

BETWEEN

BRIAN NOLAN

PLAINTIFF

AND

SUNDAY NEWSPAPERS LIMITED

TRADING AS THE SUNDAY WORLD

DEFENDANTS.

JUDGMENT of Mr. Justice O'Connor delivered on the 26th day of May, 2017.

**Introduction**

1. In these proceedings, the plaintiff claims compensatory, aggravated and exemplary damages for defamation, infringement of his right to privacy, and breach of confidence as a result of articles surrounded by photographs (some pixellated to disguise people other than the plaintiff) published on Sunday, 15th July, 2012, ("**the 2012 edition**") and Sunday, 3rd March, 2013 ("**the 2013 edition**").

**Background**

2. The plaintiff's parents (the plaintiff's father died over a year after publication of the 2013 edition), his two brothers, sister, extended family and members of his sports clubs and community were undoubtedly aware if not proud of the plaintiff's skills in Gaelic football and rugby given his achievements from school until the late 1990s. The plaintiff played with the Leinster School's rugby team and at all levels for County Kildare in Gaelic football. The plaintiff, in evidence, was realistic about his recognition among the public. It is fair to say that a small percentage of those who read the defendant's newspaper ("**the Sunday World**") in 2012, would have identified the plaintiff as an accomplished sportsman without the aggrandisement by the Sunday World of his sporting achievements in the 2012 edition and in the 2013 edition ("**the editions**").

**Suspended Sentence**

3. On 27th November, 2002, the plaintiff having pleaded guilty to a money laundering charge was (according to a press report accepted as accurate by the plaintiff in evidence) then fined IR£20,000 (€25,395) and given a suspended sentence by the Dublin Circuit Criminal Court following evidence that the Criminal Assets Bureau's account had been credited by the plaintiff for the proceeds. Involvement in that money laundering did not enrich the plaintiff. He discharged his debt to society for that conviction by the sentence, fine and subsequent publicity. His then business ceased.

4. The recall of those events in the editions published over a decade later meant that the plaintiff was brought back on the stage of nationally reviled convicts with serious consequences for the plaintiff as will be explained. Most reasonable people take a view that convictions given in youthful years, at a time of stupidity and naivety or a decade ago should not engender any particular interest unless those convictions are relevant to a subsequently linked crime. That attitude arises from cultural, religious, historical and societal influences, which is manifested in the recent uncontroversial commencement of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016. This is not to say that mention of the plaintiff's conviction is defamatory but context is indeed all important.

**The Articles**

5. The left hand column on the front page of the 2012 edition had a box entitled "**EXCLUSIVE**" followed by a photograph of the plaintiff with the scantily clad upper body of a woman whose face was pixellated ("**photograph 1**") before highlighting "**EX-GAA STAR IS THE BIGGEST SWINGER IN TOWN**".

**The 2012 Pictures**

6. Page 10 of the 2012 edition then had a picture of the plaintiff ("**photograph 2**") taken by the defendant's photographer outside his then Dublin home in circumstances which I will mention later. There were two photographs alongside which had a picture of the plaintiff stretching for a football when playing for Kildare some twenty years previously ("**photograph 4**") and a picture of the plaintiff leaning against the lower back of a woman who was leaning towards a fireplace with the backs and legs of two other women, below the shoulder line to knee height with fishnet tights ("**photograph 3**").

7. The following page in the 2012 edition ascribed to Niall Donald ("**the Journalist**") had the following photographs:-

(i) the plaintiff with a woman whose face was pixelated in a fancy dress costume and containing the caption "**SLEAZY: Nolan at party**" ("**photograph 5**");

(ii) the plaintiff holding a woman in lingerie whose face was also pixelated and with a caption "**CAUGHT: Nolan gets to grips with a guest**" ("**photograph 6**");

(iii) a person with a fancy dress wig, face and costume having a comment: "**ORGIES: A source said Nolan organised parties**" ("**photograph 7**"); and

(iv) the plaintiff in a fancy dress costume with the caption: "**KINKY: Nolan dressed as a woman**" ("**photograph 8**").

**Impression from Photographs in 2012**

8. Viewing those photographs and captions inclines a reasonable viewer towards an impression that the plaintiff was a major organiser of orgies.

**The 2012 Text**

9. The Journalist in the columns surrounding photographs 5, 6, 7 and 8 started the much vaunted exclusive with the sentence: "**MEET the convicted money launderer and former GAA star who now gets his kicks as Ireland's unofficial King of the Swingers**".

10. The text asserted that the plaintiff "*has continued to score freely by helping organise swinger parties across Ireland*". It

gratuitously continued to mention a physical disability suffered by the plaintiff and an alleged encounter by the plaintiff with "a porn star" on "the day that [the porn star] was exposed" by the Sunday World. Rather disturbingly, the Journalist then lurked back ten years to the circumstances of the suspended sentence given to the plaintiff. The Journalist then took the liberty to mention on the same page, the assassination of a convicted "mobster" in 2002, responsibility for which was denied to the Sunday World by a robber sentenced to six years in 2002. These latter details were totally inconsequential and irrelevant to the "swinger" parties which were the focus of photographs and captions on that page. I shall return to this aspect later.

### Overall View in 2012

11. The plaintiff was characterised by the 2012 edition as a principal organiser of orgies in the State with a lurking undertone of criminality.

### The 2013 Edition

12. On Sunday, 3rd March, 2013, the defendant published what it described on the front page of the 2013 edition a "12 – page Sunday World a real Irish Sunday investigation" with a picture of a couple undressing and a woman with high heels on a stairs wearing only a bra and knickers. Below the photographs were headlines, the first three of which read: "inside the online world where vice is just a click away" "the exhibitionist and the voyeurs exposed" "we reveal handymen who swap services for sexual favours".

13. The 2013 edition for Northern Ireland had the same cover page but confined itself to eight pages. This Court is concerned with the twelve page edition distributed in the State which had one part referring under the headline "KINKY ESCORT COUPLES SEEDY SEX SESSIONS" to a prostitution website and an entrapment exercise carried out by a newspaper reporter.

14. The Journalist who penned the above mentioned excerpts from the 2012 edition then contributed, or at least put his name down for, the next few pages to the 2013 edition. These pages contained a photograph of the plaintiff holding his hand over the breast of a woman in a bikini while her face was pixelated ("photograph 9") which had the caption: "SWINGERS: Brian 'Spike' Nolan". The text immediately to the left of the plaintiff's head stated as follows:-

*"It has spawned a series of 'cottage industry' sex workers - most of whom are not under the control of a pimp or criminal gang. Just like other small internet businesses, these specialised operators sell directly to the consumer – cutting out the middleman"*

15. The next page had a photograph of the plaintiff similar if not identical to photograph 6 in the 2012 edition with a different heading, however, "STILL SCORING: Former GAA player Brian Nolan now organises sex parties".

16. After referring to brothels and "legitimate massage parlours" before repeating the Journalist's association of the plaintiff with the so-called celebrity porn star, the Journalist on p. 49 of the 2013 edition wrote:-

*"Another inter-county GAA star also made the headlines for his seedy sexual antics in 2012 [i.e. by the defamatory 2012 edition]. [The plaintiff] first shot to prominence as a talented forward who played for Kildare in the 1992 Leinster final against Dublin. But [the plaintiff] proved less than Lilywhite when he was convicted of laundering money for mobster... a decade later. Despite hanging up his football boots [the plaintiff] has continued to score freely by helping organise swingers' parties across Ireland."*

17. The Journalist relied on his own "investigation" in 2012, to implicate the plaintiff inaccurately and unfairly in what one might call an industry of providing sexual services, for the 2013 edition.

18. Page 50 of the 2013 edition that followed referred to "the sleazy men who are using the economic downturn to get an upturn in their lives – by offering swap services for sex". Page 51 has a picture of a reporter looking on a couple engaged in sex acts who "hire themselves out for sex [which] has become increasingly popular in Ireland with more and more people turning to it to make an extra few quid and charging people big money for live sex shows".

19. Further pages of the twelve page "investigation" identified women, places, gigolos and pimps involved in prostitution.

### Impression from 2013 "Investigation"

20. A reasonable person who glanced at the 2013 edition and the twelve page investigation was likely to form the view that the characters (including the plaintiff) identified in the 2013 edition were immersed in economic activities involving the provision of sexual services or activities.

21. The context in which the plaintiff is placed in the 2013 edition is particularly awful once it is accepted, as this Court does, that there is not a shred of evidence to support a suggestion or innuendo that the plaintiff was involved in prostitution, pimping or any such type of illegal activity.

### The Defendant's Case

22. The defendant did not plead or rely upon the defence of truth in respect of the meanings pleaded by the plaintiff which were as follows:-

- (i) the plaintiff is involved in the provision of sexual opportunities for financial gain;
- (ii) the plaintiff helped organise swingers' parties across Ireland;
- (iii) the plaintiff has sought or permitted newspaper publicity in relation to his sex life;
- (iv) the plaintiff allowed a newspaper to publish photographs of a private and intimate nature of him at private parties in intimate poses with partially clad women;
- (v) the plaintiff's occupation was organising sex parties across Ireland; and
- (vi) the plaintiff was involved in the sex trade.

23. The defendant denied that the words and photographs were capable of bearing the meanings set out at subparas. (i) – (vi) above or any meaning defamatory of the plaintiff. It further denied that the publication of the articles caused distress or embarrassment to the plaintiff while denying any damage to the plaintiff's reputation.

24. It is worth noting at this stage that the Court accepts the evidence given by the plaintiff that he attended four of the relevant

parties with his then partner ("L") over a period of some eighteen months. This fact did not hinder a vigorous cross examination of the plaintiff which sought to have accepted by the plaintiff and this Court that:-

(i) There was no distinction in perception between attending a party at which there may have been multiple sex partner participation by people other than the plaintiff and the unsubstantiated allegation made against the plaintiff that he organised some or all of the parties.

(ii) The slight on the plaintiff's reputation arose inexorably from his voluntary attendance at the four parties rather than the full scale coverage and suggestions given in the editions as described.

(iii) The articles were of public interest which the defendant according to its formal defence was "*entitled and duty bound to report*" as "*matters of public interest*".

### **The Court's View**

25. The attempt by counsel for the defendant to blur the difference between organising chess or quiz events and organising what came to be known as sex parties can be described as a debating style point. In other circumstances, it might have had traction were it not for the circumstances in which the allegations of organising sex parties were made in the editions.

26. Nothing arises from exploring general attitudes to those who have attended a party at which there was an opportunity to engage in sexual activity with others who were not partners. The plaintiff found the relevant parties distasteful and limited his attendance to four occasions before ceasing all interest in them after eighteen months. No witness was called by counsel for the defendant. Therefore, based on the impression which I formed at trial from listening to the plaintiff and his supportive friend, I do not accept the suggestion made on behalf of the defendant that the rugby club at which the plaintiff was a coach or the social group in which he mixed would have ostracized him as occurred due to his attendance at those four parties, if they had become public knowledge other than by way of the editions.

27. There was no evidence that anyone in the plaintiff's social group learnt or was bothered to learn about the parties to which the plaintiff was brought to by L and which he attended with misgivings. Counsel for the plaintiff was right in submitting that there are occasions on which people attend parties reluctantly and appear in photographs with a smile which feign enjoyment.

28. The plaintiff's explanation for his attendance at the parties is accepted by this Court having listened to and observed the plaintiff carefully. The plaintiff has had misfortunes but has shown that he owns up to responsibilities. The defendant did not take its opportunity to call evidence to rebut the plausible account given by the plaintiff for the reason to accompany and keep L in their relationship.

29. Most people who were correctly apprised of the plaintiff's circumstances and those factors leading to the plaintiff's attendance at the four parties, would not have ostracized the plaintiff as transpired.

### **The Defendant's Investigation**

30. The last relevant party attended by the plaintiff occurred in 2011. The plaintiff and L subsequently had blazing rows which included threats by both to distribute photographs taken at the parties in order to embarrass the other. The Journalist subsequently acquired copies of the photographs used in the editions. The Journalist and an accompanying photographer doorstepped the plaintiff in the car park adjacent to his then home in Dublin on Saturday, 7th July, 2012. He showed photographs to the plaintiff which prompted pleas from the plaintiff not to publish them. The transcript of the recording from that encounter taken by the Journalist, unknown to the plaintiff then, makes it clear that the plaintiff was very concerned about access to his then twelve year old son and six year old daughter if the Journalist published details and photographs as the Journalist implied would happen.

31. The doorstep questioning by the Journalist was beguiling and suggested that the Journalist would investigate the plaintiff's account of events. The subsequent two conversations initiated by the Journalist revealed a lack of integrity which might be expected of a professional journalist engaged in the pursuit of accurate information. The disingenuous points made by the Journalist in the subsequent conversations about the plaintiff's involvement with criminality ten years previously had nothing to do with the photographs. Nevertheless, the defendant had the temerity to run a story in the 2012 edition linking the photographs and the conviction to the organising of orgies as explained.

### **Effect of 2012 Edition**

32. The 2012 edition inevitably caused conversation among the friends and acquaintances of the plaintiff. A quote from a renowned psychologist in 2004 that "*Gratuitous gossip is confessional calumny, the slaughter of reputations, the death of marriages and the trauma of social exclusion*" is quite apt save for the fact that the plaintiff had long separated from his wife by 2012. The gossip and talk did indeed lead to family and social exclusion of the plaintiff with continuing effects on his reputation. The plaintiff mentioned that an observer at the trial in Cork during March 2017 asked "*why didn't you invite me?*" without thinking how hurtful that is to the plaintiff.

33. It is wrong for any person to think, conclude or joke as that observer suggested that the plaintiff organised or willingly attended the parties. One of the ongoing effects can thus be seen and it is important that this judgment and ultimate award marks how wrong such observations are in view of the finding of the repeated defamation of the plaintiff by the defendant through its considerable newspaper circulation.

34. It is over five years since the publication of the first edition and it is apparent that the plaintiff requires one or more of the remedies sought. The ongoing damage and hurt caused to the plaintiff should be alleviated by an award of damages. Such an award is one way of sending a message that the plaintiff should not blaggar while compensating him for the continuing injury to his reputation.

35. Depression, clouds of darkness and suicidal ideation are terms which hardly do justice to the effect of the 2012 edition on the plaintiff. The plaintiff lost access to his children and their names were changed when they moved school following the publication in July 2012. He was shunned by extended family and ostracized within his social and sporting circles. It is difficult to think of more serious consequences for a father, team coach and member of an established family in the community than those which occurred following publication of the defamatory material which lead reasonable members of the plaintiff's circle to conclude that he was at least one of the biggest organisers of orgies in the State.

### Investigation for the 2013 Edition

36.No one on behalf of the defendant bothered to assess the risks posed to the plaintiff before or after the 2012 edition despite the plaintiff's pleas. In fact, the defendant just reaped its advertising and circulation income from selling 152,440 copies of the 2012 edition. It then pulled out the photographs for its "12 page" investigation contained in the 2013 edition without further inquiry or notice to the plaintiff. As explained, the 2013 edition depicted the plaintiff as involved in the provision of orgies in the context of other illegal activities like prostitution. That edition sold 148,759 copies.

### Public Interest Plea

37.As for the public interest argument advanced, the Court stresses its duty to vindicate the rights of citizens. It will not be thwarted by the vacuous plea that there is a public interest in publishing salacious material without regard to the truth. Little, if anything, was done by the defendant to portray an accurate context for the plaintiff's attendance at the parties in the 2012 edition. No consideration was given to the plaintiff's pleas in advance of publication in 2012 about the potential effect on the relationship with his estranged wife and children by the publication of information which portrayed him as having a major role in arranging orgies. Moreover, there was no suggestion that the Journalist or anyone on the part of the defendant enquired about anything and not least the welfare of the plaintiff in the year which elapsed between the 2012 edition and the 2013 edition with a heading "World of Vice Exposed".

38.Lest there be any doubt, the intrusion into the plaintiff's private life did not have any overriding consideration of the public interest. The defendant recklessly published prurient photographs and pieces which carried the import as described. The plaintiff had no option after the 2013 edition but to seek a commitment from the defendant to cease its apparent crusade to defame him with impunity. The defendant wrongly sought such impunity by reference to the plaintiff's ten year old suspended sentence and fine for acknowledged money laundering.

### Aggravating Circumstances

39.The failure of the defendant to exclude harmful inaccuracies, the refusal to heed the warning about the effect on the plaintiff's relationship with his children and the gratuitous mention of the plaintiff's public figure brother are all factors which exacerbated the defamation already identified. In addition, the questions posed during the cross examination of the plaintiff concerning the assassination in 2002 mentioned in the 2012 article which is totally irrelevant to the plaintiff and the public position of the plaintiff's brother in the 2013 article are factors which this Court can take into account together with the unnecessary reference to the plaintiff's alleged friendship with a former Government Minister in the 2012 article. The decision of the defendant to ignore the letter from the plaintiff's solicitor dated 6th March, 2013, along with the refusal to make an offer of amends constitute particularly offensive conduct.

40.The plaintiff, whether due to his occasional depressed state, fear of losing further contact with his family and friends or lack of self belief did not engage a solicitor until the day after the publication of the 2013 edition. The defendant singularly maintained its stance. It has exercised its right not to offer any explanation for the serious errors of judgement and the breach of trust between journalists and readers of the Sunday World. This Court was not made aware of any internal controls, supervision or editing services operated by the defendant to ensure that the lives of citizens are not destroyed by lack of investigation and harmful inaccuracies. If the defendant did have such controls, then they failed abysmally.

41.Thankfully, the plaintiff with the support of his close friends, family, mother, doctor and legal professionals found the strength to believe in himself. He has taken the defendant to task and this judgment will hopefully help his self esteem. The determination of these proceedings nearly four years after the 2013 edition without any sign of remorse, regret or offer of amends was not helped by the protracted row over discovery and claim for privilege concerning the Journalist's recordings. Despite the delivery of an initial letter dated 6th March, 2013, and the delivery of a Statement of Claim on 18th November, 2013, it took until 1st July, 2014, for the defendant to deliver its Defence and a further long period to resolve the issue concerning discovery.

### Privacy

42.The essence of the plaintiff's claim to privacy relies on a rather loose agreement or understanding with unidentified individuals that the photographs taken in 2010 and 2011 at the four parties would not be disclosed to anyone outside the group who attended the parties without the consent of those attending.

43.The plaintiff consented to the taking of photographs by a stranger who attended the party. It was also clear that the photographs were freely available among up to 26 people of which he might have only known four at most.

44.Therefore, I cannot find that the right to privacy has been engaged. Unlike the situation in *Herrity v. Associated Newspapers (Ireland) Limited* [2009] I.R. 316, no issue arises about the lawfulness of the defendant acquiring the photographs. In *Herrity*, Dunne J. found:-

*"[...] the publication of the telephone transcripts in this case were obtained in breach of the provisions of s. 98 of the Postal and Telecommunications Services Act 1983. As previously indicated, s. 98(1) applies to a person who not only intercepts or attempts to intercept or authorise someone else to intercept telecommunication messages but also applies to those who disclose the existence, substance or purport of any such message which has been intercepted, or uses for any purpose any information obtained from any such message and such a person is also guilty of an offence. I cannot see how anyone can assert a right to freedom of expression to publish transcripts of private telephone conversations where the legislature has expressly prohibited the interception of telecommunication message."*

45.Dunne J. went on to outline:-

*"[...] as a general proposition, I think that cases in which the right to privacy will prevail over the right to freedom of expression may well be far and few between."*

46.The plaintiff also cited the judgment in *Mosley v. News Group Newspapers Limited* [2008] EWHC 1777 (Q.B.). The defendant in that case had bribed and threatened sources, used hidden cameras in private property in order to record material of a sexual nature and alleged that the parties which the plaintiff had attended involved "Nazi or concentration camp role-play; an allegation that the court found to be totally untrue".

47.It is unnecessarily stretching the equitable jurisdiction of this Court to consider a claim for breach of confidence when the plaintiff will be satisfied with the award of damages for defamation.

48.In these proceedings, the defendant was contacted by a source who voluntarily provided information in relation to the parties

which the plaintiff admitted attending. Although the defendant used the photographs in the editions which defamed the plaintiff, I cannot align the circumstances arising in *Herrity* or in *Mosley* to those presented on behalf of the plaintiff.

49. It may be unfortunate but it is the reality of the modern world that photographs can be taken so easily and disseminated within and outside a known group. It is the Court's view that the right to privacy is a constitutional right to which effect is given when the existing law does not adequately protect the citizen. In this regard, I am guided by the following excerpt from the judgment of O'Donnell J. in *Clarke v. O'Gorman* [2014] IESC 72, [2014] 3 I.R. 340 at para. 34 page 359:-

*"The intersection between claims for damages for breach of constitutional rights and claims in tort was discussed in Hanrahan v. Merck Sharp and Dohme Ireland Ltd. [1988] I.L.R.M. 629. The effect of that decision is that the existing torts and other causes of action known to common law are to be considered the method by which the State performs its obligation to vindicate the constitutional rights of the citizen. It is only therefore if it can be shown that the existing law does not adequately protect the constitutional rights of the citizen that a separate claim for breach of constitutional rights can be invoked."*

50. There was some consensus in the submissions made to the Court that any damages which may be awarded to the plaintiff for defamation may be taken into account in a claim for breach of a privacy right. I will go further and suggest that a person like the plaintiff who is satisfied by an award of damages for defamation, including aggravated and punitive damages, need not be concerned with the demands for a successful claim for damages in respect of a privacy right infringement. In other words, damages for defamation exceed those for invasion of privacy under current law according to my review.

51. Counsel for the parties engaged with the Court's questions about the potential relevance of data legislation breaches even though there was no evidence that the photographs or information emerged from data law breaches. Suffice to say that the Court need not go there in these proceedings but the Court merely observes that it may be worth considering this area in a future claim for privacy like this if and when:-

i) Proposal 2017/0003 of 10 January 2017 for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Com(2017) 10 final) is enacted and

ii) the State implements Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) which is due by 25th May, 2018.

### Assessment of Damages

52. It is now well established that the assessment of damages in defamation cases is quite distinct to that adopted for awards of damages in personal injury actions. Dunne J. in *Leech v. Independent Newspapers (Ireland) Limited* [2015] 2 I.R. 214 at p. 276, para. 137 stated:-

*"I have come to the conclusion that the analogy of awards in personal injuries cases may be of some assistance in the area of injuries caused by reason of sexual abuse but is not so useful an analogy in the case of awards in respect of defamation actions ...."*

53. Dunne J. under the heading "*The gravity of the libel*" at para. 139 summarised the position in that case as follows:-

*"Undoubtedly the articles complained of by Ms. Leech in these proceedings amounted to a serious and sustained attack on her business and personal integrity. I think one could fairly compare the libel in this case with that in O'Brien v. Mirror Group Newspapers Ltd. [2001] 1 I.R. 1 which contained an allegation that the plaintiff had paid a £30,000 bribe to a Government Minister to procure a lucrative radio licence. In effect Ms. Leech was accused of engaging in an adulterous relationship for the sake of obtaining lucrative contracts. Such a defamation would undoubtedly have a serious effect on an individual's business and personal reputation. I accept that the defamation in this case could not be described in the same terms as that in de Rossa v. Independent Newspapers plc. [1999] 4 I.R. 432 which was described as coming within the category of the gravest and most serious libels which have come before the courts but it is nonetheless a very serious libel. Given the allegations of adultery made in respect of Ms. Leech, this must have been a source of real hurt and distress to Ms. Leech."*

54. Dunne J. then went on to deal with the conduct of the defendant in that case and addressed such issues as the absence of any offer of an apology and the use of photographs of Ms. Leech with the Minister who was implicated in the defamation. The learned judge then dealt with the impact of the defamation on the individual and she considered such issues as the necessity for one of her sons to change school during his Leaving Certificate year because of the article.

### Defamation Act 2009

55. Section 31 of the Defamation Act 2009 provides as follows:-

"(1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.

(2) ...

(3) In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case.

(4) Without prejudice to the generality of subsection (3), the court in a defamation action shall, in making an award of general damages, have regard to—

(a) the nature and gravity of any allegation in the defamatory statement concerned,

(b) the means of publication of the defamatory statement including the enduring nature of those means,

(c) the extent to which the defamatory statement was circulated,

(d) the offering or making of any apology, correction or retraction by the defendant to the plaintiff in respect of the defamatory statement,

- (e) the making of any offer to make amends under section 22 by the defendant, whether or not the making of that offer was pleaded as a defence,
- (f) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement,
- (g) the extent (if at all) to which the plaintiff caused or contributed to, or acquiesced in, the publication of the defamatory statement,
- (h) evidence given concerning the reputation of the plaintiff,
- (i) if the defence of truth is pleaded and the defendant proves the truth of part but not the whole of the defamatory statement, the extent to which that defence is successfully pleaded in relation to the statement,
- (j) if the defence of qualified privilege is pleaded, the extent to which the defendant has acceded to the request of the plaintiff to publish a reasonable statement by way of explanation or contradiction, and
- (k) any order made under section 33, or any order under that section or correction order that the court proposes to make or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation."

56. This Court heard submissions about the level of damages which did indeed assist but I remained curious about the level of damages which ordinary members of the public sitting on a jury award to claimants like the plaintiff. Attached to this judgment are pages with summary details and references for Irish Court judgments and awards from Juries as could be ascertained from public records over the last number of years. The Irish Court judgments summarised with citations were examined by this Court for the purpose of extrapolating findings and views which bind or may influence this Court. It is indeed true that the appeal courts have applied restraint and proportionality while deferring to the undoubted right of juries to send a message by an award to compensate a defamed person. Similarly, my review of the awards and judgments in the Superior Court indicates willingness to award damages to put the plaintiff back into the position as if the defamation never occurred by vindicating the plaintiff in the eyes of the public through sending a message in the form of significant quantum to correct the wrong.

57. There is indeed some judicial doubt about the wisdom of comparing awards in previous defamation cases because each claim has its own unique facts and subsequent events to consider. All that can be achieved is an award of such a size as to compensate and to impress upon the public the nature of the defamation which has occurred.

### **Punitive Damages**

58. Section 32(2) of the Defamation Act now provides in relation to punitive damages:-

"Where, in a defamation action, the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement and it is proved that the defendant—

- (a) intended to publish the defamatory statement concerned to a person other than the plaintiff,
- (b) knew that the defamatory statement would be understood by the said person to refer to the plaintiff, and
- (c) knew that the statement was untrue or in publishing it was reckless as to whether it was true or untrue,

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

### **Exemplary Damages**

59. Finlay C.J. in *Conway v. Irish National Teachers Association* [1991] 2 I.R. 305 at 322, gave the following description:-

"Punitive or exemplary damages arising from the nature of the wrong 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."

60. Finlay C.J. also stated that as a general principle, exemplary damages should not be awarded if the Court believed the total award in compensatory damages constituted a sufficient public disapproval of and punishment for the wrong committed.

### **Summary**

61. As a result of the Defamation Act 2009, matters have been simplified for punitive and aggravated damages by relying upon s. 32(2) of the Defamation Act 2009. In this respect, I propose to consider the issue of punitive, aggravated and exemplary damages solely within that statutory framework.

### **Overall Purpose of Damages**

62. It can be extrapolated from many decisions that the damages award must be convincing and given in such a way as to vindicate the rights of the person who has been defamed. The quantum should be sufficient to demonstrate to observers that the defamatory articles should not have been published while other elements such as special damage and loss of opportunity may be taken into account also.

### **Details of Awards Given**

63. The annexes to this judgment summarise the level of damages awarded by juries and the appeal courts in defamation cases. I have read each of the judgments cited and examined the information currently available for those cases involving juries which are listed in the annexes. The exercise undertaken delayed the delivery of this judgment but allowed the Court to incorporate the views and judgment of the Court of Appeal in *Christie v. TV3* [2017] IECA 128 delivered on 4th May, 2017, which followed the conclusion of

this trial at Cork Courthouse on 24th March, 2017.

64.The majority judgment in the Supreme Court delivered by Dunne J in *Leech v Independent Newspapers (Ireland) Ltd* [2015] 2 IR 214 which was a review of a jury award on appeal (summary details of which may be gleaned from the annex) assists this Court in its task. The headings used by Dunne J are quite apposite for these proceedings:-

- i)"The gravity of the libel";
- ii)"The extent of the publication";
- iii)"The conduct of the defendant";
- iv)"The impact of the defamation";
- v)"Freedom of expression" (as it may apply)

65.I cannot but find that the defamation of the plaintiff in the editions was very serious. It could have been worse but on a scale of 1 to 100, it reaches 75 when one takes account of all the circumstances and particularly those factors identified at S31 (4) (a), (b), (c), (f) and (h) of the 2009 Act.

66.The impact on the defendant was immense as already outlined. It is a credit to the plaintiff, his former wife, children, mother and friends to have regained some accord despite the total disrespect shown by the defendant and its employees.

67.In advance of awarding compensatory damages it may help to repeat that the research exercise undertaken by this Court since the trial was to identify if possible any common theme in the awards by juries which represent commonly held views. I am indeed conscious of the opinion of McKechnie J (dissenting in part on the preserve of the unique role for a jury) in *Leech v Independent Newspapers (Ireland) Ltd* where he said at para 102:-

*"How can a transcript convey the depth of a person's feelings who has been publicly humiliated; whose sense of esteem and personal worth have been undermined, even shredded in some cases; whose presence even amongst strangers may result in being shunned or rebuffed?"* which resonates when reading reports or records of previous awards too.

68.In brief I discern that ordinary people sitting on juries recognize that damages for defamation send out a message of caution not only to the person who defames but also to the wider public for the benefit of the defamed. It is my view that the starting point in a defamation of the kind presented rose to €250,000 because of the elapse of time between the 2012 edition and the even more defamatory 2013 edition. In arriving at this point I take into account that I am going to award aggravated and punitive damages as well.

69.The aggravation of the damage having regard to s 32(1) of the 2009 Act is also an issue which has been engaged. The failure to respond to the initial letter of complaint, the contribution to the delay in having the plaintiff's claim determined along with the manner of defending the claim at trial as described, meant that the plaintiff had to undergo further public scrutiny and wait years for the vindication of his rights.

70.Therefore, I award €30,000 under this heading.

71.Punitive damages is now governed by s 32 (2) of the 2009 Act. The defendant intended to publish the defamatory editions to its considerable readership, flaunted that the statements were about the plaintiff and was reckless as to whether the details and suggestions were accurate or true. It made matters considerably worse by slovenly relying for the 2013 edition on the material available for the defamatory 2012 edition. Furthermore, it did not contact the plaintiff about the clear suggestion of very serious criminality which it made in the 2013 edition.

72.I was informed on behalf of the defendant that it sold some 148,759 copies of the 2013 edition. It proceeded to today without any offer of apology while pocketing all of the revenue for its 12 page investigation on that day which grossly defamed the plaintiff. The extent of the publication in two separate calendar years and the conduct of the defendant from March 2012 to May 2017 with impunity so far (save for the award of compensatory and aggravated damages just now) leads this Court to direct that the defendant pay a further €30,000 in punitive damages.

73.Therefore, I direct the defendant to pay a total of €310,000.00 in damages to the plaintiff.