

## THE HIGH COURT

[Circuit Court record number: 177/2016]

BETWEEN

R.P. and J.P.

PLAINTIFFS/RESPONDENTS

AND

B.K.

DEFENDANT/APPELLANT

**Judgment of Mr. Justice Barr delivered on the 20th day of March, 2018.****Introduction**

1. This is a defamation action in which the plaintiffs are suing the defendant in respect of allegedly defamatory statements made by the defendant to the Early Intervention Team [hereinafter the E.I.T.] of the HSE, in which the defendant alleged that the plaintiffs' children were being exposed to violence and that the plaintiffs had imprisoned their young son in an airing cupboard for discipline purposes.
2. The plaintiffs are a married couple. They have two children, a girl and a boy. In 2015 the girl was eight years of age and the boy was six years of age. Two years earlier, he had been diagnosed as suffering from severe autism. As a result, he had great difficulty in coping with the ordinary demands of life and was unable to speak.
3. In January 2014, the plaintiffs had become tenants to the defendant and her husband of a house, which was situated in a rural part of Ireland. The house had previously been the family home of the defendant and her husband. They had decided to rent it out as they were moving to live abroad. The plaintiffs took up occupation of the house in January 2014. The original term of the tenancy was for one year. At the end of the year, it was agreed that the plaintiffs would stay on in the property for a further six months. They vacated the property on 30th June, 2015, as the defendant and her husband were returning to live in Ireland.
4. A dispute arose between the plaintiffs and their former landlords. The landlords refused to return the deposit of €1,500, which had been paid by the plaintiffs at the commencement of the tenancy. They refused to return the deposit due to the fact that they alleged that there had been substantial damage caused to the property by the plaintiffs. The plaintiffs rejected that assertion. They denied that the landlords were entitled to retain the deposit. On or about 10th August, 2015, the plaintiffs instituted proceedings before the Private Residential Tenancies Board [hereinafter the P.R.T.B.] seeking return of their deposit. On 16th September, 2015, an adjudication hearing was held before the P.R.T.B.. A ruling was given by the adjudicator on 22nd September, 2015, which held that there had been damage to the property of circa €1,800 and that accordingly the landlords were entitled to retain the deposit.
5. Unknown to the plaintiffs, the defendant, Mrs. K., had made complaints to the E.I.T. of the HSE and to Tusla to the effect that there had been damage done to the doors and furniture in her house, which gave rise to concerns on her part that there was aggressive behaviour by some of the occupants of the house and due to the fact that a vent had been inserted into the door of the hot press for no apparent reason. She had told them that she had concerns that the young boy may have been confined in the airing cupboard for discipline purposes.
6. The plaintiffs became aware of these allegations when Mr. Stephen Whelan of Tusla contacted the plaintiffs and asked them to come in to see him. When Mrs. P. did so some days later, she was informed that an anonymous allegation had been made to the effect that their children were being exposed to violence and that she and her husband were abusing their young son due to the matters which had been set out in the defendant's telephone call with Mr. Whelan. Mrs. P. was informed that Mr. Whelan would have to carry out an investigation into the matter. She and her husband were greatly upset by these developments.
7. Some three weeks later Mr. Whelan telephoned Mrs. P. and informed her that having carried out enquiries with the E.I.T., and with the principal at her son's school, and with the family G.P., they were satisfied that there was no case to answer. She was told that the case was closed and that she would get a formal letter informing her of that fact in due course.
8. The plaintiffs appealed the adjudicator's determination and a hearing was subsequently held before a tribunal of the P.R.T.B., which found that the plaintiffs owed €250 to the landlords in respect of a gas bill and €481 in respect of damage to the property. The defendant and her husband had to return the balance of the deposit.
9. It is the plaintiffs' case that the defendant made her allegations to the E.I.T. of the HSE and to Tusla out of malice, due to the fact that they had brought a case to the P.R.T.B. against the defendant and her husband, seeking return of their deposit.
10. The defendant admits that she made representations to the E.I.T. of the HSE and to Tusla. She aired her concerns for the safety of the plaintiffs' children and for the safety of their son in particular, due to the fact that damage had been done to the property, which was only consistent with aggressive and violent behaviour having been exhibited by someone within the property. She was also concerned due to the fact that the plaintiffs had installed a vent in the hot press door, when there was no need to do so. On this account she had concerns that the young boy may have been put into the cupboard for discipline purposes.
11. The defendant vehemently denied that she had been activated by malice in making these concerns known to the relevant authorities. She stated that she had only done so because she felt it was her moral duty to bring her concerns to the attention of the appropriate authorities. She stated that she had made it clear to them that she had no evidence of any abuse being perpetrated against the young boy. She also informed them that she and her husband were involved in a dispute with the plaintiffs, which was proceeding before the P.R.T.B.. She accepted that she had requested anonymity in relation to the fact that she was the person making the complaints, but that when she had been told that such could not be guaranteed, she had still gone on to make the complaints, as she felt that it was her moral duty to do so. She accepted that her concerns had turned out, after investigation, to have been unfounded.
12. It was submitted on behalf of the defendant, that as she had made her complaints to two authorities, each of whom were the appropriate authorities to receive such complaints she was entitled to rely on the defence of qualified privilege, as her complaints had been made for bona fide reasons, rather than having been motivated by any malicious intention. She also relied on the protection

afforded to persons making allegations of suspected child abuse provided under s.3 of the Protections for Persons Reporting Child Abuse Act, 1998.

### **The Plaintiffs' evidence**

13. It is only necessary to give a brief summary of the plaintiffs evidence, as the broad outline of that evidence has been given above. Mrs. P. stated that she and her husband had come to live in Ireland in 2004. Prior to 2014, they had rented a premises from a Mr. Michael Feeney. The plaintiffs had got on very well with him as their landlord. They only decided to leave that property, due to the fact that they needed more space, as their son, who had been born in 2009, had been diagnosed in 2013 with severe autism. As a result, they needed separate bedrooms for each of the two children and they also required a secure garden in which their son could play in safety.

14. They moved into the defendant's property on 1st January, 2014. During the following year, Mr. K. used to call out to the property approximately once per month to collect rent. Mrs. K. would visit the property less frequently, approximately every two months. Although Mr. and Mrs. K. were resident abroad at that time, they returned to Ireland on a monthly basis to look after their business interests. Mrs. P. stated that at no time did either Mrs. K. or Mr. K. express any concern in relation to how they were maintaining the property, or treating their children. Indeed, she stated that her husband had cleaned stains on the carpet which had been put there by previous tenants and also carried out fairly extensive repairs to a leaking toilet. At the end of the first year, it was agreed that they could stay on for a further six months. Mrs. P. and her husband vacated the property on 30th June, 2015.

15. She stated that they were shocked when the landlords refused to return their deposit. Mr. P. wrote two letters to the landlords, demanding return of the deposit. They only received a text message back from Mrs. K., informing them that as there was damage to the property, they had put the matter into the hands of their solicitor and they would not be returning the deposit. Mr. P. instituted proceedings seeking return of the deposit before the P.R.T.B. on 10th August, 2015. A hearing was held before an adjudicator on 16th September, 2015. He gave his determination on 22nd September, 2015, in which he ruled that there had been damage of circa €1,800 to the property and that therefore the landlords were entitled to retain the deposit. Mrs. P. stated that they appealed this determination to a tribunal within the P.R.T.B..

16. Mrs. P. stated that on 23rd September, 2015 she received a letter from Mr. Stephen Whelan, a social worker in Tusla, requesting that she come in to see him on the following Friday. She and her husband thought that this was in relation to some aspect concerning her son's education. For that reason only she went along to the meeting. In fact, due to work commitments, she called in to see Mr. Whelan on the Thursday, rather than on the Friday. She stated that she was shocked and distressed when Mr. Whelan informed her that an allegation had been made that she and her husband were abusing their son. She said that Mr. Whelan was very sympathetic in the way that he dealt with this meeting. He allowed her plenty of time to respond to the allegations which had been made. She was not told who had made these allegations. Mr. Whelan told her that he would have to carry out an investigation into the matter.

17. Mrs. P. stated that she returned home in a very distressed state. She told her husband what had happened. He too became very upset. She stated that in the days and weeks that followed they were terrified that some authorities would come to their house and take one or both of their children into care. Mrs. P. stated that she found the allegations shocking, as she and her husband had always acted in the best interests of both their children and in particular, had taken a great interest in the development and upbringing of their disabled son. She stated that she suspected that the allegations had been made by Mr. or Mrs. K., due to the fact that no one else would have been in a position to provide details in relation to the vent on the door of the airing cupboard, as that was on the second storey of the house. Mrs. P. went on to state that she made contact with the E.I.T. of the HSE and with the principal at her son's school to inform them that an investigation would be carried out into how they cared for their children and for their son in particular. She was reassured by these people that she had no cause for concern, as they were of opinion that she and her husband were very good parents to their children.

18. Some three weeks later, on or about 15th October, 2015, she received a telephone call from Mr. Whelan informing her that his investigation had concluded. He said that he had discussed the case with his line manager and they were satisfied that the plaintiff had no case to answer. He informed her that accordingly the case had been closed. He told her that she would receive a formal letter to this effect in due course. In a letter dated 3rd March, 2016, Mr. Whelan formally told them that the investigation had been closed. Mrs. P. stated that these events had had a very serious impact on both the physical and psychological health of her and her husband. They had both required medication and treatment from their G.P. over a number of months. In addition, she felt that people in the locality may have learnt of the allegations and on that account had caused their children to become somewhat distant from her own children and from her daughter in particular.

19. In the course of cross-examination, the plaintiff was asked about various items of damage which had been photographed and produced to the court. She accepted that there was damage to the lock on the main bedroom door upstairs, as shown in photograph no. 2. She stated that this had occurred on one occasion when her son had accidentally locked himself into the bedroom. Her husband had telephoned her at work in a state of some anxiety. They were fearful that their son would climb out of the upstairs window and fall to the ground, as he had no real appreciation of danger. In the end, her husband had been required to drill the lock so as to release their son from the bedroom. Her husband had then repaired the lock as shown in the photograph.

20. The plaintiff was asked to comment on the damage to the T.V. room door, as shown in photographs 1, 3, 7 and 8. She stated categorically that that damage was not present on the door when they vacated the property on 30th June, 2015.

21. Mrs. P. was asked about the vent which had been inserted into the bottom of the airing cupboard door, as shown in photographs 9 and 10. She stated that that vent had been put in by her husband, due to the fact that there was little air circulation in the airing cupboard, with the result that the clothes in the cupboard were developing a musty smell. The vent was put in, in an effort to deal with the smell. Mrs. P. also denied that there had been any damage to a coffee table in the living room, or to any drawer in a cupboard, nor had there been any damage to a tallboy.

22. Mrs. P. stated that she did not accept that Mrs. K. had made the referrals due to a concern on her part about the safety of Mrs. P's. son. She stated that Mrs. K. had visited the property approximately every second month, for the purposes of gathering herbs for use in a restaurant and had also inspected the interior of the property. She had never expressed any concerns during the 18 months that they were tenants in the property. Furthermore, it appeared that she had delayed for an inordinate period of time, from approximately 1st July, 2015 to 21st September, 2015, before making any complaints about abuse of Mrs. P's. son. She stated that such delayed showed that the complaints were only made out of malice and revenge for the fact that Mrs. P. and her husband had brought Mr. and Mrs. K. before the P.R.T.B. seeking return of their deposit.

23. She stated that it was absurd to suggest that the child may have been locked into the hot press, because there was no lock on that door. Furthermore, there was no evidence of any damage to either the exterior or interior of the door, which would be suggestive

of a child being locked inside. Mrs. P. stated that it was her firm belief that Mrs. K. had been motivated by malice when she made her complaints.

24. Mr. P. also gave evidence. He stated that he had suffered from depression when his son had initially been diagnosed with autism in 2013. He had gone abroad to seek treatment and had been prescribed antidepressant medication. His condition had stabilised after a number of months. He stated that during the time that they were tenants in the property, Mrs. K. had visited the property every second month. On one occasion he and his wife had had coffee in the house with Mr. and Mrs. K. for approximately one hour. During the Christmas period in 2014, the landlords had come to the property with gifts for the children. He stated that he had been a very good tenant. He had cleared the patio and had cleaned the carpets. He had also repaired a number of leaking toilets. He stated that he was shocked when Mr. K. refused to return his deposit, when they met on 5th July, 2015.

25. When Mr. K. had refused to return the deposit, he had sent two letters to him dated 9th July, 2015 and 14th July, 2015, demanding return of the deposit. In response he received the following text message from Mrs. K. on 24th July, 2015:-

"Just arrived back to C. today after being away for a few days. We have received your letter and we will be in touch through our solicitor and are instructing him to sue you for damages caused to our house during your tenancy. We have had an independent assessor in to evaluate the damage. We will be giving the report to our solicitor who will be in contact with you directly."

In response to that text, Mr. P. had replied as follows by text message:-

" You have stolen money from disabled child. You will suffer moral, financial and personal consequences because of this crime. Bastards."

Mr. P. stated that he had sent that text, due to the fact that he was particularly annoyed by the fact that the landlords were retaining the deposit. They needed the money so as to be in a position to bring their son abroad for treatment. Mr. P. went on to state that when his wife told him about her meeting with Mr. Whelan and about the allegations that had been made against them, he was extremely shocked and upset. He became quite depressed and started drinking heavily. He found it difficult to sleep and could not concentrate. It had a very bad effect on his marriage. He stated that in the weeks that followed, he was terrified that the authorities would come and take his children away.

26. In cross-examination, Mr. P. accepted that he had had a problem with alcohol dependency in 2000/2001. However, he had not had any difficulties since then, until he learnt of the allegations that had been made against them by the defendant. He was questioned about the number of times that Mr. K. may have been in the property while they were tenants there. He stated that Mr. K. used to visit the property approximately once per month and that he was inside the house on 5/6 occasions. He stated that both Mr. K. and the defendant were in the house together on two occasions, once for coffee and once prior to Christmas 2014. It was put to the witness that they would say that they were not in the house in 2015. Mr. P. stated that he could not recall the last time that they were in the house. He accepted that after the phone call from Mr. Whelan in the middle of October 2015, his wife had told him that the investigation had closed.

#### **Other witnesses on behalf of the plaintiffs**

27. Evidence was given by Ms. Kate Ferguson, who is a manager in the Early Intervention Services run by the HSE. She stated that on 21st September, 2015, she was informed by her deputy, Ms. Leydon that there was a woman on the phone who wanted to speak to her, who had phoned on two occasions previously. She stated that she went into Ms. Leydon's office and took the phone call from the defendant. The defendant identified herself, but asked whether her complaint could be treated anonymously. Ms. Ferguson replied that she could not guarantee that. The defendant went on to outline her concerns to her. This call was made at approximately 17:00 hours and lasted approximately 20 minutes.

28. The note made by Ms. Ferguson of her conversation with the defendant is central to a number of matters in issue in these proceedings. Accordingly, it is appropriate to set it out in full. It reads as follows:-

*"Statement regarding social work referral for J.P.*

*I was contacted on 21-09-2016 [crossed out and amended to read 10/9/2016, which is also crossed out to read 21/9/2015] by a member of the public B.K. I had received two written phone messages from my secretary advising B.K. had called and requested I return her call, prior to this. On the 21st Sept. I was in my office working when the Community Facilitator, Mary Leydon, came in and explained she was on a call with a member of the public, Mrs. B.K. and she wanted to report concerns about J.P. I went into Mary's office and took the call there. My recollection of the conversation is as follows:*

- *Mrs. B.K. asked if J.P. was known to the Early Intervention Team.*
- *I reported that I could not confirm the identity of any child under the care of the EIT. Furthermore, I could not discuss any child without parental consent.*
- *B.K. asked if I could listen to her concern. She said she had concerns about the welfare of a child and that at a wedding recently she discussed her concerns informally with a solicitor, who was another guest. The solicitor advised she contact the EIT service manager to report her concerns.*
- *I agreed I could listen to her concerns.*
- *B.K. explained she was until recently the landlady of R. & J.P. The family recently moved and B.K. refused to give the deposit back due to damage internally within the house. She reported holes in the wall which she is concerned were made with a fist as a result of violence. She reported concern that the child J.P. was locked in a hot press as a vent had been installed on the door, where it was not needed. B.K. read out some text extracts from text messages which she received from the child's father R.P. The extracts related to the fact that B.K. was withholding the deposit which they require for their child. My impression of the text messages was that the child's father was angry with B.K. as there was bad language in the text, according to what was read to me by B.K.*
- *B.K. reported that she and the parents were involved in a Tribunal for landladies and tenants as a result of the*

*withheld deposit.*

- *I asked what B.K. wanted me to do with this information?*
- *B.K. reported she wanted me to do whatever I needed to do to ensure it was followed up by the right people. B.K. reported she felt obliged to make this report.*
- *B.K. said she wished to remain anonymous from the family.*
- *I agreed to contact the Social Work Dept. and pass on this information, but advised I could not guarantee anonymity.*
- *I contacted Stephen Whelan, Social Worker, that afternoon and discussed the situation. Stephen advised that it was best of [sic] B.K. spoke to him directly as he would be limited in his action in responding to an anonymous call conveyed to him by myself. He advised I call B.K. back and ask her to speak directly with him.*
- *I phoned B.K. back and reiterated the above. She agreed to speak directly with Stephen Whelan.*
- *I phoned Stephen back and advised B.K. will speak directly to him and will contact him in due course. I asked Stephen if he required any further information from me or anything in writing and he advised to send in the standard reporting form.*
- *I completed the standard reporting form and included a cover letter of referral. I ticked on the standard reporting form that B.K. wished to remain anonymous and I ticked that B.K. had not discussed the referral with parents and neither had I."*

29. Ms. Ferguson stated that in the course of the telephone call, the defendant stated that she was afraid of Mr. P. as she had received an aggressive text message from him. Ms. Ferguson advised that she should contact the Gardaí if she felt threatened.

30. Immediately after the phone call from the defendant she phoned the duty social worker, Mr. Whelan. He asked her to get the defendant to phone him. She then phoned back the defendant, who agreed to speak with Mr. Whelan. She gave the defendant his contact details. Mr. Whelan had also asked her to fill in the Standard Report Form. She did that and returned it to Mr. Whelan.

31. Ms. Ferguson stated that she was contacted again by the defendant in August 2016. She asked her if she had breached her anonymity and whether the matter had been investigated. She stated that the defendant was angry during the course of that telephone call. Ms. Ferguson stated that she could not comment on the status of any investigation. She told the defendant that she had not breached her anonymity. She advised her to take her own legal advice on the matter. The defendant told her that she had been shocked to receive a solicitor's letter about the complaints that she had made.

32. In cross-examination, Ms. Ferguson stated that she was a designated officer within the HSE to receive complaints in relation to the care or safety of children. It was put to her that her initial phone call with the defendant had been made on 10th September, 2015 and not on 21st September, 2015. Ms. Ferguson disputed this. She stated that she had been away on annual leave for either one or two weeks prior to the 21st September, 2015. She was certain that that had been her first day back at work. She stated that she had made typed notes of her telephone conversation with the defendant. She stated that these had been made on her laptop, when she was in Ms. Leydon's office taking the call from the defendant. It was put to her that the original date in the typed notes read "21st September, 2016", but that another date reading "10th September, 2016" had been inserted in handwriting and then crossed out and had been replaced by another handwritten date reading "21st September, 2015". She stated that she had put in the wrong date in her typed notes and had subsequently inserted another wrong date and subsequent to that had inserted the correct date in handwriting. It was put to her that in the Standard Report Form completed by her in handwriting, she had stated that the call had been made by the defendant on "10th September at 5 PM". Ms. Ferguson stated that that had been incorrect also.

33. It was put to Ms. Ferguson that the defendant would say that her initial conversation with Ms. Ferguson had been on 10th September, 2015 and that she had received a subsequent call from Ms. Ferguson on 21st September, 2015 telling her to phone Mr. Whelan. Ms. Ferguson stated that that was not correct. She was adamant that she had made both those calls to the defendant on 21st September, 2015.

34. It was put to Ms. Ferguson that her typed notes did not appear to be drafted in the form that one would expect from a contemporaneous note of a phone call. She accepted that the heading, which read "Statement Regarding Social Work Referral for J.P." was probably added later. She did not accept that the opening paragraph of the notes had been written in the historical sense, rather than as a contemporaneous note. It was put to her that the sentence which read "My recollection of the conversation is as follows:", was suggestive of the notes being compiled sometime after the phone call had been made. The witness did not accept this.

35. Ms. Ferguson accepted that on the basis of what the defendant had told her, she had formed the view that reasonable grounds for concern existed; for that reason she had referred the matter to Mr. Whelan. She stated that the protocol was that if she was unsure about a referral, she would discuss the matter with the duty social worker and fill in the Standard Report Form, which she did. Her view was that she needed to speak to the social worker to determine if further action was needed. The social worker advised that certain further steps should be taken. She accepted that the social worker felt that there were reasonable grounds for concern.

36. Evidence was given by Mr. Michael Feeney, who had been a landlord to the plaintiffs for nine years prior to 2014. He stated that he did not know the defendant. He received a call from her out of the blue at some time in 2016. The defendant asked him to withdraw the reference that he had given for the plaintiffs and to replace it with an adverse one. The defendant told him of the damage that had been done to her property. He had given a reference in respect of the plaintiffs on 4th September, 2015. He stated that he refused to change the reference which he had given, as the plaintiffs had been model tenants to him for nine years. He stated that the phone call was quite short lasting approximately three – four minutes. He stated that the defendant was pleasant at the beginning, but became somewhat erratic or crazy when he refused to change the reference.

37. It was put to the witness in cross-examination that the defendant had phoned him merely to ascertain whether he had in fact given a good reference on behalf of the plaintiffs and whether they had been good tenants. It was put to him that he had not been asked to change his reference. The witness stated that he did not know about that. It was put to him that he had said that Mrs. P. was a nice person, but that Mr. P. was a strange man and he did not want to let Mrs. P. down. Mr. Feeney stated that he did not say that. He stated that he was certain that the defendant wanted to get him to give a bad reference for the plaintiffs. He stated that

the defendant had rung him out of the blue and he did not know what was going on between them at that time. He stated that the defendant had alleged that damage had been done to his property by the plaintiffs, in particular that they had taken out a fireplace. He stated that that was not true.

38. Evidence was given by Mr. Rory Conway, a property surveyor who had been engaged by Mr. and Mrs. K. in July 2015 to survey their property. He stated that on 7th July, 2015, he had visited the property with Mr. and Mrs. K. They had walked through the property and he had photographed various areas which had been pointed out to him by Mr. and Mrs. K., where they alleged that damage had been done to the property. He had taken a series of photographs which had been appended to his report, which had been subsequently used at the P.R.T.B. hearings. He had photographed three doors, two of which had been damaged and one which had been badly painted. These were heavy solid doors which had been damaged. There was also some minor damage to walls where holes had been drilled for hanging paintings.

39. He stated that there was no reason for the hot press to stand out. The vent that had been put in the door was very neat. He was asked to photograph the hot press door. There had also been damage to the door of the ensuite bathroom at the level of the tallboy, which was probably caused by the door hitting it. The damage to the other doors was more than that which would be caused by normal wear and tear. The door to the T.V. room was cracked from top to bottom. On the bedroom door the lock had been drilled out and repaired.

40. He was asked about a remark which he was alleged to have been made in the course of the inspection, in relation to the vent in the hot press door, where he was alleged to have said to the defendant "Are you thinking what I am thinking?". Mr. Conway stated that he did not make any such remark. However, the remark could have been made by Mr. and Mrs. K. talking among themselves.

41. In cross-examination, Mr. Conway stated that the doors in the house were solid engineered oak doors. The damage to the T.V. room door consisted of a crack running from the top to the bottom of the door. It had been poorly repaired. He stated that the damage was there on the date of his inspection on 7th July, 2015. He had photographed the door. He was of the view that the damage was consistent with the door being struck by the shoulder, or being otherwise forced open. He accepted that the damage shown in photographs 1, 3, 5, 7, and 8 showed the damage to the T.V. room door. Photographs 2 and 6 showed the damage done to the lock on the master bedroom door. He stated the drilling would not have been of use in opening a locked door. The damage to the tallboy was shown in his photograph 13.4. The damage on the wall was consistent with it being struck by the tallboy. It was a heavy piece of furniture. She did not try to push it. It was made of solid wood.

42. Evidence was given by Mr. Stephen Whelan, who was a duty social worker in Tusla in September 2015. He stated that Ms. Ferguson rang him in the late morning at approximately 11.30/12.00 hours and told him of her discussion with the defendant about a young child who was known to them. The allegation was that the child had been locked in the hot press in his home and that a vent had been placed in the door of the hot press. He asked Ms. Ferguson to ask the defendant to ring him directly. Ms. Ferguson told him that the lady making the complaints, wanted to remain anonymous. He stated that if she contacted him, he would write "anonymous" after her name and this would mean that it would not become public. He said that Ms. Ferguson rang him back later that day and informed him that the defendant would be in contact with him.

43. Mr. Whelan stated that the defendant rang him later in the day. She indicated that she wished to remain anonymous. She told him that she had concerns about the children in the property. She said that she had discussed the matter with a solicitor at a wedding in Spain. He had apparently advised her to contact child services. She informed Mr. Whelan that she was in a dispute with the parents of the children, which was then before the P.R.T.B.. The defendant said that a vent had been placed in the hot press door and she thought that the boy had been put in there as a punishment. She said that there had been a lot of damage done to the property. She said that she had not witnessed the boy being placed in the airing cupboard. She stated that the property surveyor had asked her if she thought that they put the child in the airing cupboard and she stated that that had been her impression as well. Mr. Whelan stated that the telephone conversation lasted approximately 15 minutes.

44. Mr. Whelan stated that he prepared a pro forma intake document after his telephone call with the defendant. It contained her name with the word "anonymous" written beneath it. It gave her mobile telephone number. In the section headed "Reason for Referral", he had recorded the following:-

"B.K. (anonymous) contacted D.S.W. in relation to her previous tenants (name redacted). Mrs. K. reports that the hot press door in her house has had a vent put in the bottom corner of the door without permission. Mrs. K. was advised by a family friend (a solicitor) to report her concerns to the social work department, that she is concerned that the parents of J. may have put him in the hot press as a form of discipline. Mrs. K. has no evidence to suggest that, but it is a feeling/concern that she has."

45. Mr. Whelan stated that following this telephone call he discussed the matter with his supervisor. It was agreed that the matter would have to be investigated. To that end he wrote a letter to the plaintiffs, inviting them to come into his office on the following Friday for a meeting. Mrs. P. came to the office on the following Thursday. Mr. Whelan outlined the nature of the referral that had been made by the defendant, but did not disclose her identity. Mrs. P. became very upset at these allegations. She began crying and Mr. Whelan had to get tissues for her. He explained to her that he would have to investigate the matter by contacting various people who had contact with the children.

46. Mr. Whelan stated that later on the same day, Mrs. P. returned and produced photographs of the alleged damage to the property, including the vent on the airing cupboard door, which had been produced at the adjudication hearing in the P.R.T.B.. Subsequent to that Mr. Whelan received the Standard Report Form and a covering letter from Ms. Ferguson. He subsequently conducted telephone interviews with the E.I.T., the principal of the school at which the children attended and with their G.P.. When discussing the matter with them, he did not refer to the specific concerns raised by the defendant, but asked generally whether they had any concerns about the safety or welfare of the children. He stated that all of the people contacted assured him that the plaintiffs were excellent parents. They had no concerns whatsoever concerning the health or safety of either of the children.

47. Having completed the investigation Mr. Whelan discussed it with his supervisor. They came to the conclusion that the defendant's concerns were without substance. A decision was made to close the investigation. Mr. Whelan telephoned Mrs. P and informed her that they had been cleared of any wrongdoing and that the investigation had closed. He further informed her that a formal letter to that effect would be sent out in due course. That telephone call was approximately three weeks after he had received the referral on 21st September, 2015. There was some delay in sending the formal letter in relation to closure of the investigation, which was sent on 3rd March, 2016, due to the fact that he was involved in a number of long-running court cases in the interim.

48. In cross-examination, Mr. Whelan stated that when he originally spoke with the defendant, he had asked her if she had seen the

boy being put into the airing cupboard. She said no, that it was just her suspicion. She stated that the presence of the vent on the airing cupboard door gave rise to her suspicion that the child had been put in there. That was her concern. She also mentioned damage to the doors.

### **The Defendant's Evidence**

49. The defendant stated that the property had been their family home. She had resided there with her husband and daughter from 2004 to 2009. They then moved to Spain for six years. The property had been let out to two other couples before being let to the plaintiffs. The plaintiffs resided in the property from 1st January, 2014 to 30th June, 2015. The defendant stated that the damage was evident as soon they returned to the property in the beginning of July 2015. She confirmed that the damage as shown in the photographs appended to Mr. Conway's report, was present at the time of that inspection of the property on 7th July, 2015.

50. The defendant stated that she had had experience in looking after disabled minors in the course of her previous employments. For four years she had worked in a residential facility, which catered for severely disabled children. Many of these children were non-verbal. She was in charge of a bungalow, which housed eight children. Subsequently, she worked for two years in a retreat centre run by an order of priests, which catered for residential school retreats. She had been the manager of the centre. On one occasion an issue arose when a schoolgirl had been taken from the premises for a period of time by a member of staff. The defendant stated that she had been very concerned by this and had sought advice from her second cousin, Dr G., who lectured in a regional college and was the Designated Officer for receiving complaints in relation to abuse or mistreatment of students at the college. On that occasion, Dr G. advised her to report the matter. She reported the matter and subsequent investigation revealed that there had been substance to her concerns. The significance of this event will become apparent in the context of later actions taken by the defendant in this case.

51. The defendant stated that when she and her husband did a walk-through of the property with Mr. Conway on 7th July, 2015, she was concerned about the nature of the damage to the property. Due to the damage to the bedroom door and the door to the TV room and due to damage to items of bedroom furniture, in particular the broken tracking on the drawers, the broken handle on a drawer and the damage to the tallboy, she was concerned that the damage was indicative of violent behaviour within the property. She was also concerned about the vent, which had been put into the door of the airing cupboard. The plaintiffs had not sought permission to make such an alteration to the door. She was concerned the boy may have been put in the airing cupboard for discipline purposes.

52. In relation to the comment made during the inspection by Mr. Conway, the defendant denied that she had said "Are you thinking what I'm thinking?". She stated that she was clear that it was Mr. Conway who had said that to her and her husband during the inspection. She stated that she replied "What are you thinking?", to which he replied "A child may have been put in there".

53. The defendant stated that she did nothing about it at the time. However some short time later she met a friend who was a solicitor, Mr. Bob Walsh, at a wedding in the west of Ireland. She mentioned the damage to the property to him and said that she had concerns as there were two children in the house. She said that he told her that she should report it through the proper channels. That had been a very short conversation.

54. The defendant stated that on 21st August, 2015 she arranged to meet with her second cousin, Dr G.. She stated that her cousin had been something of a mentor to her at various stages in her life. She told Dr G. of her concerns for the safety of the children and in particular for the safety of the boy, who she knew had autism and was non-verbal. She outlined the basis of her concerns being the damage to the property and the insertion of a vent into the door of the airing cupboard. Dr G. advised her to report the matter to the proper authorities. She said that even if there was no cause for her concern, she should still report it, as the safety of the children was the highest priority. Dr G. told her that she had a moral obligation to the children.

55. The defendant stated that she left it for a few days and thought about the whole issue. She felt that she had to report it to someone in order to clear her conscience. Dr G. had given her the name of Ms. Ferguson on the E.I.T.. Dr G. did not have the phone number for the team, but she was able to find the number by doing a search on Google.

56. The defendant stated that approximately three or four days after she had spoken with Dr G., she phoned the E.I.T. offices and spoke with Ms. Leydon. She asked to speak with Kate Ferguson, but was told that she was not available. She left her name and mobile number for Ms. Ferguson to phone her back. However she did not receive any call. Approximately a week later Dr G. phoned her with the number of the EIT. She told Dr G. that she had already phoned them and was expecting a call back.

57. Approximately 10 days later, the defendant stated that she made a second call to the E.I.T. and again spoke with Ms. Leydon. That was in early September. Again she was unsuccessful in speaking to Ms. Ferguson. The defendant stated that on 10th September, 2015 she phoned again. This time she managed to speak with Ms. Ferguson. Her recollection of the date was based on the fact that the third call was approximately five days after she had made the second call. In the course of the telephone call she told Ms. Ferguson about receiving the text from Mr. P. on 24th July, 2015 and that she felt threatened by it. Ms. Ferguson advised her to contact the gardai if she felt threatened. The defendant stated that she subsequently made contact with the gardai on 16th September, 2015. She produced a letter from An Garda Siochana which confirmed that her complaint had been made to them on 16th September.

58. The defendant stated that she told Ms. Ferguson that she was a landlord of the property and had found considerable damage to it. She detailed the damage as being: drill holes in the area of the lock on the bedroom door, damage to the door to the TV room, which had been split the whole way down and had been badly repaired, damage to the bedroom furniture and the insertion of the vent in the airing cupboard door, for which no permission had been sought. She told Ms. Ferguson that she was concerned that the children may have been exposed to aggressive behaviour in the home. She said that she was particularly concerned about the boy, due to her experience with disabled children. She stated that she told Ms. Ferguson that they were in a dispute with the plaintiffs, which was then before the P.R.T.B..

59. The defendant stated that she did not like Mr. P. She feared him due to the text that she had received from him. She did not particularly like Mrs. P. either. She got a bad "vibe" from her. She felt that she was covering up a lot of things.

60. The defendant stated that on 21st September, 2015, she received a call from Ms. Ferguson, who asked her to make contact with Mr. Stephen Whelan. She phoned him that day. She told him about the damage to the house. She told him that a vent had been put in the hot press door. She told him that she feared that a child might be put in there for discipline purposes. She said that she told him that she had no evidence of this. However, she was concerned that there was aggression in the property and she feared for the children's safety.

61. The defendant was asked whether she had ever noticed any smells in the airing cupboard. She stated that she had not done so, nor had any previous tenants made any such complaint to her.

62. In cross-examination, the defendant accepted that she had set out all the damage to the property in the course of her conversation with Ms. Ferguson. However, her concern was not about the damage as such, but for the children who had been in the house. It was how the damage had occurred, which was the matter which caused her concern. She accepted that she had said to Ms. Ferguson that she was concerned that the children might have been put into the hot press. Her main concern, however, was for the autistic boy, as he was non-verbal. The older daughter would be able to articulate if anything untoward was going on. It was put to her that at the hearing in the Circuit Court, she had stated that in relation to the boy being put into the airing cupboard, that Ms. Ferguson and Mr. Whelan had jumped to that conclusion. The defendant denied that she had said that. She accepted that she had told both of them that she was concerned that the boy may have been put into the airing cupboard for discipline purposes.

63. The defendant stated that there was shelving in the airing cupboard, but there was space for a child between the bottom shelf and the floor. The bottom shelf was approximately 3 ft. above the floor. There was a radiator within that space, which was approximately 2 ft. back from the door. She produced photos showing the interior of the airing cupboard. It was put to the defendant that it was not credible that she would form the belief that the child could have been imprisoned in the airing cupboard just because there was a vent on the door, when there was no damage to the door itself and no lock on the door. The defendant stated that it was her belief that that was in fact a possibility. She was not sure how it came into her mind. She stated that she had found a toy truck and car in the hot press.

64. The defendant stated that she had been frightened when she got the text from Mr. P. on 24th July, 2015. She had been afraid, but she accepted that she had not gone to the gardai until advised by Ms. Ferguson to do so. She accepted that the day on which she had made the complaint to the gardai, was the same day on which the adjudication hearing had been held in the P.R.T.B.. She stated that she just decided to make the complaint that day after the hearing concluded. It was put to her that if she had genuine fears after she received the text, she would have made her complaints much earlier. The defendant stated that she had concerns for the safety of her daughter, who was then 11 years of age, as she feared that Mr. P. would come back to the house. She stated that the delay in speaking to Dr G., was due to the fact that she had been working hard in their business and due to the fact that her uncle was dying in Dublin. It had been a very busy time after they returned from Spain.

65. The defendant stated that the atmosphere at the adjudication hearing had been business like. She accepted that by that time she did not like the plaintiffs and was also in fear of Mr. P.. In terms of the tenancy dispute, she felt that the damage to the property had been properly documented at €2,300. She felt that they were perfectly entitled to retain the deposit. She was upset that the plaintiffs had demanded the return of their deposit. She denied that she had been very angry at the hearing.

66. It was put to the witness that the damage claim had been somewhat higher at €3,367, which suggested that relations between her and the plaintiffs were extremely poor. The defendant denied that she had been aggressive towards them. She denied saying at the hearing that they were "monsters". She denied that she was incensed that they were seeking return of their deposit.

67. The defendant accepted that Dr G. had been present during the hearing in the Circuit Court, but had not been called to give evidence on her behalf. She accepted that she had not said during her evidence, at that hearing, that she had spoken to Dr G. at any stage. She denied that she had previously said that she had acted due to her conversation with a solicitor at a wedding in Spain. The defendant stated that that was not correct, that the wedding had been held on 10th July, 2015. She accepted that in the Circuit Court she had said that that was the reason for her phone call to Ms. Ferguson. She accepted that there was no reference to Dr G. in her previous evidence to the Circuit Court.

68. The defendant was asked about the reason for her delay in making her concerns known to Ms. Ferguson. She stated that she had been assessing in her mind the damage which had been done to the property and the text which she had received from Mr. P.. She felt that he could be aggressive. She then sought advice on the matter. Dr G. had put it to her that she had a duty to the children. That was the reason why she had made her complaint. It was not because she was very annoyed in relation to the tenancy dispute with the plaintiffs. She stated that the sum in question was significant, but was not huge. The defendant stated that she had agonised over making the telephone call to the E.I.T.. She regretted the upset and stress caused to the plaintiffs, but she felt that she had an obligation towards the children.

69. The defendant agreed that she had requested anonymity in relation to her concerns. She did not want Mr. and Mrs. P. to be further aggravated. They might have thought that she had a vendetta against them, which was not the case. It was put to the defendant that she wanted anonymity as that would hinder the plaintiffs' chances of pursuing her. She denied that that was correct.

70. The defendant was asked about her telephone call to Mr. Feeney, the plaintiffs' previous landlord. She stated that she had phoned him when the tribunal hearing was coming up in the P.R.T.B.. She wanted to see if he had actually written the reference, because the plaintiffs had merely handed it to her husband at the commencement of the tenancy. She had wanted to ascertain whether they had made changes to his property without permission. Mr. Feeney stated that he had given permission for any changes made.

71. In re-examination the defendant stated that she had been told in her initial phone call that confidentiality could not be guaranteed, but she had gone ahead and made her concerns known.

72. Mr. K. gave evidence that the damage to the property and the behaviour of the plaintiffs was a general topic of conversation with his wife. He said that she was a very caring person, who would be concerned for the underdog. He stated that he had complied with the determination of the P.R.T.B. tribunal, under which he had been directed to pay €767 to the plaintiffs. He stated that the plaintiffs had in fact appealed that award, but that appeal had been dismissed due to the fact that it was a repetition of the previous appeal. It was after the second determination, that he furnished the cheque for the stipulated amount to the P.R.T.B..

73. Mr. K. stated that he thought that the text sent by Mr. P. was a threatening text. His wife became excessively security conscious after receiving that text. She insisted that all the doors and windows be securely locked and they had to change the security code on the gate. He stated that he had quite a good relationship with Mr. P.. They had allowed the plaintiffs into their home because they were a family and also because they had a disabled child. He thought that perhaps Mr. P. was somewhat annoyed that they had to leave the property, which was due to the fact that he and the defendant were returning to live in the property as their daughter wanted to return to Ireland from Spain. He denied that he had any animosity towards Mr. P..

74. Finally, evidence was given by Dr G. She confirmed that on 21st August, 2015, the defendant had visited her. The defendant was quite upset. She told her about the damage to the property and about the vent in the airing cupboard door. She was concerned that

these were indicative of someone having a temper issue. She told her that one of the children was young and suffered from autism and was non-verbal. They agreed that these things did not sound right.

75. Dr G. stated that the defendant did not want to report the matter, as she was afraid due to the text she had received from Mr. P.. Dr G. stated that she advised that the boy was probably attending the Early Intervention Services. She advised the defendant that she could mention it to the staff there. They would be aware of the situation and it would not be necessary to make a formal complaint. She told her that she could make a referral in confidence and anonymously. She told the defendant that she had a moral duty to report the matter. They were both agreed on that. She also told her that she would be protected by the principal at common law known as qualified privilege.

76. Dr G. told the defendant that Kate Ferguson was a manager on the E.I.T.. She told her that she would get the telephone number. Approximately one week later, she phoned the defendant with the number, but the defendant had already obtained the telephone number. She encouraged the defendant to follow it up. She said that she told the defendant "I think you are brave to follow it up". She stated that her assessment of what she had been told by the defendant was that there was a concern which should be looked into. If an issue subsequently arose in relation to the children, it would not be good if no report had been made. She stated that she would have given the same advice to a stranger in the same circumstances.

77. Dr G. was in the habit of keeping a meticulous daily diary on her computer. She produced a printout of her entry for Friday 21st August, 2015. The salient part was as follows:-

"Also talked re-tenants who left damage to house temper, worried re-child especially non-verbal. Discussed reporting it as concern, B. reluctant but agreed was moral duty."

78. In cross-examination, Dr G. stated that the defendant had mentioned damage to the doors, walls and furniture in the house and had also mentioned the vent in the airing cupboard door. She had elaborated on these issues. She stated that she was aware that there would not normally be a handle on the inside of an airing cupboard door, so it would be possible to imprison someone in it without a lock. She accepted that there was no mention of the vent in her notes in her diary.

79. In relation to the alleged conversation with Mr. Conway, the defendant told her that he had said in relation to the vent: "That was not there before. What do you make of that? Are you thinking what I'm thinking?" To which the defendant said she responded "Depends on what you are thinking". To which he said "I think they were confining the child in the hot press". Dr G. stated that that was so unusual she recalled it being said by the defendant, even though it was not in her note.

80. She confirmed that the defendant did mention that the plaintiff had two children. However she only had concerns for the disabled child due to the suspicion of violence in the home. Perhaps it was because he was non-verbal. The defendant had not shown her any photographs of the damage to the property.

### **The Law**

81. The law of defamation in this jurisdiction is now contained in the Defamation Act 2009. Section 6(2) provides that the tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first – mentioned person), and "defamation" shall be construed accordingly. This section further provides that a defamatory statement concerns a person if it could reasonably be understood as referring to him or her. A "defamatory statement" is defined in s. 2 of the Act as meaning a statement that tends to injure a person's reputation in the eyes of reasonable members of society.

82. In "Law of Torts" (4th Ed.), McMahon and Binchy make the following observations in relation to the question of a person's reputation at para. 34.51:-

*"When the layperson hears the word 'reputation', there may be a tendency from him or her to think of well known politicians, sportsmen and celebrities, who extensively feature in the media. It should be emphasised, however, that in law no such media prominence is necessary to claim a reputation; even the most modest citizens whose travels or fame have never extended beyond his or her own village is accorded a good name by the law in his or her own community. Reputation must not be confused with fame. Moreover, every citizen is assumed by the law to be of good character, and anyone who states otherwise, must be prepared to prove or justify the slight if challenged by the injured party."*

83. Also relevant to the issue of defamation in this case, is the defence of qualified privilege. In some circumstances, the law recognises the right of a person to communicate freely, provided it is not done maliciously: such occasions are considered to be occasions of qualified privilege. Generally speaking, the person who makes the statement on such occasions is protected, provided he or she was not motivated by malice in making the statement.

84. The defence of qualified privilege is now on a statutory basis in s. 18 of the 2009 Act, the relevant parts of which are as follows:-

*"18.— (1) Subject to section 17, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately before such commencement as having been made on an occasion of qualified privilege.*

*(2) Without prejudice to the generality of subsection (1), it shall, subject to section 19, be a defence to a defamation action for the defendant to prove that—*

*(a) the statement was published to a person or persons who—*

*(i) had a duty to receive, or interest in receiving, the information contained in the statement, or*

*(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and*

*(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons....*

*(7) In this section—*



*"duty" means a legal, moral or social duty;*

*"interest" means a legal, moral or social interest."*

85. Section 19 of the Act provides that the defence of qualified privilege can be lost in certain circumstances. Section 19(1) is in the following terms:-

*"19.— (1) In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice."*

86. In *McCormack v. Olsthoorn* [2004] IEHC 431, Hardiman J. stated as follows in relation to whether the person making the statement must have had reasonable grounds or evidence before making the statement:-

*"Equally, I have to disagree with the dictum in the judgment in Coleman v. Keanes [1946] I.R. Jur Rep 5, to the effect that a person seeking to avail of the privilege 'must have reasonable grounds or evidence before so acting. He must not immediately jump to a rash conclusion'. I do not believe that the requirement of 'reasonable grounds' is a correct statement of the law. Privilege is lost by malice, excessively wide publication or one of the other established causes. It is not lost merely because the belief turns out to be erroneous, or because the defendant was hasty. The presence or absence of reasonable grounds for the defendant's belief may be very relevant in a case where malice (that is, some improper motive) is pleaded but there is no such plea here, and on the facts, there could not have been."*

87. An issue which has arisen in this case is whether in making her statement to Ms. Ferguson, the defendant was acting maliciously and was motivated by a desire for revenge for the fact that the plaintiffs had brought a case against the defendant and her husband before the P.R.T.B.. It seems to me that the statement of the law set out by the learned authors, McMahon and Binchy, at para. 34.249 *et seq* is a correct statement of the law. It is in the following terms:-

*"34.249 The presence of personal spite and ill-will on the part of the author may clearly indicate wrong motive in some cases and, as we have seen one of the clearest ways malice can be shown is by proving that the defendant did not believe in the truth of his statement or was recklessly careless whether the statement was true or false. The incidental presence, however, of an improper motive will not always be fatal; provided the author was primarily and honestly interested in protecting the recognised interest, the incidental presence of disgust, indignation or annoyance will not destroy the privilege:*

*'The motive with which human beings act are mixed...it is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found' [per Diplock L.J. in Horrocks v. Lowe [1974] 1 All E.R. 662, at p. 670]*

*Put positively to establish malice, the plaintiff must show that the improper motive was the dominant factor operating in the defendant's mind at the relevant time.*

*34.250 Furthermore, malice will not necessarily be proved merely because the defendant's thought process was flawed or inconsistent. In this regard, the law is somewhat indulgent of the defendant. It does not demand that he be 'right'; it only demands that he be honest.*

*'The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men...in affording to them immunity from suite if they have acted in good faith...the law must take them as it finds them...in greater or lesser degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfections of the mental process by which the belief is arrived at it may still be 'honest' i.e. a positive belief that the conclusions they have reached are true. The law demands no more.' [per Diplock L.J. in Horrocks v. Lowe [1974] 1 All E.R. 662, at p. 669]."*

88. Protection is also afforded to people who make complaints in relation to suspected child abuse. They are given statutory protection under the provisions of the Protections for Persons Reporting Child Abuse Act 1998. Section 1 of that Act (as amended) provides that an "appropriate person" means a designated officer or a member of An Garda Síochána. A "child" is a person who has not attained eighteen years of age; "designated officer" means an employee of the Health Service Executive or the Child and Family Agency appointed under s. 2 of the Act to be a designated officer for the purposes of the Act.

89. The specific protection is given in s. 3 of the 1998 Act (as amended), which provides as follows:-

*"3.—(1) A person who, apart from this section, would be so liable shall not be liable in damages in respect of the communication, whether in writing or otherwise, by him or her to an appropriate person of his or her opinion that-*

*(a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, or*

*(b) a child's health, development or welfare has been or is being avoidably impaired or neglected, unless it is proved that he or she has not acted reasonably and in good faith in forming that opinion and communicating it to the appropriate person."*

## Conclusions

90. Having considered all the evidence outlined earlier in this judgment, I have reached the following findings of fact. I propose to deal with these in chronological order. The first issue concerned the extent of damage to the defendant's property at the conclusion of the plaintiff's tenancy thereof on 30th June, 2015. The plaintiffs accepted that there had been damage to the lock on the main bedroom door and that a vent had been inserted into the door of the airing cupboard. However, Mrs. P. denied that the damage to the T.V. room door had been done prior to the time that they left the property. She also denied that there had been any damage to the furniture in the house. I accept the evidence given by Mr. Conway that the damage, which he photographed at the time of his inspection on 7th July, 2015, included the extensive damage to the T.V. room door. If Mrs. P's evidence is correct, the only inference

which can be drawn is that the defendant and her husband were lying when they said that that damage had been done when they took possession of the property on 1st or 2nd July, 2015 and that they did this damage prior to the date of the inspection by Mr. Conway. That is a completely fanciful proposition. There is no logical reason why they would damage their own door, merely to retain a deposit of €1,500. Accordingly, I prefer the evidence of the defendant and her husband that the damage to the T.V. room door existed when they took possession of the property on 1st July, 2015, and that such damage existed at the date of Mr. Conway's inspection, seven days later. Accordingly, I do not accept the evidence of Mrs. P. in this regard.

91. I accept the evidence given by Mr. Conway that the damage to the T.V. room door was consistent with someone applying considerable force thereto; either by putting their shoulder forcefully against the door, or in some other way trying to force the door open.

92. I also accept the evidence given by the defendant and by Mr. Conway that there was the damage as outlined by them to the various items of furniture in the house. While some of that may have been consistent with normal wear and tear, I am satisfied that certainly a portion thereof was damage, which was in excess of normal wear and tear and was consistent with the application of force thereto. I accept the evidence of Mrs. P. that the only damage to the walls, was caused by the insertion of holes in the walls for the hanging of paintings and photographs.

93. It is common case between the parties that a vent had been inserted into the airing cupboard door by the plaintiffs, without any permission having been sought by them. Having viewed the photographs of the interior of the airing cupboard, I am satisfied that there was, sufficient space between the bottom shelf and the floor in the area in which the radiator was situated, in which to confine a small child of six years of age.

94. In the course of her evidence in cross examination, the defendant stated that she found a toy truck and car in the airing cupboard. I view this evidence with great suspicion. The defendant did not mention this fact to Dr G., or to Ms. Ferguson or to Mr. Whelan. Nor did she mention it in her evidence in chief. One has to be suspicious of little nuggets of evidence that are thrown in, in the course of cross examination. However, even if she did find the toys in that location, that is not of any relevance, because anyone who has been around young boys of three years of age and older, will know that they leave toys in the most extraordinary of places. Accordingly, I attach no weight to this evidence.

95. In relation to the alleged conversation between the defendant and Mr. Conway at the time that he was photographing the vent in the airing cupboard door, I accept the defendant's evidence in this regard. She gave an account of this conversation to Dr. G. and to Mr. Whelan. Mr. Conway recalls such a comment being made, but denies that it was made by him. I am satisfied that this was a somewhat casual remark, which passed between the three of them as the inspection was proceeding. It was not the expression of a considered opinion given after mature reflection. I think that his evidence to the court was probably coloured by a desire not to be seen as having, in any way, encouraged the defendant to make allegations against the plaintiffs, which have subsequently turned out to be unfounded.

96. It is common case that Mr. P. sent a text message in response to an earlier text message sent by the defendant on 24th July, 2015. I accept the defendant's evidence that she was put in fear by Mr. P's text message. Her evidence in this regard is supported by the evidence of her husband which, I accept. While I accept that Mr. P. sent the text message when he was somewhat enraged, it is understandable that it was open to a threatening interpretation when received by the defendant.

97. I accept the evidence given by Dr. G. that she met with the defendant on 21st August, 2015. Dr. G. struck the court as being a conscientious and careful person, who had given the defendant advice in a somewhat similar type of situation years earlier. I accept her evidence that the defendant outlined her various concerns arising from the damage to the property and the placing of a vent in the airing cupboard door. I accept her evidence that she advised the defendant that she should make her concerns known to the E.I.T. and to that end, she gave Ms. Ferguson's name to the defendant. I accept her evidence that she impressed upon the defendant, that it was her moral duty to make her concerns known regarding the possible threat to the safety and welfare of the children and to the disabled boy in particular.

98. While it was perhaps surprising that Dr. G. who was present in the Circuit Court, was not called to give evidence at that hearing, it was never put to her that her evidence before this Court was false or misleading in any way. I do not think that I could draw any such inference merely due to the fact that she was not called to give evidence at the earlier trial.

99. The next issue is whether the defendant first spoke with Ms. Ferguson on 10th September, 2015, as alleged by the defendant. This has been denied by Ms. Ferguson, who insisted that all her dealings with the defendant took place on 21st September, 2015, being the date that she passed on those concerns to the duty social worker, Mr. Whelan.

100. I have not found the evidence given by Ms. Ferguson on this aspect to be credible. Firstly, her notes which were allegedly made contemporaneously with her phone call with the defendant, has a number of wrong dates included therein, including the date "10th September, 2016". There was no adequate explanation given by Ms. Ferguson for these errors. Secondly, the same allegedly erroneous date of 10th September, 2015, appears in her handwritten Standard Report Form. Again, she had no adequate explanation for that error.

101. Thirdly, her evidence in relation to the timing of the telephone calls on 21st September, 2015, cannot be correct. She stated that her first conversation with the defendant was at 5pm that day. She remembered that, due to the fact that she had to pick up her child from the childminder. This is inconsistent with the evidence of Mr. Whelan, who stated that he received the telephone call from Ms. Ferguson at 11:30/12:00hrs on 21st September, 2015. I am satisfied that Mr. Whelan's evidence as to the timing of his telephone call from Ms. Ferguson on 21st September, 2015, is correct, due to the fact that Ms. Ferguson phoned him back, later in the day and informed him that the defendant had agreed to make contact with him. He further stated that the defendant did, in fact, phone him later that day. This is more consistent with the original phone call having been made by Ms. Ferguson at approximately 11:30/12:00hrs, rather than her making it some time after she had received the first call from the defendant at 17:00hrs, as alleged by her.

102. Sixthly, the wording of her "*contemporaneous*" notes is not of the type that one would normally find when taking notes during a telephone call. In particular, the heading of the document, which Ms. Ferguson admits may have been put in later and the first paragraph thereof and in particular the last sentence of that paragraph, which reads: "*My recollection of the conversation is as follows*", are not consistent with the content of that document having been drawn up while the telephone call was being made. I suspect that the document was created later from handwritten or brief notes made by Ms. Ferguson during the course of the telephone call.

103. Finally, the defendant's evidence in relation to the timing of her calls to Ms. Leydon and the gap of approximately eleven days between her first conversation with the defendant on 10th September, 2015, and her subsequent call on 21st September, 2015, is credible. This is supported by the fact that during the first telephone conversation, Ms. Ferguson advised her to contact the gardaí if she felt threatened by the text which she had received from Mr. P. She did, in fact, make such a complaint to the gardaí on 16th September, 2015. This is confirmed by a letter which was issued by the gardaí. That being the case, the advice given by Ms. Ferguson, could not have been given during the telephone call on 21st September, 2015, as such advice would have been redundant, as the defendant had already taken that step.

104. Accordingly, I find as a fact that the defendant made her concerns known to Ms. Ferguson in the course of a telephone call which was made on 10th September, 2015. She had a subsequent telephone conversation with Ms. Ferguson on 21st September, 2015, wherein she was asked to make contact directly with Mr. Whelan and was given his contact details. She did so later that day.

105. The evidence given by the defendant, and by Ms. Ferguson and by Mr. Whelan is broadly in agreement in relation to what the defendant said to them in relation to her concerns for the safety and welfare of the plaintiff's children. Accordingly, I find as a fact that the defendant indicated that her concerns for the safety of the children arose due to the fact that she had found damage to the property, which she elaborated in the course of the telephone call, which she felt, was indicative of violence on the part of some of the occupants of the property. She also indicated that her concerns arose out of the fact that a vent had been placed in the airing cupboard door for no apparent reason. She indicated that she was concerned that the young boy may have been put in there for discipline purposes. I am satisfied that she told Ms. Ferguson and Mr. Whelan that she did not have any direct evidence of these concerns and that these were merely her concerns arising from the things that she had found on the property.

106. I am further satisfied that she told them that she was in dispute with the plaintiffs in relation to retention of their deposit following termination of the tenancy. She told them that that dispute was proceeding before the P.R.T.B.. I am satisfied that the defendant requested anonymity in relation to the making of her complaint from Ms. Ferguson, but was told that such could not be guaranteed, yet she went ahead and made her concerns known. That concludes my primary findings of fact.

107. The only claim in defamation in this case is in relation to the statements made by the defendant to Ms. Ferguson. I have already found that such statements were made on 10th September, 2015.

108. The first question which I must decide is whether these statements were defamatory statements within the meaning of the 2009 Act. It was submitted on behalf of the defendant that as the defendant had stated clearly that she had no direct evidence of any violence being perpetrated on the children, or of the boy being locked in the airing cupboard, but merely had concerns for the safety of the children due to the matters outlined, this could not be taken as a defamatory statement of the plaintiffs, as there was no direct statement that they had mistreated the children, or actually imprisoned the boy in the airing cupboard.

109. I do not think that that submission is correct. To adopt such an argument would mean that a person could make a damaging allegation against a person, but argue that that allegation was not a defamatory statement because they had not said that a certain state of facts existed, but merely that they had concerns that such a state of facts may have existed at a particular time. If the law were to enable a person to engage in such sophistry as a means of avoiding liability for a defamatory statement, the law would be brought into great disrepute.

110. A "*defamatory statement*" is defined in the 2009 Act as a statement that tends to injure a person's reputation in the eyes of reasonable members of society. In looking at whether a particular statement is a defamatory statement, the court should look at it in a sensible and reasonable manner, to see whether ordinary people would think worse of the person as a result of the statement being made. I have no doubt that to make a statement to a third party, that you had concerns from what you had seen on a property, that the parents may have been exhibiting violence towards their children and may have been imprisoning their disabled son in the airing cupboard for discipline purposes, would certainly tend to injure their reputation in the eyes of reasonable members of society. Accordingly, I have no hesitation in finding that the statements made by the defendant to Ms. Ferguson on 10th September, 2015, were defamatory statements within the meaning of the 2009 Act.

111. The key issue in this case is whether the defendant's communication with Ms. Ferguson on 10th September, 2015, was covered by qualified privilege. It was accepted at the hearing that Ms. Ferguson was a designated officer within the HSE at the relevant time. Accordingly, it was appropriate to communicate any concerns that one may have about the safety or welfare of minors to Ms. Ferguson. It was submitted on behalf of the plaintiffs that, while the making of the defamatory statements may have been ostensibly covered by qualified privilege, that privilege was lost due to the fact that the defendant made these statements, either knowing them to be untrue, or reckless as to whether they were true or untrue and did so out of malice, due to the fact that she was embroiled in a dispute with the plaintiffs over retention of the deposit which had been paid by the plaintiffs at the commencement of the tenancy. It was the firm belief of Mr. and Mrs. P. that the defendant only made the allegations against them, out of a desire to extract revenge against them for the fact that they had brought the defendant and her husband before the P.R.T.B..

112. While it is certainly true that the defendant was embroiled in a dispute with the plaintiffs before the P.R.T.B. at the time that she made her complaint to Ms. Ferguson, one has to look at matters as they presented themselves to the defendant in the weeks leading up to the making of her allegations. In the beginning of July, when she had returned to the property with her husband, they found fairly significant damage done to the property. Some of this damage, and in particular, the damage to the T.V. room door, was only consistent with the application of considerable force to the door. There was also evidence of damage to the lock on the master bedroom door. That damage indicated that someone, for whatever reason, had locked the door and was either unwilling or unable to unlock it. As a result, someone else had to apply a drill to the area of the lock in an effort to open the door. The defendant and her husband also found that a vent had been inserted into the door of the airing cupboard. The plaintiffs had never asked for permission to insert such a vent into the door. Of more importance, however, was the fact that the defendant had received no explanation at all from the plaintiffs for any of the damage done to the property, or for the insertion of the vent. In these circumstances, it seems to me that it was understandable that she came to the conclusion, albeit a mistaken conclusion, that the damage was only consistent with someone within the house causing the damage through violent actions.

113. It was also understandable that the defendant, perhaps with the tacit agreement of her husband and Mr. Conway, also came to the conclusion that the vent may have been put into the door of the airing cupboard, so that the young boy could be confined there for discipline purposes. As I have already found, there was sufficient space between the bottom shelf and the floor for a child to be confined therein.

114. While the defendant was criticised for delaying in taking any action, if she had reached such conclusions in relation to the safety of the children, I accept her evidence that the making of such allegations to the appropriate authorities is not something that one does lightly. I also accept her evidence that there were other issues, both on the business front and in relation to her uncle, who was

dying in Dublin at the time, which prevented her taking immediate action. The discovery of the damage to the property was followed by the receipt of a fairly aggressive text from Mr. P. on 24th July, 2015. While I understand that he was quite worked up at that time by what he saw as being the unjustified retention by the defendant and her husband of a sizeable sum of money, that text must have seemed somewhat aggressive and threatening when received by the defendant. I accept the evidence of her husband that she became excessively security conscious following receipt of the text.

115. As already indicated, I accept the evidence of Dr. G. that the plaintiff consulted her on 21st August, 2015. She encouraged the defendant to make her concerns known to the Early Intervention Team. It seems to me that it was reasonable for the defendant to consult with her cousin, who is some years older and who has had considerable experience in the area of child protection. Such action is not consistent with the allegation that the defendant was purely acting out of malice and spite against the plaintiffs. Furthermore, the timings of the phone calls made by the defendant to Ms. Ledyon and to Ms. Ferguson on 10th September, 2015, are consistent with a genuine desire on her part to do the right thing and make her concerns known to the appropriate authorities as she had agreed to do at her meeting with Dr. G. on 21st August.

116. The significance of the timing of these calls is that it shows that they were made prior to the adjudication hearing before the P.R.T.B. in the middle of September. Thus they cannot be seen as having been made because the defendant was very annoyed about the adjudication hearing on 16th September, 2015.

117. The protection afforded to the defendant pursuant to s. 18 of the 2009 Act, would only be lost in circumstances where the plaintiffs established that the defendant had acted with malice in making her allegations known to Ms. Ferguson. As can be seen from the various dicta cited above from the decision in *Horrocks v. Lowe* [1974] 1 All E.R. 662, the law gives considerable latitude to persons who make various concerns known to the appropriate authorities. As was pointed out by Diplock L.J. as long as the person making the statement has acted in good faith, the law must take them as it finds them. To a greater or lesser degree, according to their temperaments, training and intelligence, they may be swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt upon the validity of the conclusions they reach. But despite the imperfections of the mental process by which the belief is arrived at, it may still be "honest" i.e. a positive belief that the conclusions they have reached are true. The law demands no more.

118. Even where there may be mixed motives for a person in making certain allegations, I accept the statement of the learned authors of McMahon and Binchy at para. 34.249, that the incidental presence of an improper motive will not always be fatal; provided the author was primarily and honestly interested in protecting the recognised interest, the incidental presence of disgust, indignation or annoyance will not destroy the privilege. In support of that opinion, the learned authors cited portion of the judgment of Diplock L.J. in the *Horrocks* case, which has already been cited above.

119. Given the state of affairs which confronted the defendant in July 2015, the receipt of the text from Mr. P. later that month and the advice she received from Dr. G., I am satisfied that the defendant was acting honestly and in good faith when she made her concerns known to Ms. Ferguson on 10th September, 2015. Accordingly, she is entitled to rely on the defence of qualified privilege in respect of her statements on that occasion.

120. There is no claim in these proceedings relating to the publication of the statements by the defendant to Dr. G. on 21st August, 2015. That was probably due to the fact that the plaintiffs were ignorant of the making of such statements when they issued their proceedings. Accordingly, the making of such statements by the defendant to Dr. G. does not fall for consideration. However, even if it were included in the claim, I would have found that the defendant acted reasonably and responsibly in seeking the guidance of Dr. G. before she made her concerns known to the appropriate authorities. Accordingly, I would have come to the conclusion that those statements too were covered by qualified privilege.

121. Finally it seems to me that the defendant is also entitled to rely on the provisions of s. 3 of the Protections for Persons Reporting Child Abuse Act 1998 (as amended). I am satisfied that in making her concerns known to Ms. Ferguson, she clearly came within the provisions of that Act. She would only lose the protection afforded by s. 3 thereof, if it were proven that she had not acted reasonably and in good faith in forming the opinions that she did and communicating them to Ms. Ferguson. For the reasons set out above, I am satisfied that the defendant did act reasonably and in good faith in making these concerns known to Ms. Ferguson. Accordingly, she has not lost the protection of that section.

122. Having regard to the findings made herein, I allow the defendant's appeal and dismiss the plaintiffs' action against the defendant. However, it should be made clear that the plaintiffs have been found to be very good parents to both of their children at all times. There was no substance to the concerns which were expressed by the defendant to Ms. Ferguson. The plaintiffs have only failed in their action due to the fact that the law allows certain protection to people who make statements on occasions of qualified privilege, or who make concerns known in respect of the safety or welfare of children and therefore come within the protection provided for in s. 3 of the 1998 Act. While the statements made by the defendant were defamatory of the plaintiffs, she is entitled to the protection of the law in the circumstances surrounding the making of those statements.

Finally given the findings set out in this judgment, I also dismiss the plaintiff's appeal against quantum.