difficult to measure defamation in cases on any set scale. Taking simply by way of example the *de Rossa* and *Leech* cases and this case, each one has very different features. The distinctive aspect of the *de Rossa* case, was not just the serious allegations and the vigour with which they were pursued, but the longstanding reputation of the plaintiff, the fact that he was a very well-known figure, and the fact that his political career was based upon his reputation. He had achieved high office, and the publication threatened not just his public reputation, but his very career. On the other hand, the plaintiff in the *Leech* case was not widely known to the public at all, at least before the circumstances which gave rise to the series of publications. But on the other side of the balance, there were features of that case not present in *de Rossa*. As already discussed, the defamation in the Leech case was part of a repeated campaign which went to considerable lengths, both in the language used and photographs employed, to suggest an improper relationship on her part. Furthermore, and as already discussed, the damage done to her business was not only a significant factor in the case, but also one which made the assessment of damages more difficult. The issue in the present case is not readily comparable to either of those cases, although of course the award would suggest some comparison. There is no doubt that to allege that someone is a drug dealer, let alone a major drug dealer, and not establish the truth of that allegation, is a very serious defamation particularly when carried in the most prominent position in the largest circulating newspaper in the State."

148. So, whilst many of the most often cited judgments acknowledge the difficulties in comparing the injurious nature of defamations in different cases, it has been the almost invariable practice of the Supreme Court to engage upon such an analysis, particularly in respect of the gravity of the libel, when considering whether an award made was or was not disproportionate to the injury sustained and the plaintiff's right to have his or her good name vindicated.

149. Whilst recognising the somewhat different function of an award of damages in a personal injury action, many of the judgments in the cases to which I have earlier referred have acknowledged that it is often of at least some assistance to compare the award made by the jury to the level of general damages commonly awarded in the most serious cases of paraplegic or quadriplegic injury.

150. In relation to the use of personal injury awards as comparators in defamation actions, the decision in *Lillie & Reed v. Newcastle City Council [2002] EWHC 1600 (Q.B.), a case involving entirely untrue allegations of sadistic* child abuse, is, I believe, of some relevance. In his judgment concerning the damages awarded in that case, Eady J. stated that he felt it necessary to keep the amount of damages from exceeding the maximum awarded in personal injury proceedings, which he acknowledged at that time to be in the region of GBP £200,000. Thus, although at para. 1549 of his judgment he expressed himself satisfied that the claimants had merited an award at the highest permitted level "several times over" due to the scale, gravity and persistence of the allegations, he evidently felt precluded from exceeding the sum of GBP £200,000, noting his duty to "bring their compensation into line with current policy." That approach is one which later developed significant traction in the English courts with the result that with the exception of a few very large awards, damages for defamation usually fall comfortably below what might be described as the "ceiling" for damages in personal injury cases. One such exception to which I will refer, because, as in this case, the claim was brought in respect of an allegation of sexual impropriety, is *Garfoot v. Walker* (The Times, 8th February 2000) where an award of damages in the sum of GBP £400,000 was made at a time when the maximum award for damages for personal injuries claims was in the region of GBP £200,000. However, the allegation in that case was one of rape and had been made against a member of the medical profession, a far cry from the gravity of the libel found by the jury in the present case. I make that observation mindful of the fact that any allegation of sexual impropriety is highly likely to have grave consequences for the person against whom it is made.

151. Returning to the authorities in this jurisdiction, the following was what O'Donnell J. stated in *McDonagh* concerning the value of drawing any comparison between a defamation award and awards made in personal injury cases:

> "44. Turning to this case, I agree that broad comparisons can be made with personal injuries awards and awards in other defamation cases. 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. The assessment of damages for personal injuries has itself long been recognised as a business of equating incommensurables, or, as O'Higgins C.J. put it in Sinnott v. Quinnsworth [1984] I.L.R.M. 523, 'assaying the impossible'. There is no market in personal injuries to which a court can refer for evidence and guidance. No one offers to sell, or would be permitted to buy, a broken leg. However, unless the cost of accidents causing injuries are imposed upon the person causing the accident, the inevitable outcome will be that the incentive towards careful conduct is reduced, and the number of accidents will increase. To some extent, a similar calculation arises here.
>
> 45 . . . [I]t is clear, therefore, that no easy or direct comparison can be made in this regard with defamation cases.

Nevertheless, as an indicator of courts' approach to the business of ascribing a monetary value to the damage and injuries suffered by a plaintiff, the awards in personal injuries do provide some guidance. On this basis, plainly, the figure of €900,000 is comparatively speaking extremely high."

152. I will make just one final brief observation in relation to the type of exercise that might be carried out by an appellate court when asked to consider whether an award made by a jury in a defamation action was proportionate to the injury sustained. In the course of considering whether the award of €900,000 in McDonagh was proportionate and fair to the parties, O'Donnell J. at para. 24 of his judgment observed that the size of the award was such that the plaintiff could have lived off it comfortably for the rest of his life. He noted that the award would not be subject to tax and that in such circumstances it was worth considering just how long and hard an individual would have to work to amass such a sum and also what might be purchased with a sum of that magnitude. Accordingly, it would appear that these are yet further factors which might provide guidance concerning the proportionality of any award.

153. As already stated, this aspect of defamation proceedings is now governed by s. 31 of the Defamation Act 2009 which would appear to permit the trial judge to refer to awards in other defamation proceedings and/or to the type of damages that might be awarded in certain types of personal injury actions when directing the jury as to "the matter of damages as required by s. 31(2)". As is observed by Cox & McCullough at para. 11-35, it is not that the jury should be asked to draw a comparison between the injury to a plaintiff's reputation and a physical injury inflicted on a third party. Rather, the purpose of the comparison should be to inform the jury's sense of objective justice with the hope that awards made with the benefit of such guidance would become more consistent inter se and thus more proportionate to the injury wrongfully inflicted. The practice of asking the jury to make such a comparison has, as the authors observe, the merit of encouraging the making of awards that fit within the moral compass of the average person.

Factors relevant to the assessment of damages by a jury

154. In her judgment in *McDonagh* and in her decision in Leech, Dunne J. referred to the passage from the judgment of Hamilton C.J. in the De Rossa case in which he quoted with approval a passage from the English Court of Appeal in *John v. MGN Ltd.* [1997] Q.B. 586 at p. 463:

> "The factors to be taken into account in determining the damages to be awarded are clearly set out in many cases and in particular in the judgment of the Court of Appeal in *John v. M.G.N. Ltd.* [1997] Q.B. 586 at p. 607 of the report where it is stated as follows:-
>
> > 'The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way'."

155. I now propose to look at the factors identified in the authorities as relevant to the assessment of damages in a defamation action and I will do so having regard to the evidence given in these proceedings and the facts as found in a number of the other defamation claims to which I have earlier referred. I will also address the argument advanced on behalf of Kenmare to the effect that Mr. Kinsella's alleged conduct in precipitating the publication of the press release ought to have disentitled him to any damages or alternatively should have been reflected in the jury's award. I propose to consider the evidence and the arguments under the following headings:

(i) Gravity of the defamation;

(ii) Effect on the plaintiff;

(iii) Extent of publication;

(iv) Conduct of the defendant;

(v) Conduct of the plaintiff.

Gravity of the defamation

156. The text of the Press Release is core to a consideration of the gravity of the defamation in the present proceedings. Notwithstanding the fact that it is set out in full earlier in the judgement, I will nonetheless repeat it here because of its importance.

> "Kenmare Calls Special Board Meeting
>
> 10th July, 2007.
>
> The Chairman of Kenmare, Mr. Charles Carvill has convened a special meeting of the Board of Directors to be held tomorrow, Wednesday 11th of July. The purpose of the meeting is to consider a motion to remove Mr. Donal Kinsella as Chairman of the Company's Audit Committee. Mr. Donal Kinsella is deputy chairman and director of Kenmare.
>
> There was an incident on 9th May 2007 at Kenmare's Moma Titanium Minerals Mine in Mozambique. On foot of this incident, a complaint was made by the Company Secretary, Miss Deirdre Corcoran, against Mr. Donal Kinsella. Mr. Charles Carvill requested that the Company solicitors, O'Donnell Sweeney Eversheds, conduct an investigation and prepare a report on the incident for his consideration. This report was completed and presented to Mr. Charles Carvill on 20 June

2007.

Mr Carvill then sought and received a written apology from Mr. Donal Kinsella to Miss Deirdre Corcoran. The incident made it impossible for Miss Deirdre Corcoran, as Secretary to the Audit Committee, to work to work effectively with Mr. Donal Kinsella as Chairman of the Audit Committee. Mr. Charles Carvill therefore asked for Mr. Donal Kinsella's resignation as Chairman of the Audit Committee.

Mr. Donal Kinsella's voluntary resignation from the Audit Committee has not been forthcoming.

The Chairman has now called a special meeting of the Board at which Mr. Donal Kinsella's removal as Chairman of the Audit Committee will be proposed."

157. Also of particular relevance is the first question which was put to the jury, namely:-

> "Did the Press Release of 10th July 2007 state or infer that Donal Kinsella had made inappropriate sexual advances to Deirdre Corcoran?"

158. It is obviously a grave matter to publish about someone something from which it is to be inferred that they made inappropriate sexual advances to a work colleague. Nonetheless, that is not as serious as publishing a statement from which it is to be inferred that they had made *serious* inappropriate sexual advances to a colleague or that they had, for example, sexually assaulted their colleague. Like every type of offensive conduct, there is a moral scale upon which any defamatory comment or statement concerning sexual misconduct can readily be placed. A false allegation of rape, as was the case in Garfoot would perhaps be close to the top of that scale. The question is where on the scale of contemptible, immoral or criminal sexual conduct should the defamatory allegation that Mr Kinsella made an inappropriate sexual advance to a female colleague be located?

159. This type of theoretical scale was referred to by Henchy J. in *Barrett* when, in the course of his judgment, he addressed the lack of assistance available to the jury to guide it in its assessment of the damages that it should award. At p. 24 of his judgment he stated as follows:

> "The fact remains, however, that the jury were not given any real help as to how to assess compensatory damages in this case. A helpful guide for a jury in a case such as this would have been to ask them to reduce to actuality the allegation complained of, namely, that in an excess of triumphalism at his leader's success the plaintiff attempted to tweak the beard of an unfriendly journalist. The jury might then have been asked to fit that allegation into its appropriate place in the scale of defamatory remarks to which the plaintiff might have been subjected. Had they approached the matter in this way, I venture to think that having regard to the various kinds of allegations of criminal, immoral and otherwise contemptible conduct that might have been made against a politician, the allegation actually complained of would have come fairly low in the scale of damaging accusations. The sum awarded, however, is so high as to convince me that the jury erred in their approach."

160. In considering where the allegation made against Mr Kinsella should fall on the scale of damaging accusations, relevant in my view is the fact that when endeavouring to reach agreement on the questions to be put to the jury, counsel for the defendant submitted that the first question should be:

> "Did the Press Release of 10th July 2007 state or infer that Donal Kinsella had made *serious* inappropriate sexual advances to Deirdre Corcoran?" (emphasis mine).

161. Counsel for Mr. Kinsella disagreed with that submission and successfully argued that the word 'serious' should not be included. It follows that Mr. Kinsella himself did not believe that it could reasonably be inferred from the Press Release that he had been guilty of any *serious* sexual impropriety but only of sexual advances which could not be classified as serious.

162. Whilst all accusations of sexual impropriety are extremely serious, it is beyond question that the more egregious the allegation the greater the effect it will likely have on the life of the person against whom it is made. It is important therefore to consider where the sexual impropriety alleged against Mr. Kinsella would sit on an imaginary scale of sexual allegations that could be made against an individual, and that scale would have to include all types of allegations of sexual impropriety such as rape, sexual assault and lewd or sexually provocative behaviour.

163. Whilst a notional hierarchy of such conduct might not meet with universal approval, since every allegation of sexual impropriety connotes a matter of inherent gravity, this type of imaginary scale serves to demonstrate that the allegation of sexually inappropriate conduct made concerning Mr Kinsella was far from the gravest type of allegation of sexual misconduct that might have been made, as is perhaps also apparent from cases such as Garfoot and Lillie. This is clearly an important factor when it comes to considering whether the damages awarded by the jury in this case should be considered proportionate.

164. When compared to the defamations which underpinned the awards of damages made or upheld by the Supreme Court in the cases to which I have already referred, and while once again acknowledging the difficulty in comparing the gravity of individual libels, I am nonetheless satisfied that on the facts of the present case the defamation in this case was nothing as grave as that perpetrated on the plaintiffs in any of those cases as is hopefully apparent from the following brief summary of the facts in *O'Brien, Leech* and *De Rossa* .

165. In *O'Brien*, the defendant newspaper had published an article in which it maintained that Mr. Denis O'Brien, who at the relevant time was one of Ireland's most prominent businessmen, had paid IR £30,000 to a Government Minister as a bribe with the objective of securing a licence for a radio station and that he had also secured a licence for Esat Digifone in circumstances which gave rise to a suspicion of bribery such that his conduct warranted investigation by a Government appointed tribunal. He was awarded €250,000 in the High Court and the newspaper appealed that award.

166. The Supreme Court took the view that even though the libel was undoubtedly serious and justified an award of substantial damages, it could not be regarded as coming within the category of the grossest and most serious type of libel which had come before the courts. It set aside the High Court award and sent the action back for rehearing on the issue of damages. As Dunne J. in her judgment in *McDonagh* noted, it was indeed ironic that on the retrial Mr. O'Brien was awarded the much greater sum of €750,000.

167. Whilst it is very difficult, for the reasons earlier stated in this judgment, to compare one defamation with another, it is hard to see how the libel in the present case could be treated as one which was anything close to as grave as stating of a prominent

businessman that he had bribed a government minister for the purposes of securing a highly lucrative contract.

168. Likewise, in *Leech* the defamation found by the jury was, on any reasonable assessment of the differing facts, significantly more serious to that complained of by Mr. Kinsella. Dunne J. at para. 138 of her judgment considered the gravity of the defamation by reference to the meanings ascribed by the jury to the words complained of. It was clear from their answers to the questions posed that they accepted the thrust of Ms. Leech's case to the effect that the article meant that:

> "(a) she, a married woman with two children, had an affair with the Minister;
>
> (b) that as a result of that affair, she got lucrative Government contracts;
>
> (c) that she was someone who was prepared to have an adulterous affair to advance her business career;
>
> (d) that she betrayed the trust of her husband and children."

169. When compared to the question posed to the jury in the present case, one cannot realistically suggest that the defamation in the present proceedings was as grave as that in *Leech*. It is nonetheless extremely important not to underestimate, first, the undoubted seriousness of a statement from which it was to be inferred that a successful businessman, husband and father had made inappropriate sexual advances to a female colleague and, second, the serious personal and professional repercussions that might be expected to flow as a result, apart altogether from the consequential hurt, distress and embarrassment. The defamation here was admittedly a serious one: it is just that it was not by any means as serious as that at issue in *Leech*.

170. Relevant also to my assessment of the proportionality and fairness of the award made in the present case is the fact that notwithstanding the gravity of the libel in *Leech* and *O'Brien*, neither was considered to be as serious as the libel in *de Rossa* which was described as coming within the category of the gravest and most serious libels which had ever come before the court.

171. In *de Rossa,* the jury found that the words complained of by the respondent meant that he had been involved in or tolerated serious crime and that he personally supported anti-Semitism and violent communist oppression. The following is what Hamilton C.J. stated concerning the publication of such words in relation to Mr. de Rossa:

> "To publish such words in relation to the plaintiff, a politician dependent on the support of his constituents and his colleagues and at a time when he was engaged in negotiations, as was well known to the defendant at the time of publication, which might lead to his participation in government, renders such publication more serious and grave, particularly when they might have interfered with his chances of participation in such government. The words published clearly affected the plaintiff's personal integrity and professional reputation."

172. Once again, looking at the gravity of the defamation in the instant case and comparing it with that in *de Rossa*, regardless of the very different facts of both cases, no reasonable person could consider the allegation made against Mr. Kinsella, namely that of having made inappropriate sexual advances to a female colleague, to be as serious or as damaging as a statement that a politician had, as a matter of course, tolerated serious crime, and supported anti-Semitism and violent communist oppression.

Effect on Plaintiff

173. To assess the effect of the libel on Mr. Kinsella, it is necessary to revisit some of the evidence which he and his daughter, Ciara, gave to the jury concerning this issue.

174. Mr. Kinsella told the jury that he was a married man with six children who had started his business career by running a hotel. Thereafter, he had become the owner of a successful jeans manufacturing business. Later still he had become the Chairman of a company known as Seafield Gentex which had two factories, one in Balbriggan and one in Trim, County Meath.

175. According to Mr. Kinsella, he had become involved in Kenmare Resources in 1986 and at the time he was defamed was Deputy Chairman of the company and Chairman of its Audit Committee. He also told the court that Kenmare was worth approximately £650,000,000Stg and that it had bought a mine in Mozambique in 2007, a purchase which involved an investment of hundreds of millions of euros.

176. Mr. Kinsella stated that when he read the Press Release initially he did not think it was that bad. Later, when he read it again, he felt it suggested he had done something salacious, sinister or improper. When his wife saw the Press Release in their home that evening, she said nothing and went upstairs. His son John, who worked at Kenmare at the time, threw the Press Release on the table in disgust saying "My Jesus, what were you doing. You don't get put down for doing nothing Dad." He arranged for his wife to go to Spain with his daughter, Ciara, lest the media jump on the story. Mr. Kinsella stated that at that stage he feared he might lose his relationship with his wife and children because of what he described as a "contaminant" or "virus" having come into their home.

177. Mr. Kinsella told the court that on the day following the Press Release he was upset because one of the newspapers had carried an article which contained a lot more information than he had given to Mr. McEneaney.

178. When asked about the effect of what had resulted from the Press Release on his life, Mr. Kinsella recalled a number of incidents, some of which were mundane, but often involved what he described as "catcalling, jibes and jokes". He described not wanting to go into the clubhouse at his golf club on the day after the Press Release as he was ashamed and embarrassed about what had been claimed in the newspaper that morning. Mr. Kinsella also described an occasion upon which somebody had texted him to say that they were going to a fancy dress party, but because the fancy dress shop was closed they had decided to go to the party as him. Concerning this incident, he said "I thought it was funny and it was said in good heart, that is the type of thing that was said". He then described an unpleasant incident that had occurred in 2009 when he was in Croke Park. According to Mr. Kinsella, a noisy businessman, whilst in the presence of a large gathering of people, had attacked him by stating "I don't know what the f-ing hell you were doing with that woman" with the result that he could not get away from him quickly enough. Mr. Kinsella also described how, shortly after his removal as Chairman of the Audit Committee, he had attended the Galway Races and when in the Winners' Enclosure, somebody had started singing the 'We Have No Pyjamas' song. "There was a lot of fun about that", he said.

179. Whilst it is always difficult from a transcript to assess the extent to which a witness was or was not upset or distressed when recalling events such as those last described, certainly the language used by Mr. Kinsella was not that of a man who felt himself grievously damaged or hurt by those episodes. However, he gave evidence to the effect that he was seriously upset at how he was treated on other occasions and he instanced some deeply offensive conduct to which he had been subjected. He mentioned the murmur which might start following his entry into a room. Mr. Kinsella described how, occasionally, somebody would have a "go at him"

if they did not like his opinion and might say something like "what would you know, sure you've got no pyjamas" or "what would you know, you're a molester". He also described having been rebuked as a pervert of sorts by a consultant who was working on a project with him and how he had been treated in a similar fashion when on one particular occasion he had questioned the accounts of his rugby club. Mr. Kinsella sought to explain how he felt he had lost the right to argue, disagree or give an opinion lest he be challenged by reference to the defamation and how, as of the date of the trial in November 2012, "this" was still part of his life.

180. The only other evidence relevant to the effect of the libel on Mr Kinsella was that of his daughter, Ms. Ciara Kinsella. In her evidence, she stated that her father was shaken by the Press Release as it had not indicated that he had been exonerated by Kenmare. She had not seen him on the day of the Press Release and confined her evidence to how he presented the following day. She told the jury that she thought her father looked old, small and upset.

181. What is clear from the evidence is that the Press Release and whatever was published in the newspapers the following day, a matter to which I will later return, caused Mr. Kinsella much upset and distress over the ensuing years. Nonetheless, it would seem that he was able to take in relatively good spirits the jibes and comments made by friends or acquaintances relating to what had been published as a result of the Press Release. It is certainly clear from his evidence that he felt capable of braving the golf club, the Galway Races, Croke Park, his rugby club, *etc.*, even if at times he was embarrassed or upset by conduct or comments arising from what had been published concerning the events that had taken place in Mozambique. That is not to say that Mr. Kinsella's feelings of upset in relation to what he considered was likely being said behind his back did not cause him significant hurt and embarrassment.

182. Relevant also to this particular issue is that Mr. Kinsella did not seek to contend that his relationship with his wife or children had been seriously or permanently adversely affected by the libel, other than in the relatively immediate aftermath of the Press Release when he felt that a virus of distrust had entered his home. His relationship with his wife of 40 years, it would appear, remained strong, as apparently did his relationship with his family. Material in this regard is Mr. Kinsella's letter to Mr. Carvill of the 9th July 2007, wherein he stated that his whole family had read the report of Mr. Norman Fitzgerald and were supporting the stance he was taking in the matter. Furthermore, they had, he insisted, unanimously resolved to defend what he described as "the family honour" in the face of Kenmare's allegedly despicable conduct. Certainly, Mr. Kinsella's eldest daughter gave no evidence to suggest that she thought any the less of her father as a result of what had been published in the Press Release. Indeed, she referred to the fact that the Press Release had been unfair to him as he had been exonerated by the independent investigation, evidence which suggests that from the outset he had her support and that she accepted he had done nothing of a sexually inappropriate nature. In this respect the effect on Mr. Kinsella of the libel was much less serious than the effect of the defamation in *Leech*, where what was published concerning Ms. Leech's alleged relationship with the government minister had caused enormous damage and distrust to the point that her marriage had been put at real risk.

183. Neither was it ever claimed by Mr. Kinsella that the libel in this case had any serious adverse effect on his business, income or career prospects. Again, the facts of this case are in stark contrast to those in *Leech*, where the libel was not only of much greater gravity, but was one which had had a devastating effect on a business which was in an embryonic stage at the time and which, as a result, never got off the ground. I think it is important here to record that it is to be inferred from the decision of Dunne J. in *Leech* that a significant figure was included in the general damages awarded in respect of financial loss. This is important when considering the parameters of an award that might be considered proportionate in a case such as this.

184. As already cautioned in many of the judgments to which I have earlier referred, it is indeed difficult to compare and contrast the effect of different defamations on individual plaintiffs. Nonetheless, what can safely be said is that the defamation in this case had, for Mr. Kinsella's personal and professional relationships, nothing like the very far-reaching implications that were visited upon Ms. Leech as a consequence of the defamation in her case.

185. Having considered all of the evidence in the present proceedings, I am quite satisfied that the effect of the Press Release and whatever followed in the newspapers the following day, whilst serious and regrettable, was fortunately nothing as far-reaching as it might have been.

Extent of publication

186. Regrettably, for the purposes of considering the extent to which the libel in these proceedings was published, it is probably necessary to refer briefly to (i) certain aspects of the pleadings, (ii) the evidence concerning republication and (iii) a number of rulings made by the trial judge.

187. In his Re-Amended Statement of Claim delivered on the 28th January 2010, Mr. Kinsella pleaded that the appellants well knew that the Press Release would, as a natural and probable consequence of their actions, be published by national newspapers and broadcasters. In particular, at para. 25B it was pleaded as follows:-

> "Subsequently, the said words as published by the Defendants were in fact republished by national newspapers and broadcasters with the effect that the Plaintiff's personal and professional reputation was further seriously injured as a result of this republication which was a direct consequence of the original publications made by the Defendants. The Defendants are liable for the damage caused to the Plaintiff by this republication, details of which can be adduced in evidence at the hearing of these proceedings."

188. In the course of his opening address to the jury, counsel on behalf of Mr. Kinsella sought to have handed in to the jury certain articles that had been published by the newspapers on the 11th July 2007. Following an objection on the part of the appellants, the trial judge ruled that the articles could not be handed to the jury at that time. It is also relevant to record that at no later stage in the proceedings did Mr. Kinsella seek to introduce the articles published on the 11th July 2007 as evidence in support of his claim.

189. Regardless of the fact that the newspaper articles published on the 11th July 2007 were not introduced as evidence in the proceedings, Mr. Kinsella told the jury that when he looked at one of the newspapers that day he was upset by its content and that it contained a lot more information than what was in the Press Release or what he had told journalists. Furthermore, Mr. Michael Carvill, when questioned regarding the extent of the publication, whilst denying that Kenmare was responsible for the story published by the newspapers, accepted that "things" had been published by three newspapers the following day, *i.e.*, the *Irish Independent*, *Irish Times* and the *Irish Examiner*, and that the "story" about Mr. Kinsella had gone all over the world.

190. At the end of the closing address to the jury by counsel for Mr. Kinsella, in the course of which he had emphasised the extensive publication of the libel by reason not only of the Press Release but because of what had later been published in the newspapers, counsel for the appellants requisitioned the trial judge to instruct the jury that there was no evidence of what had been carried by the newspapers the following day. It was submitted on behalf of the appellants that the only publication of which there had been evidence was publication of the Press Release to the business desks of four newspapers. Counsel submitted that in order that

damages could be claimed for any additional injury caused as a result of what had appeared in the newspapers, the burden of proof was on Mr. Kinsella to prove that the articles in the newspapers and the Press Release had the same sting and that he had failed to do so.

191. In response, counsel for Mr. Kinsella submitted that he had been precluded by the trial judge from bringing to the jury's attention the newspaper articles published the following day which, he maintained, bore the same sting as the Press Release. He submitted that the newspaper articles were the natural and probable consequence of the actions of the appellants in sending the Press Release to the business desks of the relevant newspapers with the result that they were liable for the additional upset and hurt caused by the republication. The appellants must have expected that the sting of the Press Release, namely that Mr. Kinsella had been guilty of making inappropriate sexual advances to a female colleague, would appear in the newspapers. According to counsel, the fact that the jury did not see the newspapers did not preclude Mr. Kinsella from making the case that as a consequence of the Press Release, the sting of that Press Release had gone out to the world via the readership of the newspapers. The readers had, according to counsel, received the story that the appellants had given to the newspapers. Furthermore, counsel maintained that Mr. Kinsella had proved that the sting of the Press Release, namely that he had acted in a sexually inappropriate way with a female colleague, was what had emerged from the articles published in the newspapers the following day. It did not matter that in giving their evidence, witnesses had referred to facts which had not been in the Press Release, such as the fact that he may not have been wearing pyjamas. The sting remained the same regardless of any additional information or change of wording, namely, that he had been guilty of sexual impropriety with a female colleague.

192. It is also perhaps relevant to note that, in the absence of the jury, counsel for the appellants accepted that the Press Release had been published in full in both the *Irish Independent* and the *Irish Times* on the 11th July 2007.

193. Ultimately, counsel for Mr. Kinsella advised the trial judge that, in his view, the difficulties that had emerged due to the fact that the newspaper articles were not proved in evidence would adequately be met if the jury could be told that the *Irish Independent* and the *Irish Times* had carried the Press Release in full the following day. In response, counsel for the appellants maintained that the problem with that approach was that the evidence given by Mr. Kinsella suggested that he had been held up to ridicule because of the additional information contained in the newspaper articles which information had not emanated from Kenmare. Furthermore, the plaintiff had not sought to prove that the sting of the Press Release was the same as the sting of the newspaper articles.

194. In the course of his ruling in relation to the appellants' requisition, the trial judge confirmed that he had not precluded the plaintiff from proving what had been published by the newspapers following the Press Release. He had only prohibited the plaintiff from handing the newspapers to the jury in the course of the opening. He indicated that he would tell the jury that whilst there was no absolute proof that the Press Release had been published by the newspapers, they were entitled to take the view, in light of the thrust of the evidence, that it had been so published. Accordingly, the trial judge went on to advise the jury that it was for them to decide, on the balance of probabilities, whether or not the statement contained in the Press Release had received widespread distribution by being published in the three newspapers or whether it had been confined to the business desks of the relevant newspapers.

195. From his ruling it is clear that the High Court judge was satisfied that there was sufficient evidence from which the jury might conclude that the Press Release had received widespread distribution by being published in the three newspapers referred to by Mr. Carvill in his evidence. I would also infer from his charge that he must have been satisfied that the evidence concerning the defamation, insofar as it focused on factual information not contained in the Press Release, such as the fact that Mr. Kinsella was not wearing pyjamas, was such that the jury might reasonably conclude that the sting of what was published in the newspapers was not inconsistent with the sting of the Press Release, although he gave the jury no guidance in this regard. The trial judge would appear to have found favour with the legal argument advanced on behalf of Mr. Kinsella that, having given the Press Release to the business desks of the newspapers, the appellants should not be permitted to hide behind the fact that additional information had been published by the newspapers for the purposes of seeking to avoid compensating Mr. Kinsella for the additional hurt and embarrassment he experienced by reason of what had been published by the newspapers. Thus he left it open to the jury to decide as a matter of probability whether the Press Release was likely republished in the articles that appeared the following day. It is, of course, important to remember that in circumstances where the jury did not get to see any of those articles, it could not have been influenced by any other more damaging or salacious material that they may have contained. All the jury was aware of was the content of the Press Release and what was said by Mr. Kinsella and Mr. Carvill concerning what was later published.

196. In my view, it is beyond doubt, having regard to the charge of the trial judge and the size of the award made, that the jury must have accepted that the content of the Press Release was likely published in the *Irish Independent*, *Irish Times* and *Irish Examiner* on the 11th July 2007. It follows that it was the extent of that publication that the jury was entitled to consider when making its award. It was nonetheless confined to assessing damages on the basis that what was republished was no more damaging than what was to be inferred from the Press Release itself. The jury was not, for example, entitled to award Mr. Kinsella damages on the assumption that the newspaper articles had included significantly more serious or salacious allegations of sexual misconduct or that the articles were given any particular prominence in the newspapers.

197. Relevant also to a consideration of whether or not the damages awarded to Mr. Kinsella were proportionate is the fact that the extent of the publication in this case was nothing remotely as intense as that which occurred in *Leech* where the plaintiff had been subjected to a repetitive daily assault to her reputation. Neither was there any evidence that Mr. Kinsella had been the victim of any salacious headlines or photographs destined to attract the attention of the reader. In this regard it is worth recalling what McKechnie J. stated concerning the nature and extent of the publication at para. 88 of his judgment in *Leech*:-

> "if such allegations had been confined to a single publication, then matters may not have been as confrontational for the plaintiff as they turned out to be. Unfortunately, however, no doubt by way of a strategic policy decision, deliberately and tactically executed, the defendant in a cold and calculating manner decided to attack the reputation of the plaintiff, and did so in a targeted and sequential way; all inevitably resulting in a crescendo which occurred when public scorn and contempt was at its highest."

198. All of that is not to seek to diminish or minimise the serious consequences for Mr. Kinsella of the fact that the sting of the Press Release found its way into articles published by three national newspapers on the 11th July 2007. As was clear from Mr. Kinsella's evidence, the sexual impropriety attributed to him by the Press Release as later republished had a significant adverse effect on his reputation and standing in his personal, social and professional life.

Conduct of the Defendant

199. In many libel actions a defendant will seek to defend a claim for defamation by relying upon a plea of justification. Where the trial proceeds on that basis, the plaintiff who succeeds in his or her action will probably have been caused much additional and

unnecessary hurt and upset by reason of that approach, apart altogether from the fact that they are also likely to have received further adverse publicity. In addition, their cross-examination will likely have been more gruelling and distressing than would have been the case had the action been defended on some alternative basis. However, the appellants did not take such an approach in the present case. They defended the proceedings on the basis that the Press Release was not capable of bearing the meanings which had been attributed to it by Mr. Kinsella and, in the alternative, on the basis that if the meanings alleged were established, the publication had taken place on an occasion of qualified privilege. It follows that the conduct of the appellants in the manner in which they defended the proceedings was not, in my view, particularly relevant to the assessment of damages to be made by the jury. By way of contrast, in *Leech* the newspaper defended the proceedings on the basis of a plea of justification and fair comment and an apology was only provided following the award of the jury in the sum of €1.872 million. Relevant also to the defendant's conduct when it came to the assessment of damages in that case was the fact that the newspaper had cropped and manipulated certain photographs to lend force to the implication that Ms. Leech had been awarded government contracts by virtue of the fact that she was having an affair with a Government Minister.

200. In relation to the conduct of the appellants, I accept the submission made on behalf of Mr. Kinsella that the jury was entitled to take into account its finding to the effect that they had intended to embarrass Mr. Kinsella by sending the Press Release to the newspapers. However, that is not a factor which in my view should have warranted any significant augmentation of the damages which might otherwise have been awarded. I say this because that conduct did not lead to any additional damage to Mr. Kinsella's reputation as would have been the case had the appellants sought to defend the proceedings based upon a plea of justification. As already stated, the purpose of damages in defamation proceedings, leaving aside aggravated and/or exemplary damages, is to compensate for the injury sustained and vindicate a person's reputation. To this extent, whether the appellants did or did not intend to cause Mr. Kinsella damage by publishing the Press Release did not impact upon the injury sustained or further damage his reputation.

Conduct of the plaintiff

The relevance of Mr. Kinsella's involvement in allegedly precipitating publication of the Press Release to the media.
201. The heading to that section of Kenmare's written submissions which commences at para. 115 reads as follows: –

> "The plaintiff's own admitted role in precipitating the press release was such that he ought not have been entitled to any damages".

202. This, as far as I am aware, is the only time that Kenmare ever asserted that Mr. Kinsella's conduct predating the press release could, as a matter of law, disentitle him to an award of damages in the event of the jury finding that he had been defamed. Whilst in the course of his address to the jury, senior counsel for Kenmare placed great emphasis on Mr. Kinsella's conduct over the week which preceded the publication, highlighting the threats conveyed to Kenmare in correspondence and his use of Mr. Kierans to intimidate Ms. Corcoran so that she might withdraw her insistence that he resign as Chairman of the Audit Committee, at no stage did he suggest to the jury that such conduct would warrant it making no award of damages if it found the press release to be defamatory. Neither did Kenmare requisition the trial judge to advise the jury that such was its entitlement. Furthermore, no legal authority has been provided to support Kenmare's assertion that Mr. Kinsella be entitled to a nil award of damages by reason of his conduct and neither is such a claim the subject matter of any of the multitudinous grounds of appeal in its Notice of Appeal. Accordingly, I do not propose to consider this submission further.

203. A somewhat different argument was made by Kenmare at para. 115 of its written submissions. There it was contended that:-

> "the jury's award of damages (both compensatory and aggravated) totally failed to have any regard to the Plaintiff's own role in precipitating the sequence of events which led to the defamation of which he complains."

It was argued on behalf of Kenmare that Mr. Kinsella had incited, provoked and precipitated the Press Release with the result that if he was entitled to any damages the award should have been "contemptuous" in nature.

204. On behalf of Mr. Kinsella it was argued that there was ample evidence to justify the jury's rejection of Kenmare's submission. In cross-examination Mr. Kinsella had stated that he did not want publicity and that he had called Mr. Kierans, who was a personal friend, and had requested him to contact Ms. Corcoran with the aim of keeping matters out of the public domain. Counsel for Mr. Kinsella further relied upon the fact that the "central thesis" of the closing speech of counsel for Kenmare was that Mr. Kinsella had been involved in a "dishonest scheme of orchestrating Mr. Kierans' involvement" and that he had been the author of his own misfortune. However, it was clear from the award made by the jury that they had rejected these submissions and had found favour with Mr. Kinsella's evidence.

205. As was noted by O'Donnell J. in *McDonagh*:-

> "A jury's decision is necessarily opaque. The decision is delivered, and not the reasons for it. It cannot be interrogated for justifications, and may indeed be arrived at by a process of compromise".

Whilst that is undoubtedly an important observation in the context of jury actions in general, the degree of opacity of any particular decision made by a jury will depend upon the circumstances or issue under consideration in any individual case. It is true that in the present case this Court has nothing from the jury to explain the factors or evidence which it took into account when it assessed the damages to which it considered Mr. Kinsella entitled. Nonetheless, it would be perverse, from the unprecedented size of the award, to draw any inference other than that the jury rejected in no uncertain terms the submission advanced on behalf of Kenmare that Mr. Kinsella had been the author of his own misfortune in inciting, provoking or otherwise precipitating the press release. There is no opacity at play here. The only question that needs to be answered is whether there was credible evidence upon which the jury was entitled to so conclude.

Burden of proof in overturning the findings of a jury on a question of fact
206. In *McEntee v Quinnsworth Ltd.* (Unreported, Supreme Court, 7th December 1993) Finlay C.J. stated at pp. 20-21 of the judgment: -

> "Having regard to the principles enunciated in the cases of Dunne (an infant) v. The National Maternity Hospital and *Hay and O'Grady*, it seems quite clear to me that once a jury were satisfied of the honesty and integrity as witnesses of the two Plaintiffs in this case they were well entitled on their evidence to accept that they had not been guilty of theft. In so doing the fact that they were rejecting the evidence of Mr. Kelly, the store security man and of the other security man who though submitted as an independent witness was in fact under contract to the Defendants and in instances other

than the direct evidence concerning theft possibly preferring the evidence of the Plaintiffs to some of the evidence of the members of the Garda Síochána who were later called to the scene does not in any way invalidate their verdict."

207. The judgment continued:

> "This principle that the appellate court should not overturn a decision on fact made either by a judge sitting without a jury or by a jury who have seen and heard the witnesses is no mere procedural limitation on our appellate function. It is fundamental and the precise issues with regard to which it is raised in this case illuminate its importance as a fundamental principle of justice. If the submission made by the Defendants on this part of their appeal were to be accepted by this court then in effect what this court would have done would have been in the case of two persons in respect of whom a jury were satisfied that it had not been proved they were guilty of theft to condemn them as thieves with all the consequential damage to their reputation never having heard or seen either of them giving evidence."

208. Finlay C.J., in considering a submission that the verdict of the jury was perverse, having cited *Dunne (an infant) v. The National Maternity Hospital* [1989] I.R. at p. 108 with approval, proceeded to state:-

> "Insofar as the judgments of the former Supreme Court in *McGreene v. Hibernian Taxi Company* [1931] I.R. 319 can be interpreted as meaning that in Ireland the appellate jurisdiction of the Supreme Court from the High Court includes a jurisdiction to set aside a jury's finding of fact on the grounds that it was against a predominant weight of evidence even though it could not be said to be a finding which a reasonable jury could not make, I must decline to follow it. The sole test in my view is whether in accordance with the principles I have outlined the learned trial judge was correct in law in leaving the challenged issue of fact to the jury."

209. Perhaps the most often cited authority on this issue is the judgment of McCarthy J. in *Hay v. O'Grady* [1992] I.L.R.M. 689, where at p. 694 he stated as follows:-

> "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."

210. In the present case, regardless of the view that any member of this Court might have concerning Mr. Kinsella's reprehensible conduct in engaging Mr. Kierans with a view to intimidating or embarrassing Ms. Corcoran into withdrawing her demand that he stand down as Chairman of the Audit Committee, there was ample evidence upon which the jury was entitled to rely in order to reject the submissions advanced on behalf of Kenmare that he had incited, provoked or precipitated the Press Release.

211. The jury had Mr. Kinsella's own evidence that he had contacted Mr. Kierans in the hope and expectation of being able to keep the Mozambique incident out of the public arena. It was open to the jury, as arbiters of fact, having been afforded the opportunity to observe his demeanour, to satisfy themselves as to his honesty and integrity and to draw their own conclusions as to his likely state of mind when he approached Mr. Kierans.

212. There was other evidence too that, notwithstanding his exoneration by the independent inquiry, Kenmare was more than willing to avail of the incident as a mechanism to facilitate an ulterior objective on its part to undermine Mr. Kinsella's position within the company or otherwise secure his expedited exit from the company. In particular, the evidence of Mr. Finbar Cahill, which *inter alia* questioned the *bona fides* of Kenmare and his clearly expressed perception of a lack of meaningful or constructive engagement in his attempts to amicably resolve matters between the parties, was available to the jury and appeared in many material respects to be supportive of contentions advance by Mr. Kinsella both in his direct evidence and in cross-examination. Furthermore, the fact that the jury found that Kenmare had published the Press Release with the intention of embarrassing Mr. Kinsella also serves to demonstrate that the jury did not favour the evidence or submissions of Kenmare that Mr. Kinsella's conduct had provoked or precipitated the press release. These are but indicative examples of the extensive evidence which the jury had before it to weigh in the balance in arriving at its determination on the crucial factual disputes.

213. Accordingly, I am entirely satisfied that the issue as to whether Mr. Kinsella was the author of his own misfortune, as was contended for by Kenmare at the trial and in its closing address to the jury, was a question of fact which fell exclusively within the domain of the jury for its determination. The necessary inference from the size of the award of damages made is that the jury rejected that proposition and in my view there was credible evidence to support that conclusion. Accordingly, Mr. Kinsella's conduct was not a factor which had to the reflected in the award of damages made.

Discussion and decision as to whether the award of €9m by way of compensatory damages should be set aside

214. Having regard to the guidance provided by the Supreme Court in the authorities earlier referred to as to how an appellate court should assess whether or not an award of damages made by a jury in defamation proceedings should be considered proportionate to the injury sustained, I am fully satisfied that the award of €9m in respect of compensatory damages awarded in this case must be set aside.

215. First, the award made in favour of Mr. Kinsella is approximately seven times greater than any previous award of damages made or upheld by the Supreme Court in a defamation action, with *Leech* being the highest at €1.25m. As already stated on many earlier occasions in this judgment, no reasonable jury or court could consider the defamation in this case to be more serious than that in *Leech*, not to mention more serious to the point that Mr. Kinsella could reasonably have been awarded a multiple of the damages awarded in *Leech*, which included a significant sum for financial loss. Consequently, the award must be considered disproportionate to the injury sustained and for that reason alone should be set aside.

216. Second, the award of €9m represents approximately fifteen times more than might be awarded to a child born with a condition such as cerebral palsy as a result of negligence at the time of their birth, or to a young person rendered quadriplegic as a result of some other type of tortious behaviour. I would here observe that those most badly affected by cerebral palsy invariably suffer from spasticity and are wheelchair bound for life apart from the fact that they need to be fed, toileted and hoisted from one piece of equipment to another on a daily basis. Many are destined to experience significant ongoing pain and most require ongoing medication and medical intervention just to survive.

217. Most plaintiffs who suffer the severest of injuries, such as those to whom I have just referred as well as those who are rendered paraplegic or quadriplegic, will be denied, amongst so many other things which people unaffected by significant injury take for granted, their dignity, the right to work and the joys of intimacy, marriage and children. Most who have preserved brain function live fearful of what may happen to them when their parents or loved ones die and/or the money awarded to them by way of compensation

runs out.

218. The fact that these gravely injured plaintiffs often obtain additional large awards in respect of the cost of future care, housing or other heads of financial loss is, in my view, irrelevant to the value of using awards of general damages in catastrophic injury cases as a helpful comparator when considering, amongst the other factors already mentioned, whether the damages awarded to a plaintiff by a jury in a defamation action were proportionate. Those additional sums are awarded on the basis that they will be invested and drawn down on an annual basis to meet the plaintiff's ongoing care, medical expenses and other needs and in all brain damage cases remain under the control of the Offices of the Wards of Court. They are not monies available to be used by the plaintiff in the same way as they might enjoy sums awarded as general damages for pain and suffering.

219. I recognise that the purpose of an award of general damages in a personal injury action is different from that of an award of damages in a defamation action, particularly by reason of the fact that the latter type of award is one which must not only compensate the plaintiff for the injury caused but must also vindicate their good name. Nonetheless, as I have earlier stated, and particularly where the appellate court is charged with safeguarding against disproportionately large awards, as was urged by the ECtHR in *Independent Newspapers (Ireland) Ltd v. Ireland*, I am satisfied that the awards of general damages made in the most severe personal injuries cases provide a good moral compass to guide a jury or an appellate court towards the making of a proportionate and fair award in a defamation claim. Taking guidance from that moral compass, and without any intended disrespect to Mr. Kinsella for the hurt and upset which he undoubtedly suffered as a result of the appellant's wrongful conduct, the award in the present case was, in my view, perverse and divorced from reality. I am entirely satisfied that no jury could reasonably have come to the conclusion that an award of the magnitude of €9m was necessary to compensate Mr. Kinsella for his hurt and upset and to re-establish his reputation.

220. I ask myself how I might explain to a young person rendered quadriplegic as a result of the negligence of a third party, and who as a result had received an award of general damages of €500,000 to compensate them for the lifetime of pain, suffering and loss that they would endure, that Mr. Kinsella, a man who had lived a full and happy life until he was 64 years of age, could justly and fairly receive a sum of €9m as compensation for the hurt and upset he experienced as a result of the fact that it was widely published about him that he had made an inappropriate sexual advance to a female colleague and in order that he might vindicate his good name. Apprised of Mr. Kinsella's personal circumstances, they would, I am sure, reflect upon the fact that notwithstanding what was published about him, he continued to enjoy a happy marriage, the support of his children, friends and colleagues, was able to participate in all of his much-valued sporting and leisure activities and, with the exception of the occasional upsetting incident, continued to enjoy the very full and rewarding life that he had lived prior to that publication.

221. Third, without seeking to diminish the seriousness of the defamation in the present case, the allegation made against Mr Kinsella, when considered on a spectrum of potential allegations concerning sexual conduct, was not remotely close to the top of the scale of inappropriate sexual allegations that could have been made, as is clearly demonstrated when contrasted with the wholly false allegation of rape made in the *Garfoot* case. It follows as a matter of logic that if the award of €9m awarded in the present case were to stand, in order for awards to be proportionate inter se, a person wrongly accused of rape would likely have to receive an award in excess of €20m or thereabouts. The logical consequence of finding that the award of €9m was proportionate would be that awards in excess of €10m might become an unexceptional feature of defamation proceedings in this country, at least in cases of serious defamation. Apart from the fact that such awards would likely have a chilling effect on freedom of expression, particularly insofar as the news media is concerned, I am satisfied that such awards would also be offensive to public opinion particularly, as O'Donnell J. observed in *McDonagh*, if one considers awards of that magnitude in the context of what ordinary members of society can expect to earn over a lifetime or what might be purchased with a sum of that size.

222. Fourth, the gravity of the libel and the effect it had on Mr. Kinsella was of a significantly lesser magnitude than in *Leech*, *de Rossa* and *O'Brien*. Accordingly, having regard to the fact that the award made to Mr. Kinsella was several multiples greater than any of the awards made in the aforementioned cases, regardless of the sanctity of the role of the jury in defamation proceedings, the award must be set aside as disproportionate to the injury sustained and his entitlement to have his good name vindicated. It is to state the obvious that whilst Ms. Leech, like Mr. Kinsella, was relatively unknown at the time she was libelled, by the end of the two-week period during which the newspaper had published eleven articles in which she was defamed, she had become "notorious". The extent of that notoriety is evidenced by the fact that she had become the subject matter of questions raised in the Dáil. So, whilst the libel perpetrated against Mr. Kinsella undoubtedly caused him ongoing upset and distress the effect that it had on his reputation was nothing close to that which was visited upon Ms. Leech.

223. Fifth, whilst the jury clearly accepted that newspaper articles containing a similar sting to that of the Press Release had been published to readers of Irish newspapers all over the world, Mr. Kinsella was not a well-known public figure. In this respect the extent of the publication was far less damaging than would have been the case in *O'Brien* and *de Rossa* where the plaintiffs were both well-known internationally. For this reason, it is also difficult to see how a jury or this Court could conclude that Mr. Kinsella experienced much by way of additional injury or hurt by reason of the fact that the relevant articles may have been published all over the world. If he was not known by sight or by name to those who read the newspaper articles overseas, it is difficult to understand how he suffered much by way of additional injury due to that aspect of the publication or how he was or might in the future be subjected to any ridicule or contempt by those readers.

224. Sixth, awards of damages in defamation proceedings must be fair to the parties and in this respect it is to be remembered that the second named appellant in the within proceedings is a natural person and is jointly and severally liable for the award made in this claim. As was stated by O'Flaherty J. in *Dawson v. Irish Brokers Association* (Unreported, Supreme Court, 27th February 1997), "[t]he defendants in defamation cases should never be regarded as the custodians of bottomless wells which are incapable of ever running dry". An award of €9m would appear to fall foul of this guidance. It was an award of a magnitude which on any run of the evidence was wholly unfair to the defendants and one which provided Mr. Kinsella with an unjustifiable windfall.

225. Finally, it is clear from the judgment of the ECtHR in *Independent Newspapers (Ireland) Ltd) v. Ireland* that the appellate court has a role in safeguarding against disproportionately large awards of damages in defamation actions and that it is obliged to scrutinise carefully awards which appear "unpredictably high". The award made by the jury in this case clearly falls into that category. For completeness I would here note that the ECtHR considered that the award of €1.25m made by the Supreme Court in Leech constituted a restriction on the newspaper's right to freedom of expression as protected under Article 10 of the Convention, the extremely grave nature of the libel and the reprehensible conduct of the newspaper notwithstanding. However, the fact that these proceedings are not brought against a newspaper, does not, in my view, weaken the importance of the guidance provided by the ECtHR. It is to be remembered that most libel actions which are not brought against newspapers are brought against individuals or corporate entities who will not be insured in respect of any award of damages made in such proceedings and disproportionately large awards may have catastrophic consequences for those defendants. Having regard to all of the aforementioned factors the award of €9m by way of compensatory damages clearly must be set aside on the basis that no reasonable jury could have considered an award

of that magnitude necessary to compensate Mr. Kinsella for the injury which he sustained and in order that he might re-establish his reputation.

226. I pause here momentarily to say that I regret having to describe the jury in this case, or indeed the jury in any other defamation case, as "unreasonable" and their decision "perverse". This is because the jury, like all juries in defamation proceedings which predate the 2009 Act, was asked to assess damages with little or no guidance as to how it should carry out that task. Jury members are not lawyers. They know nothing of the law of damages or the levels of awards that have been approved of by appellate courts in other defamation actions. Their unpreparedness for the task of assessing damages is to be contrasted with the knowledgeable preparedness of the members of the appellate court who will later sit to adjudicate on the reasonableness of their decision. When doing so the members of the court will, of course, call upon their own legal training and their familiarity with the law of damages. More importantly they will get to make their decision guided by the knowledge of all past awards of damages earlier approved of in defamation proceedings, as well as the prevailing level of damages in personal injury actions. Further, judgments made in a collegiate setting naturally benefit greatly from the pooled knowledge and expertise of the individual members of the court. Much harder is the role of the jury who, although charged with achieving the same end, namely the making of a fair and just award of damages, are expected to do so absent legal training or any of the tools made available to the professionals. So whilst the award of the jury in this case must be considered "unreasonable" and "perverse", I use those words in a technical sense because it is those words that are used in the relevant case law. They are not intended to reflect any moral judgment on the members of the jury.

Discussion and decision as to whether the award of €1m in respect of aggravated damages should be set aside

227. In his closing address to the jury, counsel for Mr. Kinsella asked the jury to consider making an award of aggravated damages to his client. He did so based upon the manner in which Mr. Kinsella had been challenged concerning one particular aspect of his evidence.

228. Mr. Kinsella's evidence was that on the day after the night upon which he had been found sleepwalking by Mr. Carvill, he had travelled in a jeep with Ms. Corcoran as far as the gate of the premises where they had been staying. According to Mr. Kinsella, in the course of that short drive Ms. Corcoran had stated "Donal Kinsella, you are a very lucky man. If I did not wait for you, you would have been left behind by your friends". According to Mr. Kinsella, Ms. Corcoran had been both "courteous" and "nice" and from their engagement he was absolutely satisfied that she could not have been upset or offended by anything that had occurred the previous night.

229. In the course of cross-examination, it was put to Mr. Kinsella by counsel on behalf of the appellants that no such conversation had taken place in the jeep, that Mr. Kinsella's evidence in this regard was "a complete fabrication" and that Ms. Corcoran would give evidence that the conversation described by Mr. Kinsella had never taken place.

230. It is undoubtedly the case that Mr. Kinsella was annoyed and upset by the suggestion that his evidence in relation to the aforementioned conversation was a fabrication, as is clear from the following exchange: –

> "Q. I have to suggest to you that this is a complete fabrication, Mr. Kinsella.
>
> A. Well, then you are suggesting wrong. I can't let you away with that, Mr. Shipsey. You are not to say that's a fabrication. That's not a lie. That is the absolute truth."

231. It is common case that Ms. Corcoran was not called as a witness, as had been promised, with the result that no evidence was advanced to challenge that which had been given by Mr. Kinsella concerning the conversation.

232. When the trial judge came to charge the jury he referred to the manner in which Mr. Kinsella's evidence concerning his conversation with Ms. Corcoran had been challenged. He also referred to the fact that the appellants had not, as they had promised to do, called any evidence to back up the challenge made to Mr. Kinsella that his evidence was a fabrication. The trial judge told the jury that if they considered it appropriate to "top up" the general damages they could do so in order to express their disapproval of what he described as "the aggravated insult to Mr. Kinsella". Regarding the level of those damages, the High Court judge told the jury that they should be less than the amount awarded in respect of the defamation itself.

233. Regrettably, it is a feature of an adversarial system of litigation that counsel for one party will invariably be given instructions to challenge the evidence given by the other party as to the truth of their evidence. In almost every case each party will maintain that some aspect of their opponent's evidence is untrue. The plaintiff will say that "A" happened and the defendant will say that "B" happened. In order for the defendant to contend that "B" happened it must be put to the plaintiff's witnesses that their evidence to the effect that "A" happened was untrue. After all, there would likely be no litigation if the parties were agreed as to the relevant facts and circumstances. Accordingly, it might be said that in every case where counsel challenges the truth or accuracy of a witness's evidence-in-chief they could be stated to be accusing that witness of committing perjury or a criminal offence. It is upon this type of questioning, albeit accompanied by the use of strong language, that Mr. Kinsella relies to support his entitlement to an award of aggravated damages and to stand over the size of that award.

234. It is true that what happened in the present case was perhaps somewhat more serious than the process described in the last preceding paragraph insofar as, having challenged Mr. Kinsella's evidence as a fabrication, the appellants did not, as they maintained they would, call Ms. Corcoran to counter his evidence. While that is indeed regrettable and should not have occurred, in my experience that type of conduct on the part of a litigant and/or their counsel has never been treated as sufficiently high-handed or malevolent to warrant an additional award of aggravated damages. In the vast majority of cases when counsel challenges the evidence of a witness by stating that their evidence will be contradicted by some other named witness, counsel has every intention of calling that witness to give evidence. However, very occasionally, and usually for reasons that were not to be anticipated when the challenge was made, it becomes clear that there is no longer any good reason why the named witness should be called. While the failure to call the witness promised by counsel on cross-examination may result in a reprimand from the trial judge, if complained of by the opposing party, I know of no case in which such an approach has, *of itself*, ever led to an award of aggravated damages.

235. In my view, the questioning of Mr. Kinsella regarding the aforementioned conversation and the failure of the appellants to call Ms. Corcoran to challenge his evidence provided no reasonable basis for an award of aggravated damages and the trial judge should have directed the jury to that effect. The situation might have been different had the questioning upon which Mr. Kinsella relied as objectionable been part of an overly prolonged or hostile cross-examination.

236. In coming to my conclusion in relation to the award made in respect of aggravated damages, I also have to the forefront of my mind the fact that the purpose of an award of aggravated damages is to compensate a plaintiff for some additional injury perpetrated beyond the libel the subject matter of the proceedings. In this context, whilst Mr. Kinsella was clearly upset about the fact that he

had been accused of fabricating the conversation between himself and Ms. Corcoran, the additional upset caused by that challenge could not have inflicted upon him an injury of the type or magnitude that would have warranted the award of an additional sum by way of aggravated damages. There are few witnesses who leave a witness box unchallenged as to the truth of their evidence or who do not feel somewhat bruised and upset as a result of the oftentimes hard-hitting consequences of an adversarial system of litigation.

237. Furthermore, even if there was a legal basis upon which an award of aggravated damages might have been made, the award would in any event have to be set aside because the sum awarded was disproportionate to the extent that it must be considered perverse and irrational. No reasonable jury could have concluded that an award of that magnitude was necessary to compensate Mr. Kinsella for any additional upset caused by the questioning earlier described. I would observe that the award of aggravated damages was almost as large as the highest ever award made in this State for defamation, *i.e.*, the award made in Leech which, as already stated, was considered excessive by the ECtHR notwithstanding the gravity of the defamation and its ensuing consequences for Ms. Leech in terms of injury, loss and damage.

Remedy

238. It is not in dispute that, pursuant to the provisions of s. 96 of the Courts of Justice Act 1924 (as amended by s. 48 of the Courts (Supplemental Provisions) Act 1961), this Court, in lieu of ordering a new trial or sending the proceedings back for an assessment of damages, could substitute its own award of damages for that made by the jury. This jurisdiction was affirmed in *Holohan v. Donohoe* [1986] I.R. 45. Furthermore, the Court enjoys a similar jurisdiction at common law as is clear from decisions such as that of the English Court of Appeal in *Skeate v. Slaters Ltd.* [1914] 2 K.B. 429.

239. Nonetheless, there is good reason for an appellate court to be slow to usurp the role of a jury in assessing damages for defamation. In his judgment in *Barrett v. Independent Newspapers Ltd.* [1986] I.R. 13, Finlay C.J. stated at p. 19 that, although the assessment by a jury of damages was not sacrosanct, it certainly carried "a very unusual and emphatic sanctity". As was observed by McKechnie J. in his dissenting judgment in *Leech*, the jury trial has been retained for defamation actions initiated in the High Court, whereas it has been abolished for many other forms of civil action, and this retention "must be considered deliberate and necessarily of value". He maintained that in defamation proceedings, where a primary concern is the hurt and humiliation experienced by a plaintiff, the role of the jury in applying community standards to these experiences ought to be preserved, especially in circumstances where an appellate court was poorly placed to do same due to its inability to directly assess and evaluate the evidence of witnesses. For these reasons, it could be said that there should be strong and compelling reasons as to why an appellate court would substitute its own award.

240. In his judgment in *McDonagh*, O'Donnell J. described the discretion of an appellate court to either substitute its own award of damages or send the matter back for a retrial as a choice "between alternatives, neither of which is attractive". In relation to the latter option he observed that:-

> "[A] re-trial is not like the re-running of a science experiment with one variable element excluded. In such a situation all the elements present in the previous experiment can be introduced in precisely the same way, and none of them have, by definition any memory of the previous experiment. The same cannot be said of litigation. Some witnesses may not be available, others may become available, and those who were present in both cases will not be able to, and in most re-trials will not be permitted to, forget what occurred and was said in the previous trial. The events the subject matter of these proceedings occurred nearly twenty years ago. Inevitably the memories of all the witnesses will be poorer. There are also other problems which have no easy answer. What if anything is a jury to be told about the previous trial? This is a case which has attracted a high degree of publicity and commentary, and reference to a previous trial might well trigger memories of the award in this case, or prompt research on the part of the jury… Put at its lowest, no one can suggest that a trial of twenty years remove from the events described and the publication complained of is a very satisfactory option."

241. In that case, given the time which had elapsed and the costs which had accrued, O'Donnell J. concluded that the prospect of a re-trial, with the possibility of further appeals, was a "less satisfactory and less just solution".

242. In her judgment in the same case Dunne J. reached a similar conclusion. Although conceding that the task of assessing damages in a defamation action at appellate level was a difficult one which should be undertaken "only in exceptional cases", she too drew attention to the further expense and delay inherent in a re-trial, concluding that it was "undoubtedly in the interests of justice for the parties at this stage to bring an end to this lengthy litigation."

243. Dunne J. had, in the earlier case of *Leech*, adopted the same approach of substituting an award of damages, again in reliance on the time elapsed since the material events, which in that case had been 10 years. There can be no doubt that similar concerns present themselves in the instant case, in which over 11 years have passed since the events in Mozambique and the ensuing press release. I am inclined to agree with the comment of O'Donnell J. in *McDonagh* that there is a "strong incentive towards bringing finality to litigation", as well that of Fennelly J. in *Ryanair v Aer Rianta* [2003] 4 I.R. 264, which was quoted with approval by O'Donnell J.:-

> "The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the object of expedition and economy".

244. Finally, it is perhaps the case that the rather unusual events subsequent to the decision of the Supreme Court in *O'Brien* should give cause for caution where the ordering of a re-trial is concerned, particularly as the hearing will not benefit from the increased guidance to jurors that is now available by reason of the provisions of the 2009 Act. As already observed, in that case, the Supreme Court ordered that a jury award of €250,000 be set aside as excessive having regard to the injury suffered by the plaintiff. However, upon a re-trial on the issue of damages, the jury decided to favour Mr. O'Brien with an award of €750,000, an occurrence that hardly speaks well of the legal process governing defamation proceedings prior to 2009. There is, of course, also the possibility that Mr. Kinsella may be dissatisfied by any award of damages made by a new jury and may wish to appeal that award.

245. What can safely be stated is that it is far from probable that both parties will consider whatever award may be made by a new jury to be proportionate having regard to the circumstances, with the result that yet further legal costs and delay will follow.

246. As matters stand, almost twelve years have now elapsed since the events the subject matter of these proceedings. If the proceedings are remitted to the High Court, that will probably add a further six months to the life of the proceedings, even if they are remitted for an assessment of damages only. If there was to be an appeal that could stimulate a further delay of somewhere between two and three years. In other words, the likely consequence of remitting the proceedings to the High Court would mean that the action might not conclude until 2022, a scenario which it is hard to justify regardless of what is described as the sanctity of the award of a jury in defamation actions. In such circumstances both parties would be exposed to differing risks depending on the

approach taken by the parties to those proceedings and the orders ultimately made.

247. For the above reasons, which I consider to be strong and compelling, I would favour the approach adopted in *Leech*, where the court substituted its own figure for that which had been awarded by the jury. For completeness I would also observe that it appears that a similar course of action would have been preferred by a majority of the Supreme Court in *McDonagh*, had it not been for the fact that the appeal settled just before the court's decision was actually delivered.

Reassessment of damages

248. As was stated by the ECtHR in *Independent Newspapers*, it is vital for an appellate court, where it chooses to reassess the damages to which a plaintiff is entitled as a result of defamation, to provide a clear explanation for the award made. I regret that in meeting this requirement I will now have to repeat some aspects of the evidence to which I have already referred.

249. I am also mindful of the concern expressed in the aforementioned judgment that in assessing the damages to which I consider Mr. Kinsella is entitled, I should not be influenced by the magnitude of the award made by the jury at first instance. However, I believe I must have regard to the size of the award for one purpose only, namely to guide me as to the likely findings of fact made by the jury. I am satisfied that one must approach my assessment on the basis that it is to be inferred from the enormity of the award that the jury likely accepted in full the sincerity of Mr. Kinsella's evidence, the extent of his embarrassment and upset as a result of the libel, and that they also preferred his account of the disputed facts.

250. In reaching the conclusions which follow I have kept to the forefront of my mind the fact that the award must be sufficiently large to compensate Mr. Kinsella both for the injury and upset that flowed from the defamation and to vindicate the damage occasioned to his reputation.

251. Concerning the injury, i.e., the hurt and upset caused to Mr. Kinsella as a result of the defamation, it is clear from the evidence that he suffered much by way of upset and embarrassment, certainly in the short term. He described how the publication affected his relationship with his family, friends and work colleagues.

252. It would appear from Mr. Kinsella's evidence that he coped relatively well with the jibes and jokes of friends and colleagues concerning what had been published about him. However, he was clearly upset about what he considered was likely being said about him behind his back, or by those people who, when he entered a room, he thought to be murmuring about him in an unsavoury way. Mr. Kinsella also recalled a number of unpleasant incidents when, by reason of the defamation, he had been "called out", so to speak, as somebody who had been guilty of sexual impropriety with the result that he felt reluctant to express his opinion for fear of this type of wounding behaviour.

253. Mr. Kinsella also told the court of how, in the aftermath of the Press Release he felt that a virus of distrust had entered his home. He felt it necessary to send his wife and daughter away for a short holiday so that they could be protected from what might be said in the newspapers. His son had reacted angrily and with distrust to the Press Release albeit that his daughter, Ciara, was obviously convinced from the outset that he had done nothing wrong. Thankfully, there was no evidence to suggest that there was anything other than very short-term adverse consequences for his relationship with his wife.

254. In terms of the damage to Mr. Kinsella's reputation, it is undoubtedly the case that to publish of a man that he made inappropriate sexual advances to a woman is very damaging indeed, even if it be the case that in terms of all of the possible allegations of sexual misconduct that might be made, it is not by any means the most serious one. It is nonetheless the type of allegation that is not easily forgotten and has the potential to lead to professional and social ostracization, not that there was any evidence of that having occurred in this case. However, only knowledge of the fact that Mr. Kinsella had received a relatively substantial award of damages would likely convince a member of the public aware of the defamation that what had been said about him was without any foundation. Relevant also is the fact that the publication in the instant case was extensive, even if, for the reasons earlier outlined, I think it is highly unlikely that the damage to Mr. Kinsella's reputation was significantly increased because of what was published concerning the Press Release in other countries.

255. In coming to my view as to what I consider to be a just and fair award I have also factored into my consideration the awards made or upheld by the Supreme Court and this Court in recent defamation proceedings. In addition to the Supreme Court decisions in cases such as *Barrett*, *de Rossa*, *Leech* and *McDonagh*, it might be noted that in *Speedie v. Sunday Newspapers Ltd.* [2017] IECA 15 this Court rejected the argument that an award of €85,000 was inadequate to compensate the plaintiff in respect of a defamatory article which had alleged that he assorted with known criminals.

256. In *Christie v. TV3 Television Networks Ltd.* [2017] IECA 128, the defamation consisted of a short nine-second clip of television footage which mistakenly showed the solicitor for the defendant in a serious criminal trial rather than (as had been intended) the accused himself. In the High Court, the trial judge (who for this purpose sat without a jury) assessed the starting point of damages as €200,000. Hogan J. held that this starting figure was too high, saying:

> "…None of this is to say that it was not a serious defamation, because it was. As I have already observed, the potential for confusion, distress and embarrassment was considerable and should not be minimised. It is rather to say that it was not a defamation of such a character as would merit a starting point in the region of €200,000 in terms of the assessment of damages. If that were indeed the starting point in a case of this kind, then, adapting the language of Henchy J. in *Barrett*, the damages in respect of a deliberate, calculated accusation of serious wrongdoing by the plaintiff in which he had been mentioned by name would be 'astronomically high.'
>
> For my part, taking account all relevant factors - a once-off nine second broadcast, the fact that the plaintiff was not named, the very limited range of viewers who might think that the news item referred to Mr Christie, the absence of any animus towards the plaintiff, coupled with the fact that it was plainly a case of mistaken identity - I consider that these mitigate the otherwise very serious nature of the defamation. In the light of these factors, therefore, it is sufficient to state that this is not a defamation which would warrant a starting point in damages of €200,000 identified by the trial judge and that in these circumstances a starting point of €60,000 is appropriate and proportionate."

257. While the defamation here is of a different character than that alleged in both *Speedie* and *Christie*, the allegation and its effects on the plaintiff are more serious than either of those two cases. This in itself is a strong indicator that any award now made by this Court should be significantly higher than the €85,000 figure in *Speedie* and the €60,000 starting figure *in Christie*.

258. I have also, albeit to a lesser extent, had regard to the levels of awards of general damages commonly made to those who have fallen victim to catastrophic injury, as I have to factors such as the average industrial wage, how many years it might take the

average worker to earn the sum which I have decided upon and what might be purchased with a tax-free award of that size.

259. Having regard to all of the aforementioned factors I am satisfied that a just and fair award in all of the circumstances would be the figure of €250,000.

Conclusion/summary
(i) Kenmare has not established the existence of any circumstances which would justify this court interfering with the finding of the jury as to the meaning of the Press Release and its determination that it was defamatory of Mr. Kinsella. This Court, being an appellate court, respects the role of the jury in coming to the determination which it did, a determination that was open to it having regard to the evidence and the question posed for its consideration.

(ii) The Court is satisfied that there was no serious error in the manner in which de Valera J. charged the jury regarding the meaning of the Press Release.

(iii) The Court is satisfied that the High Court judge erred in law, on the facts of this case, in concluding that the publication of the Press Release took place on an occasion of qualified privilege.

(iv) The Court is also satisfied that the award of €9m compensatory damages in respect of the libel established by Mr. Kinsella must be set aside as disproportionate, unjust and unfair in circumstances where it is satisfied that no reasonable jury could have considered that an award of that magnitude was necessary to compensate him in respect of the injury which he sustained and in order that he might re-establish his reputation.

(v) The Court is further satisfied that the manner of Mr. Kinsella's cross-examination did not justify the trial judge leaving open to the jury the possibility of an award of aggravated damages, and for that reason the award of €1M made in respect of aggravated damages must be set aside. Even if the issue of aggravated damages fell to be considered by the jury the award made would, in any event, have to be set aside as disproportionate, unjust and unfair in all of the circumstances. It was an award which no reasonable jury could have considered necessary to compensate Mr. Kinsella for any additional hurt or upset caused by the manner in which he was cross-examined concerning the conversation which he maintained he had had with Miss Corcoran while they were in a jeep in Moma, Mozambique.

(vi) It does not follow as a matter of law or principle that because the awards made by the jury in respect of general damages and aggravated damages were disproportionate, perverse and unfair that the court should set aside the findings of the jury in respect of any other issue.

(vii) For the reasons earlier stated in this judgment, of the two possible options open to this Court to remedy the wrong visited upon the appellants by the awards of damages made by the jury, the Court, for the reasons earlier stated, would favour reassessing the damages to be awarded to Mr. Kinsella rather than remitting the proceedings to the High Court for a rehearing on the damages issue.

(viii) The Court has considered in full the evidence advanced by Mr. Kinsella concerning the effect of the publication of the Press Release on all aspects of his life and recognises that any award of damages to be made in his favour must also be sufficient to vindicate his reputation. In coming to its conclusion the Court has, of course, had regard to all of the legal principles and other factors discussed earlier in this judgment and has taken into account the awards of damages approved of by appellate courts in other proceedings, particularly those in defamation proceedings. Thus the Court has concluded that an award of damages in the sum of €250,000 would be just and fair compensation for the wrong visited upon Mr. Kinsella as a result of the Press Release.

(ix) The Court will accordingly set aside all orders for damages made by the jury and will substitute in their stead an award of general damages in the sum of €250,000, for which the appellants, Kenmare and Mr. Carvill, will be jointly and severally liable.