

THE HIGH COURT

[Record No. 2013/13293P]

BETWEEN/

DAVID CHRISTIE

PLAINTIFF

AND

TV3 TELEVISION NETWORK LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 12th day of November 2015

1. In these proceedings the plaintiff has applied to the court to assess damages for defamation in circumstances where the defendant has, pursuant to the provisions of the Defamation Act, 2009, made an offer of amends and has not defended the proceedings other than by way of making submissions as to how the court should approach the question of damages.

Background facts

2. The plaintiff is a solicitor who carries on a mixed civil and criminal practice in a small firm in Dublin. In 2013, he represented a Mr. Thomas Byrne, a by then struck-off solicitor who was charged before the criminal courts with a large number of offences of theft, forgery and fraud. The details of the offences are not relevant here, save for the fact that they were for the most part connected with Mr. Byrne's professional capacity as a solicitor. The case ran for several weeks in October and November, 2013 and attracted widespread publicity. Mr. Byrne, who was on bail throughout the trial, was eventually convicted on all charges and was sentenced to a term of imprisonment.

3. On the evening of the 11th November, 2013, in its main news bulletin, the defendant reported on the trial in the following terms:

"The jury in the trial of solicitor Thomas Byrne will resume its deliberations tomorrow morning.

It has already spent several hours considering its verdict.

The 23-day trial ended this morning with a summing-up from Judge Patrick McCartan.

Thomas Byrne has pleaded not guilty to 50 counts of theft, forgery, using forged documents and deception.

The total amount involved is almost €52m."

4. Unfortunately, these words were accompanied solely by footage of the plaintiff making his way, on his own, into the Criminal Courts of Justice building in Parkgate Street.

5. On the 14th November, 2013, the plaintiff's solicitor wrote to the defendant. The broadcast was described as "*wholly untrue, false and malicious and grossly and seriously defamatory*". A total of 23 separate defamatory assertions were identified as having been made, beginning with an assertion that the plaintiff had been struck off and ending with the assertion that he was a convict. The letter sought an "*immediate, unequivocal and suitable*" retraction and apology, and the furnishing of proposals for "substantial" compensation.

6. By letter of the same date, the defendant's solicitor responded as follows:

"TV3 accept that your client was featured on the news item dealing with the trial of Mr. Thomas Byrne. This was an innocent mistake that arose due to an editing error and for which our client offers their sincere apologies to Mr. Christie. They are prepared to broadcast a clarification and apology on their news bulletins and on tv3.ie in terms to be agreed and you might please let us have your proposed wording. TV3 have taken immediate steps to ensure that the footage cannot be rebroadcast at any time in the future and have also removed it from their online content.

In respect of your claim for substantial compensation TV3 denies that the piece was grossly and seriously defamatory of Mr. Christie or that they accused him of the matters set out in your letter. Thomas Byrne's image has featured extensively in television and print media over the last number of weeks and is readily recognisable by the general public as a result. At no point during the piece was your client identified by name. Anybody who visually recognised him would be well aware that he was David Christie and not his/your client, Thomas Byrne.

TV3 once again accept that a mistake was made and they are more than willing to apologise for that mistake but they do not accept the allegation that the matter merits substantial compensation as demanded by you."

7. On the morning of the following day, the 15th November, 2013, the plaintiff's solicitor took issue with the defendant's approach and asserted that the broadcast "most certainly" identified the plaintiff as Thomas Byrne. The letter continued:

"Furthermore, your letter entirely ignores the rebroadcast streams, where Mr. Christie's image is shown over captions reporting:-

'Thomas Byrne trial'

'the jury will resume deliberations in the case of Thomas Byrne tomorrow, who is charged with multiple counts of fraud.'"

8. A draft apology was enclosed, to be broadcast on the upcoming 5.30 news bulletin and on the internet. The draft was in the following terms:

"On our 5.30 News Bulletin on Monday, 11th November, 2013 and in subsequent rebroadcasts on various platforms, we published lengthy video images and footage of Mr. David Christie with voice-over wrongly identifying him as solicitor Thomas Byrne who is on trial for fifty counts of theft, forgery and related serious offences.

TV3 acknowledges that the unintended reference to Mr. David Christie was wholly untrue, false and grossly defamatory

of him.

TV3 is happy to clarify this matter and apologises to Mr. Christie and to his family for the distress and embarrassment caused.

An agreed sum in compensation has been paid to Mr. Christie, together with a contribution to his legal costs."

9. Responding later that day, the defendant offered to broadcast the following apology:

"On our 5.30 News Bulletin on Monday, 11 November 2013 and in subsequent rebroadcasts on various platforms, we broadcast footage of Mr. David Christie with voice-over wrongly identifying him as solicitor Thomas Byrne who is on trial for fifty counts of theft, forgery and related serious offences.

TV3 acknowledges that the unintended reference to Mr. David Christie was wholly false and untrue. TV3 are happy to acknowledge that Mr. Christie is a well respected solicitor. We apologise to Mr. Christie and to his family for the distress and embarrassment caused.

TV3 has agreed to make a donation to a charity nominated by Mr. Christie."

10. The sum proposed by way of charitable donation was €1,000, to be paid as a gesture of goodwill and without any admission of liability.

11. This proposal was rejected by the plaintiff's solicitor as displaying

"a continuing determination to belittle our client's concerns and to trivialise your client's outrageous behaviour and its consequences."

12. An apology was broadcast later on the 15th November, 2013, as follows:

"On our 5.30 News Bulletin on Monday, 11 November 2013 we broadcast footage of Mr. David Christie during a news item relating to the ongoing trial of former solicitor Thomas Byrne. Mr. Byrne is on trial for a number of serious offences.

TV3 would like to clarify that there is absolutely no suggestion that Mr. Christie has been on trial for any such offences. TV3 are happy to acknowledge that Mr. Christie is a well respected solicitor and would like to apologise to Mr. Christie and his family for any distress and embarrassment that may have been caused."

13. On the 19th November, 2013, the plaintiff's solicitor complained that the defendant either did not appreciate the seriousness of the defamation or was choosing to ignore it. The broadcast had been described only as a "mistake", when the plaintiff had been identified as the "perpetrator of one of the biggest frauds in the history of the State".

14. The correspondence between the parties continued for some time. However, no progress was made, with the defendant holding to its position that an entirely innocent mistake had been made, which had been the subject of prompt and constructive efforts on the part of the defendant and a genuine and fulsome apology. In one letter it said:

"It is worth repeating that Thomas Byrne is an almost uniquely identifiable individual owing to the extraordinary amount of coverage he has received on television and print media over the past six years. Mr. Christie was never named or identified by TV3 during the piece in question. We do not see how any ordinary person would have confused Mr. Christie with his client, Thomas Byrne. It is also quite clear that anybody who knows Mr. Christie and saw him on the 5.30 News broadcast in question would have known full well that he was not Thomas Byrne...

...unfortunately, in all of the circumstances our client does not believe that 'substantial compensation' is warranted."

The proceedings

15. A plenary summons was issued on the 4th December, 2013. The defendant entered an appearance, and a statement of claim was delivered on the 21st January, 2014.

16. It is pleaded in the statement of claim that the words complained of regarding the plaintiff meant that:

- a. he was a disgraced solicitor;
- b. he was on trial for multiple counts of theft;
- c. he was on trial for multiple counts of forgery;
- d. he was on trial for multiple counts of using forged documents;
- e. he was on trial for multiple counts of deception;
- f. he was on trial for multiple counts of fraud;
- g. he was unprincipled;
- h. he was dishonest;
- i. no one should do business with him;
- j. he should be shunned and abhorred by all right-thinking persons;
- k. he was of ignominious professional standing;

- l. he was unfit to engage in his chosen profession;
- m. he was engaged in an abuse of his status of solicitor; and
- n. he was unprincipled.

17. It is also pleaded that the plaintiff has been greatly injured in his character, credit and reputation and that he has been disparaged in his profession.

18. On the 5th March, 2014, the defendant made a formal offer of amends pursuant to s. 22 of the Defamation Act, 2009. The offer was expressly stated to be in respect of the entire statement and broadcast published on the 5.30 programme on the 11th November, 2013.

"Our client's offer to make amends means that it will, again, if required by your client, make a suitable correction of the statement and broadcast published and apologise to your client. As you are aware, TV3 already apologised to Mr. Christie and corrected the broadcast that is the subject matter of these proceedings on its 5.30 news programme of Friday, 15 November 2013. We believe that the correction and apology published by TV3 was reasonable and practicable in the circumstances. However, our offer now includes a proposal to re-publish this apology should your client require it to be done for a second time.

Our client's offer to make amends also means that it is prepared to pay such damages and costs as may be agreed by our respective clients or as may be determined by the Court. If you accept our offer you are required to specify what damages and costs your client is seeking.

If you refuse to accept this offer of amends then our client shall rely upon your failure to accept the offer as a defence to these proceedings."

19. The plaintiff's solicitor responded on the 23rd April, 2014, when it was indicated that the offer was accepted subject to clarification as to whether it covered any rebroadcasts of the original bulletin on the internet, and subject also to detailed proposals in accordance with s.22(5) of the Act. The writer reserved the right to make such appropriate submissions on the suitability and /or adequacy of the offer as might be necessary in the course of the proceedings.

20. On the 2nd May, 2014, the defendant confirmed that the offer covered the publication of the item on TV3 Player.

"On that basis we trust that our client's offer to make amends has been accepted by your client."

21. The letter continued:

"In our letter of 5 March 2014 we confirmed that we would republish the original correction and apology and called on you to specify what damages and costs your client is seeking. We believe this constitutes a valid Offer to Make Amends in accordance with Section 22 of the Defamation Act 2009, but we note that your client has declined to specify his demands and instead called on our client to set out further details of their offer."

22. The defendant's position as to the merits of the case, set out in earlier correspondence, was repeated. In conclusion, the writer said:

"Our client now repeats their offer to re-broadcast the original correction and apology, or such other correction and apology as may reasonably be agreed between the parties, and confirms that they are prepared to make a payment of [redacted] to your client by way of compensation together with costs to be taxed in default of agreement."

23. The letter asked for confirmation within 14 days as to whether or not the offer was accepted.

24. A response dated the 13th June, 2014, confirmed that the offer to make amends had been accepted. The view was expressed that "agreement could be reached" about the apology. It was also considered that taxation would probably resolve the costs aspect. However, the sum offered by way of compensation was rejected as being "derisory".

25. The plaintiff issued a motion for directions on the 17th June, 2014, as to the time and mode of trial for the purpose of determining the issues between the parties pursuant to s. 23(1) of the Defamation Act, 2009. The motion was grounded upon an affidavit sworn by the plaintiff's solicitor. He refers to the pleadings and sets out the words complained of. The letter of the 5th March, 2014, described as "a purported Offer of Amends", is exhibited, as are the subsequent letters between the parties. The solicitor then avers as follows:

"I say that as appears from the said correspondence, it is not denied by the defendant that it wrongly published and broadcast the said defamatory material detailed above. It is clear, however, that the parties do not agree as to various compliance measures and/or damages that should be paid by the Defendant to give effect to the said offer of amends."

26. It seems that no application was made for directions as to points of claim or defence, or further affidavits, and the matter was listed for hearing on the basis of the pleadings as lodged by the plaintiff, the correspondence, the notice of motion and the grounding affidavit. No replying affidavit was delivered on the part of the defendant.

The evidence in the hearing

27. The broadcast was played in court. It shows the newsreader at his desk, with a large screen behind him on which the plaintiff is shown in close-up for a period of nine seconds while the words set out above are spoken.

28. The only oral evidence adduced was that of the plaintiff personally.

29. The plaintiff said that he qualified as a solicitor in 1992 and had been a partner in Christie & Gargan since 1997. In late 2007 he had agreed to represent Mr. Byrne. This originally involved dealing with the Law Society on his behalf, when moves to strike Mr. Byrne off the Roll of Solicitors were in train. The plaintiff subsequently agreed to defend him in the criminal proceedings.

30. On the morning of the 13th November, 2013, the plaintiff was waiting to cross the street on his way into the Criminal Courts of

Justice. He noticed two photographers and a cameraman pick up their equipment and run towards him. He said that he was "*a little embarrassed*" by this. He was quite certain that the cameraman knew that he was not Thomas Byrne, because he had previously objected to that particular individual's behaviour to Mr. Byrne. The cameraman was still filming as he went in the door of the building, and the plaintiff said to him something to the effect that he was on his own, or that he did not have his client with him.

31. The plaintiff did not see the defendant's news bulletin that evening. When he went in to the office the next morning his partner told him that he should check it out. Another member of Mr. Byrne's legal team showed it to him online during the course of the day, and he felt shocked.

32. Later that evening he left court with Mr. Byrne. As they walked up the street together a man spat in the plaintiff's face and called him "a fucking scumbag" and "a thief". He was really upset by this. Mr. Byrne apologised to him.

33. The same evening the plaintiff began to receive phone calls from former clients wanting to know if he had returned their deeds to the bank and similar questions. One man asked what had happened to his wife's settlement cheque in a personal injury claim, although the case was still with the Personal Injuries Assessment Board and no cheque had issued.

34. On an occasion when the plaintiff was socialising with some colleagues, a man approached him, grabbed him by his jacket and invited him outside for a fight, addressing him as a thief.

35. On another occasion, shortly before the hearing of this matter, the plaintiff was out with his wife. A man said to him "*I thought you were locked up*". The plaintiff told him he was mistaken, whereupon the man threw his pint over the plaintiff's coat.

36. The plaintiff said that he and his wife had stopped going out for dinner because people stare at them. He thinks that there is still an effect on his practice – he is still getting calls from clients asking what he has done with their documents.

37. The plaintiff said that he thought that the proposed apology and donation to charity was insulting. Charitable donations were a matter for himself and his wife. The proposal belittled his position as a solicitor.

38. On behalf of the defendant, Mr. O'Callaghan SC commenced his cross-examination by apologising to the plaintiff for "*the mistaken footage*".

39. It was put to the plaintiff that he could not say whether the man involved in the spitting incident had seen the bulletin. It was further suggested that there is "*a downside for lawyers representing unpopular clients*" in that members of the public do not always distinguish between the client and the lawyer. The plaintiff accepted that that could be true, although he did not accept that it made what had happened right. It had not been an issue before the broadcast.

40. The plaintiff further did not accept that the apology was either fulsome or genuine. He asserted that the man who read the apology had been in court on a number of occasions during the trial and would have known who he was. The apology was not genuine because it did not show a picture of him, to distinguish between Mr. Byrne and himself. It also did not say that the broadcast had been untrue and defamatory.

41. Asked whether he thought that the original footage had been broadcast in this manner deliberately, the plaintiff said he did not know. TV3 had filmed him previously, he had been interviewed by its reporter and he had told the cameraman that morning that he was on his own.

42. The plaintiff accepted that he had been shown in a lot of the coverage of the trial by TV3 and by RTE, and that a lot of people knew that he was in the case. He further agreed that Mr. Byrne's image had been widely portrayed, and that there had been comment to the effect that Mr. Byrne wore a different, distinctive coat on every day of the trial. It was suggested to him that any of his own clients knew what he looked like, and that people following the trial knew what Mr. Byrne looked like. The plaintiff responded that people did not even hear the name – they just heard the words fraud and theft.

43. Again, it was suggested that most people would have known that it was Mr. Byrne who was sentenced, and not the plaintiff. The plaintiff referred to the incident of the man who said "*I thought you had been locked up*".

44. The plaintiff was asked if he thought that his practice had been affected. He replied that he had thought so for a while, but that it could just have been the economy. It was now picking up again.

The statutory context

45. Pursuant to s. 6 of the Defamation Act, 2009 ("the Act"), the torts of libel and slander have ceased to be described as such and are instead collectively described as defamation. A "defamatory statement" is defined in s.2 as a statement that tends to injure a person's reputation in the eyes of reasonable members of society. It includes "*visual images, sounds, gestures and any other method of conveying meaning*". Section 6(3) provides that a defamatory statement concerns a person if it could reasonably be understood as referring to him or her.

46. The tort of defamation is actionable without proof of special damage. A defamation action is (for the purposes of this case) defined as an action for damages for defamation.

47. Pursuant to s.3(1) the Act does not apply to causes of action that accrued before its commencement. Section 3(2) provides, further, that the Act shall not affect the operation of the general law in relation to defamation except to the extent that it provides otherwise (either expressly or by necessary implication).

48. Section 22 of the Act provides in full as follows:

"22.— (1) A person who has published a statement that is alleged to be defamatory of another person may make an offer to make amends.

(2) An offer to make amends shall—

(a) be in writing,

(b) state that it is an offer to make amends for the purposes of this section, and

(c) state whether the offer is in respect of the entire of the statement or an offer (in this Act referred to as a "qualified offer") in respect of—

(i) part only of the statement, or

(ii) a particular defamatory meaning only.

(3) An offer to make amends shall not be made after the delivery of the defence in the defamation action concerned.

(4) An offer to make amends may be withdrawn before it is accepted and where such an offer is withdrawn a new offer to make amends may be made.

(5) In this section "an offer to make amends" means an offer—

(a) to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer,

(b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances, and

(c) to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by them or as may be determined to be payable,

whether or not it is accompanied by any other offer to perform an act other than an act referred to in paragraph (a), (b) or (c)."

49. Section 23 of the Act sets out the procedure to be adopted where there is an offer to make amends.

50. If the parties are agreed as to the measures to be taken, the court may, on the application of the person to whom the offer was made, give a direction under s.23(1)(a) that those measures be taken.

51. If the parties do not so agree, the person who made the offer can seek the leave of the court pursuant to s.23(1)(b) to make a correction and an apology by way of a statement before the court.

52. By virtue of s. 23(1)(c), where the parties do not agree as to the damages or costs payable by the person making the offer, those matters shall be determined by (in this instance) the High Court,

"...and the court shall for those purposes have all such powers as it would have if it were determining damages or costs in a defamation action, and in making a determination under this paragraph it shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer."

53. Under s.23(2), where a defendant makes an offer of amends that is not accepted, that fact will constitute a defence to a defamation action unless the plaintiff can prove that at the time of publication the defendant knew or ought reasonably to have known that the publication referred to the plaintiff, or was likely to be understood as referring to the plaintiff, and that it was false and defamatory of the plaintiff. In other words, the plaintiff will have to prove bad faith on the part of the defendant. It is not necessary for defendants to plead the offer as a defence, but if they do they may not plead any other defence in relation to the matter covered by the offer.

54. An application to the court for a determination of damages under s.23(1)(c) is made, under O. 1B r. 5 of the Rules of the Superior Courts, by way of originating notice of motion grounded upon an affidavit sworn by or on behalf of the person to whom the offer was made. The respondent may deliver a replying affidavit but is not obliged to. Under r.6, the matter may be determined by way of plenary hearing

"...where it appears to the Court that the subject matter of the application is likely to involve a substantial dispute of fact or it is otherwise necessary or desirable in the interests of justice (and the Court may for that purpose make orders and give directions in relation to the exchange of pleadings or points of claim or defence between the parties)".

55. Section 24 of the Act deals with the effects of an apology. Subsection (1) provides that a defendant may give evidence in mitigation of damage of an offer of, or publication of, an apology where, inter alia, the offer or publication happened as soon as practicable after a complaint is made by the plaintiff. An apology does not constitute an express or implied admission of liability and is not relevant to the determination of liability. This section is applicable to all defamation actions, and not only those heard by a jury.

56. Section 31 of the Act deals with damages. Subsection (2) obliges a judge sitting with a jury to give directions in relation to damages. Subsection (3) provides that in making an award of general damages, "regard shall be had to all of the circumstances of the case".

57. Subsection (4) sets out, without prejudice to the generality of subs.(3), a detailed list of matters to which "the court" shall have regard. The "court", in this section, means the jury, if the High Court is sitting with a jury. The matters in the list potentially relevant to this case are as follows:

(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, and

(h) evidence given concerning the reputation of the plaintiff.

Submissions

58. On behalf of the plaintiff, Mr. Doyle S.C. submits that where there is an unqualified offer, the court should generally proceed on the basis that the defamatory statement means what the plaintiff says it means. He refers in this respect to Gatley on Libel and Slander (12th ed. 2013) and the cases referred to therein. The factors to be taken into account under Irish law, as set out by the Supreme Court in *Leech v Independent Newspapers (Ireland) Limited* [2014] IESC 79, are: - the gravity of the defamation, the extent of publication; the effect on the plaintiff and the conduct of the defendant.

59. In this instance, it is submitted, the gravity is at the top end of the scale. Mr. Byrne had been struck off at the time of the broadcast and was a disgraced former solicitor. The presumption of innocence notwithstanding, it is defamatory of a person to say, untruthfully, that he or she is on trial for a criminal offence, and it is the most serious thing that could be said about a solicitor. The publication was on a national medium.

60. Mr. Doyle says that there is no entitlement to any credit, or reduction in damages, for the fact that the defamatory statement was a mistake. Rather, the principle is that if it was malicious, damages would be aggravated. Motive is relevant only where the defendant raises issues such as privilege or honest opinion.

61. It is accepted that the defendant apologised promptly, and further accepted that the Act requires a discount where the defendant makes an offer under s.22. However, it is submitted that the broadcast apology was inadequate in that it did not admit defamation and the plaintiff was not identified by image. The defendant's attitude thereafter was that there would be no offer of compensation. The reduction for the s.22 offer should therefore be modest, given that the section envisages an offer of compensation before proceedings are issued. Here, the defendant was denying defamation and it was necessary to bring the action. Mr. Doyle suggests that the reduction should be in the region of 10 to 20%.

62. Mr. Doyle says that while the United Kingdom authorities on the discount to be applied may be of some assistance to the court, they must be treated with caution since the level of damages for defamation in that jurisdiction tends to be "a fraction" of awards here. There is also a cap on awards there, which currently appears to be set at £275,000.

63. On behalf of the defendant, Mr. O'Callaghan S.C. refers to the principles set out in various United Kingdom authorities dealing with a similar procedure, citing *Cleese v. Clark* [2003] EWHC 137 (QB), *Nail v. Jones* [2004] EWCA Civ 1708; [2004] EWHC 647 (QB) and *KC v. MGN Limited* [2013] EWHC Civ 3; [2012] EWHC 483 (QB). He says that there should be a "healthy discount" of at least 50%, not least because of the public interest in ensuring that the procedure is seen to be of use.

64. On the facts before the court, Mr. O'Callaghan submits that it is a "mistaken identity" case. It is not comparable to *Leech v. Independent Newspapers*, where there was a deliberate attack on the plaintiff. There is in this case no question of malice and there had been an almost immediate apology. The unpleasant experiences described by the plaintiff could not, on the balance of probabilities, be attributed to the nine seconds long broadcast, or the presence of the material on the website for four days.

65. It is not accepted that the court should assess gravity simply by reference to what the plaintiff has pleaded. The court must consider whether there has actually been damage to the plaintiff's reputation, in circumstances where the evidence is that he is still highly respected. He may simply have suffered for representing an unpopular client.

66. In answer to a query whether this latter argument was open to a defendant who had, literally, identified a lawyer with his client, Mr. O'Callaghan said that it was unrealistic to suppose that there was any significant number of people who did not follow the trial and thought that the plaintiff was the accused. The plaintiff's clients knew what he looked like, and the people following the trial knew what Mr. Byrne looked like, and knew that he had gone to jail.

67. With reference to the conduct of the defendant, it is submitted that it "could not have behaved better". The defendant was entitled to be concerned about the request for "substantial damages". No figure had been proposed by the plaintiff. If he had requested that his image be shown during the broadcast of the apology there would have been no difficulty about it.

Damages for defamation

68. Having regard to the reference in s.23(1)(c) to the powers of a judge in assessing damages in defamation proceedings, the plaintiff relies on the decision of the Supreme Court in *Leech v Independent Newspapers (Ireland) Limited* [2014] IESC 79 as demonstrating the factors to be taken into account.

69. That case (which, of course, predates the Act) concerned an appeal against a jury award of €1,872,000. The jury had not been asked to consider aggravated or exemplary damages. The core argument in the appeal was that the award was so disproportionately high that it ought to be set aside.

70. Having considered the authorities establishing the reluctance of appellate courts to interfere with jury awards, the judgment of the Court (given by Dunne J.) referred to the factors to be taken into account in an examination of the proportionality of the award in question. It took as a starting point the following passage from *John v MGN Ltd.* [1997] QB 586, approved by the Supreme Court in *de Rossa v. Independent* [1999] 4 I.R. 432 at p. 463:

"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A

successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

71. The Court noted that a jury could, as well as looking at the nature of the defamation and the extent of the publication, take into account relevant aspects of the conduct of the defendant from the time of publication up to the conclusion of the case, including such matters as the absence of an apology or persisting in a plea of justification not supported by the evidence. These could be considered under the heading of compensatory damages or, as appropriate, aggravated damages.

72. The gravity of the libel in the case, which ascribed to the plaintiff adulterous behaviour carried out for the sake of obtaining lucrative contracts, was described as "very serious", although not in the category of the gravest and most serious.

73. Publication of the libel involved eleven articles published over about two and half weeks in a newspaper that circulated widely within the State. The plaintiff had gone from being a person not known to the general public to one who was notorious. The publication was in these circumstances described as "*particularly extensive and widespread*".

74. The defendant had run a defence of justification, although not on the meanings contended for by the plaintiff. The Court observed that this was a risky strategy. The fact that it did not succeed was a matter that could be taken into account by the jury.

75. No apology had been offered by the defence at any stage, and the jury were entitled to take account of that.

76. It was a feature of the case that photographs accompanying the articles had been cropped and manipulated so as to convey particular impressions. It was open to the jury to take this into account.

77. The impact of the defamation was far reaching in that it attacked the plaintiff in respect of both her personal and professional life, involving her moral character and her professional integrity. There had been evidence as to the destructive effect on her career and as to the stress suffered by the plaintiff and her family.

78. The Court accepted that an award of damages cannot be so disproportionate as to have the effect of not just vindicating the good name of the citizen but of restricting the freedom of expression of a newspaper. The case was at the higher end of the scale of seriousness, but was not one of the most serious to come before the courts. The appeal was allowed to the extent that the verdict was set aside and a sum in the amount of €1,250,000 was substituted.

Offer of amends – the United Kingdom authorities

79. There are as yet no Irish authorities on the operation of s.22 of the Act. However, the parties have helpfully referred the court to a number of United Kingdom decisions dealing with the very similar provisions of ss.2 and 3 of the Defamation Act, 1996 and to the commentary thereon in Gatley on Libel and Slander.

80. The first two of these are *Abu v MGN Ltd* [2003] 2 All E.R. 864 (in effect, a case management ruling) and *Cleese v Clark and Associated Newspapers* [2003] EWHC 137 (an assessment of compensation). In summary, and in so far as his rulings are relevant to the instant case, Eady J. in these cases determined that the evidence and submissions should be heard in the same way as in a contested trial. Since the principles to be applied in a hearing of this nature are precisely the same as those applicable to conventional libel proceedings, account must be taken of issues such as mitigation, aggravation and causation of loss. Thus, the defendant is entitled to demonstrate that some element of the damage occasioned to a plaintiff was caused by factors other than the defamation complained of. Since damages are at large, the court may take the broad circumstances into account, if they emerge from the evidence, including the conduct, position and standing of the plaintiff. (However, the defendant may not claim that any defamatory meaning is true, or justified on the basis of fair comment.)

81. Eady J. noted in *Abu* that the "*offer of amends*" procedure would by no means always lead to speedy and cheap resolution. He considered that it would sometimes be necessary to have pleadings, or at least notification of the matters intended to be relied upon by a defendant.

82. It is noteworthy that in *Cleese* the parties disclosed to the court at least some of the figures mentioned in the negotiations, although they had not initially intended to do so. Eady J. commented that he thought it preferable that this should not happen.

83. Having been invited in *Cleese* to offer guidance on the appropriate procedure to be followed, the judge observed that the whole of the "*offer of amends*" regime is predicated upon the parties' willingness to negotiate meaningfully in order to achieve a reasonable compromise as quickly and inexpensively as the circumstances permit. He went on at para. 20:

"As has always been the case, the amount of financial compensation is likely to be assessed partly by reference to the timing, scope and effectiveness of any apology made, or proffered, and it clearly makes sense for the two matters to be on the agenda for discussion at the same time. The two are intimately related. Discussion about monetary compensation is likely to remain hypothetical until a defendant's best offer for vindicating the complainant is on the table....The court is enjoined to take account of any steps carried out in fulfilment of the offer and (so far as not agreed between the parties) the suitability of any apology and the reasonableness of the manner of publication. It is obvious that where such matters cannot, for some reason, be agreed a defendant (or potential defendant) will generally be well advised to publish as prompt and generous an apology as the circumstances permit, with a view to moderating the level of compensation which the court may ultimately award."

84. The plaintiff's solicitor in *Cleese* had originally told the defendant that the case was worth £30,000 but that he was willing to give a two-thirds discount for a quick and prominent apology. The apology was not published for a further three months, contained no photograph and was not as prominent as the alleged defamation. The plaintiff refused a subsequent offer of £10,000, but apparently never said what he would accept. Eady J. described this as an "*old-fashioned*" approach to litigation, leaving the defendant's solicitor to guess at a figure and not advancing the purpose of the "*offer of amends*" procedure.

85. In deciding on the sum to be awarded, Eady J. took into account the genuine efforts made by the defendants to retrieve the situation; the publication of the apology (albeit that he found that this had been published "*without enthusiasm or generosity of*

spirit"); and the fact that the apology offered a degree of vindication, although little if any mitigation to the hurt to the plaintiff's feelings. He did not specifically state his view of the value of the claim, other than to say that the plaintiff's estimate was too high, or the extent of the discount applicable in respect of the offer to make amends.

86. *Nail v. Jones and News Group Newspapers Ltd* [2004] EWHC 647, was the second assessment under the relevant provisions of the UK legislation and was also dealt with by Eady J. There was an attempt by the defendants to characterise certain of the allegations made by them as not in fact defamatory. Eady J. did not accept that characterisation, and held that it could not in any event succeed in the circumstances. The matter before him was an application for assessment of damages following the acceptance of an unqualified offer of amends and the allegations must therefore be taken to be false and defamatory. The defendants had had the options of defending the libel action, or making a qualified offer, and had not done so. At para. 26 he said:

"This has the effect that the parties, the advocates and the court generally need to work on the basis that the words complained of bore the pleaded meanings. I would to some extent part company with [counsel for the defendants] when she submitted that it remains the task of the court to form its own view on the precise meanings. I agree that any exaggerated or distorted meaning should be ignored but, if such circumstances arise, one would expect a defendant to have made the challenge clear – presumably by making only a qualified offer. It would seem unfair on a claimant who accepts an unqualified offer to find that the court dismisses his meanings as untenable when it comes to assessing damages."

87. In considering the proper approach to compensation under the procedure, Eady J. said (at paragraphs 35 and 36 of the judgment):

"The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively "won". He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.

Whereas juries used to compensate for the impact of the libel 'down to the moment of the verdict', once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will to a large extent be restored..."

88. The judge noted the submission made on behalf of the defendants that media defendants would be reluctant to utilise the procedure if they did not feel that they would get what was termed "a healthy discount" for so doing. He considered this to be a fair point, given the public policy objectives underlying the legislation and given his own view that defendants who promptly apologise are entitled to be rewarded.

89. In assessing awards in both *Cleese* and *Nail*, Eady J. stressed that he was not attempting to find a figure that would have been awarded by a jury, based on past awards by juries. The approach was to determine what was "appropriate, necessary and proportionate". He considered that it was helpful to assess the case as if it was a contested action, run without a jury, in which there were no issues of aggravation (such as a failed defence of justification) or mitigation (such as an apology). Having reached a hypothetical figure, the judge should then move on to consider the discount to be given for mitigating factors.

90. He proceeded to give a reduction of 50% for the mitigating factors, which appear in that case to have been confined to the offer of amends made about three months after the claim was initiated and the apology published about six weeks later (being some 14 months after the original newspaper publication).

91. The plaintiff in *Nail* appealed in relation to the quantum of the award. (The judgment of the United Kingdom Court of Appeal is reported at *Nail v. Jones and News Group Newspapers Ltd* [2004] EWCA Civ 1708.) The core issue in the appeal was the extent to which the making of the offer of amends should go in mitigation of compensation.

92. The Court of Appeal referred firstly to the general principle applicable to damages in defamation proceedings in that jurisdiction, as set out in *John v. MGN Limited* (quoted above at para. 70).

93. At paragraph 37 of the judgment the Court of Appeal noted that in determining compensation under this provision, the role of a judge sitting alone was not to speculate on what a putative jury might award but to determine what he or she considers to be proper compensation. The court also accepted the proposition that compensation under the section was to be assessed on the same principles as in contested defamation proceedings.

94. It was noted that there was a need to be careful not to drive damages down to "a level which publishers might with equanimity be tempted to risk having to pay". The corollary was that the level should not be so high as to unduly curtail freedom of speech.

95. At paragraph 41 the court referred to the principle that damages are to be assessed as of the date of assessment, not the date of publication. The conduct of the defendant after publication can, therefore, aggravate or mitigate the damage and the award.

"That said, if an early unqualified offer to make amends is made and accepted and an agreed apology is published, as in the present cases, there is bound to be substantial mitigation. The defendant has capitulated at an early stage without pleading any defence, has offered to make and publish a suitable correction and apology (and has in fact done so in the agreed terms in the present cases) and has offered to pay proper compensation and costs...The claimant knows that his reputation has been repaired to the full extent that that is possible. He is vindicated. He is relieved from the anxiety and costs risk of contested proceedings. His feelings must of necessity be assuaged, although they may still remain bruised (and he is entitled to say so, if that is so). He can point to the agreed apology to show the world that the defamation is accepted to have been untrue and unjustified. There may be cases in which some of these features are absent, or in which their impact may be slight. An example could be if the defendant had offered and published a correction and apology, which the claimant had not agreed and which the court found to be unsuitable and insufficient...There may also be aggravating features, although the use of the procedure would generally suggest that there is unlikely to be significant aggravation after the making of the offer to make amends. "A healthy discount" may be a more colourful phrase than "substantial mitigation" but they mean the same thing."

96. There was, according to the court, no distinction to be made between a reduction in compensation on account of the substantial mitigation resulting from use of the procedure and a "reward" for using it (provided that the same mitigating factors were not brought into play twice). Conducting a contested hearing to determine compensation under the section does not on its own amount to aggravation.

97. In concluding that there had been no error of principle in the approach taken by the trial judge, the Court of Appeal stressed that there could not be a conventional or standard percentage discount when an offer to make amends is accepted and an agreed apology published. *"Each case will be different and require individual consideration"*. However, most such cases will exhibit substantial mitigation.

98. In *"KC" v. MGN* [2012] EWHC 483 (QB), the trial judge rejected a submission by the defendant that the mitigating factors came into play at the first stage of the process. To take the admission and apology into account at that point would lead to a double discount.

Discussion and conclusions

99. In the first instance I think that it is important to say that the process required under the section would, in this case, have benefited from clarification of, in particular, the position of the defendant by way of points of defence. As matters stand, that position is set out in the correspondence, in cross-examination and in counsel's oral submissions only.

100. It is unclear whether the defendant maintains the position taken up in correspondence that the broadcast was not defamatory, bearing in mind that a defamatory statement is one that tends to injure a person's reputation in the eyes of reasonable members of society. The correspondence suggests that an innocent mistake had occurred, which was apologised for and which would not be repeated but was not defamatory. It was put to the plaintiff in cross-examination, and submitted to the court, that no one could have confused him with Mr. Byrne; that there was no proof that the people who insulted him had seen the broadcast; that he might simply be suffering the downside of representing an unpopular person; and that nothing that had happened to him could, on the balance of probabilities, be attributed to the broadcast. However, counsel has at the same time urged the court not simply to accept the particular plaintiff's case as pleaded in the statement of claim but to assess for itself the damage to the plaintiff's reputation. It seems to me that it was implicit in this submission that the court would find that damage had been done. This all raises the question – for what does the defendant believe it has offered amends?

101. In my view the best approach to this situation is that adopted by Eady J. in *Nail*. The defendant had the options of contesting a full action, or making a qualified offer of amends. It chose to make an unqualified one, and that means accepting that the plaintiff was defamed. I further consider that, allowing for the possibility that the court might disregard exaggerated or distorted meanings attributed by a plaintiff to a publication, adoption of this procedure must in general mean that the defendant is bound by the meanings pleaded by the plaintiff. To hold otherwise could mean that a defendant could, in effect, run a full defence without having to plead it and without having to go to the full expense and risk of a jury trial.

102. In determining the appropriate sum to award, the following are the matters to be taken into account.

The fact that an unqualified offer of amends has been made

103. For the reasons identified in the United Kingdom authorities cited above, I agree that this entitles the defendant to substantial mitigation of damages.

The measures taken in compliance with the offer (s.22(1)(c))

104. I am not aware of any measures taken since the making of the offer but I think it reasonable to include here the fact that there was a proposal to re-broadcast the apology already made.

The matters set out in s.31(4) of the Act.

105. Although it is not entirely clear, it seems to me that the effect of subs.(8) of s.31 is that, where a judge is sitting without a jury, *"the court"* means that judge. If I am wrong about that, I would in any event consider that all of the subs.(4) matters can be grouped within the common law headings of gravity, extent of publication, impact of the defamation and the conduct of the defendant. I will therefore consider them in the statutory sequence.

(a) The nature and gravity of the allegations. Under this heading I find that the defendant wrongly identified the plaintiff as being a solicitor who had been struck off in circumstances of disgrace and was, at the time of the broadcast, on trial for offences of serious dishonesty arising from his professional practice. This is a deeply serious allegation to make against a solicitor, whose personal, professional and social standing depends so much upon a reputation for professional integrity. The goodwill built up by a practice (especially, perhaps, in a smaller firm) is obviously put at risk in the circumstances.

(b) The publication was on television and on the defendant's website, which means that it was capable of enduring.

(c) The broadcast was on a national television station, on its main evening news bulletin. Publication must therefore be considered to have been widespread. However, I take into account the difference between a one-off incident such as this and the prolonged and repetitive campaign of publication in the Leech case.

(d) An apology was broadcast. The defendant is entitled to some credit in this respect. However it seems to me that the apology as broadcast was less satisfactory than the draft offered by the defendant itself on the 15th November, 2013 – that had the merit of acknowledging that the broadcast had wrongly identified the plaintiff as Mr. Byrne. The broadcast apology, in effect, merely admits having caused some confusion.

During the hearing I expressed a view that the wording of the apology as broadcast was unfortunate, with the use of the phrase "no such offences" leaving open a suggestion of other discreditable possibilities. However, since the plaintiff and his representatives had not taken that interpretation it was agreed that I should disregard it and I do so.

(e) An offer to make amends was made.

(f) The reputation of the plaintiff is very important to any existing or potential clients of his firm. I accept his evidence that existing clients began to query his handling of their files in a way that had not previously occurred. I do not find that

the practice in fact lost business as a result, not least because of the plaintiff's honest (and probably realistic) view that the fall-off in the practice may have been because of economic conditions generally.

(g) The plaintiff did not cause, contribute or acquiesce in the publication.

(h) No evidence has been led concerning the plaintiff's reputation. However the case was approached by both sides on the basis that he is well respected. The court has no reason whatsoever to consider this approach to be wrong.

106. In so far as this list does not fully deal with the impact on the plaintiff, I consider that I am entitled under the general provision in s.31 (3) ("*all of the circumstances of the case*") to take into account that the plaintiff was subjected in public places to the abuse described by him, by persons who considered him to be a dishonest solicitor. The type of behaviour he experienced would be a source of distress and humiliation in any circumstances and I accept his evidence that it had not previously happened to him. I further accept that it may have changed his and his wife's social habits to some extent.

107. In my view what happened to the plaintiff goes beyond the alleged tendency of members of the public to identify lawyers with their clients. If such identification does occur, it is to be deprecated. Every person, no matter how unpopular, is entitled to legal representation and it is the duty of the profession to provide such representation. This suggestion cannot in my view mitigate the responsibility of a broadcaster who, quite literally, made such an identification. Further, I do not accept the submission put forward on behalf of the defendant that, in effect, the viewing population of the country could be divided into those who followed the Byrne trial and were fully aware of what he looked like, and those who knew the plaintiff. This aspect has to be considered also, in my view, in the light of the fact that nine seconds is actually quite a long time when the camera is focused on one face. I accept the evidence as to the spitting incident the day after the broadcast, and note that it was the plaintiff who was accosted and not Mr. Byrne.

108. In taking all of the above matters into consideration for the purpose of determining the appropriate level of damages, I adopt the same position as the English judges. I cannot estimate what a jury might have awarded in the case. It is simply not possible for a judge to replicate the collective decision-making process of twelve members of the public.

109. In the hypothetical scenario of the case being dealt with as a fully contested defamation action heard without a jury, with no mitigating aspects, I would be inclined to award a sum in the region of €200,000. I consider it to be appropriate to allow a discount in the region of one third, to take account of the offer to make amends and the apology. It does not seem appropriate to allow further mitigation in the absence of a more comprehensive apology and a failure, in the running of the action, to take responsibility for the fact that the plaintiff was damaged in his reputation as a result of the broadcast.

110. I therefore award the sum of €140,000.