THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 141

Record Number: 2017 304

Peart J.
Whelan J.
Baker J.

BETWEEN:

BRIAN NOLAN

PLAINTIFF/RESPONDENT

- AND -

SUNDAY NEWSPAPERS LIMITED

(trading as SUNDAY WORLD)

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 15th DAY OF MAY 2019

1. The plaintiff/respondent commenced these proceedings seeking an award of damages for defamation against the Sunday World newspaper because he considered that his good name and reputation had been seriously traduced in two separate editions of that newspaper on the 15th July 2012 and again on the 3rd March 2013. He also claimed damages in respect of breaches of his constitutional right to privacy.

2. The proceedings were determined in favour of the respondent, and by order dated 14th June 2017 (O'Connor J. sitting without a jury) he was awarded damages for defamation in the amount of €310,000, being €250,000 for general damages, €30,000 for aggravated damages, and €30,000 for punitive damages. The appellant appeals not only against the award of these damages, but also against the trial judge's finding that the respondent was defamed by the said articles, and that his reputation had been damaged. The trial judge concluded that the right to privacy was not engaged.

3. The articles in question were salacious in nature, and were accompanied by photographs of the respondent attending what were described as sex parties or 'swingers' parties, and in the company of females who I will describe simply as being scantily clad. For the purpose of this appeal any further detail as to the nature of the parties themselves, the activities that may occur between consenting adults attending same, or the manner in which attendees shown in the accompanying photographs were clad, is unnecessary.

4. The articles in question not only described him as someone who attended such parties (which he does not deny – in fact the photographs would preclude any such denial), but also as an organiser of such parties. He denies that he was an organiser, and, indeed, the appellant does not seek to stand over that part of the story. In its defence the appellant did not plead truth as a defence under s. 16 of the Defamation Act, 2009 ("the 2009 Act"). Nor did it plead 'honest opinion under s. 20, nor 'fair and reasonable publication on a matter of public interest' under s. 26 thereof. The defences relied upon were (a) that the words and photographs complained of, whether in their natural and ordinary meaning or by way of innuendo or otherwise, did not bear, nor were they understood to bear or capable of bearing the meanings ascribed to them by the respondent at para. 20 of his statement of claim or any defamatory meaning; and (b) that the articles and photographs were published on an occasion of privilege, namely that they were published in good faith as part of the appellant's lawful and legitimate reporting on matters of public interest.

5. The meanings attributed by the respondent in his statement of claim at para. 20 thereof were the following:-

(i) The plaintiff is involved in the provision of sexual opportunities for financial gain;

(ii) the plaintiff helped organise swingers' parties across Ireland;

(iii) the plaintiff has sought or permitted newspaper publicity in relation to his sex life;

(iv) the plaintiff allowed a newspaper to publish photographs of a private and intimate nature of him at private parties in intimate poses with partially clad women;

(v) the plaintiff's occupation was organising sex parties across Ireland, and

(vi) that the plaintiff was involved in the sex trade.

6. While the appellant acknowledged during the trial of this action that it had incorrectly referred to the respondent as an organiser of such parties in these articles, rather than a mere attendee, it went on to argue that any damage to the respondent's good name and reputation arose from his attendance at the parties, and not the erroneous reference to him as an organiser.

7. In relation to the defence of privilege, as particularised, namely that the articles constituted a fair and reasonable publication on a matter of public interest, the appellant relied on its belief that the respondent is "a public figure". In that regard, reliance was placed upon the fact that (a) he was a well-known and prominent GAA footballer having represented Kildare in the 1992 Leinster football final

against Dublin, (b) that his brother had been in the past Mayor of Kildare, (c) that he was a friend of a named prominent politician, and (d) that he had achieved notoriety in the media in 2002 when he was convicted of laundering money for a well-known criminal, which resulted in a suspended prison sentence and a fine of €25,000.

8. Prior to the publication of the first article on the 15th July 2012 a journalist employed by the appellant had called unannounced and without invitation to the respondent's home in an effort to seek comments on the article that it was proposed would be published. Despite protest from him, and despite his urging the journalist that any publication would cause serious damage to his family relationships, including with his young children, the publication went ahead. I should add that by this time, the respondent was separated from his wife but enjoyed regular and consensual access with and shared custody of his children, then aged twelve and six respectively. He was fearful that those arrangements would be put in jeopardy by the proposed publication.

9. The second publication occurred on 3rd March 2013 without any prior warning, and the respondent considered that it compounded the damage caused by the earlier publication. It was only after the second publication that the respondent consulted his solicitor. Following the first publication the respondent had taken no action but he hoped that the newspaper would not repeat the publication.

10. As for the damage caused by these publications, the respondent pleaded the following in his statement of claim:-

> (i) It caused the plaintiff's wife, from whom he is separated, to question his suitability to have contact with his children, and to remove them from his care.
>
> (ii) It caused the plaintiff's wife to change the surnames under which his children were enrolled in school and by which they were referred so as to avoid association with him.
>
> (iii) The plaintiff was shunned by his neighbours and ostracised by his friends and was the subject of public scorn and humiliation.
>
> (iv) The plaintiff was forced to move house.

11. Part of the evidence adduced by the respondent in relation to reputational damage resulting from these articles was that at the time of publication he was a rugby coach with a well-known rugby club in Dublin. He ceased that role in the club following the second publication, and he terminated his membership.

12. At trial the respondent gave evidence and called just one witness, namely Tom Power who was a friend of his since about the year 2000. They had met through rugby, and met socially on a regular basis both before and after these publications. Mr Power gave evidence as to the negative effect the articles had had on the respondent, and on his social and work life generally, including that after the second article appeared the respondent had been very depressed and had spoken of "ending it all" – something that Mr Power dissuaded him from doing, and, instead, recommended that he would speak to his doctor.

13. Mr Power was cross-examined during which he was asked whether it would be fair to say that it was the revelation that the respondent *attended* swingers' parties that put people off him. Mr Power did not think so, but rather that those friends thought that he was *organising* the parties. He said that he knew that some of the men in question had been told by their wives to keep away from him. But he was quite definite that it was the allegation that he was organising the parties that caused the problem, and not simply his attendance at them, although he had no doubt that some people might have thought that attending them was not "quite right", but that is "between themselves". During cross-examination he went on to state that the respondent had been held in high esteem at the particular rugby club "because of his success as a coach … at different age groups, mostly in the under 20s".

14. Following the evidence given by Mr Power, and the closure of the respondent's case, the appellant did not call any evidence.

The trial judge's findings

15. In his written judgment ([2017] IEHC 367), having set out brief extracts from the 2012 article and having described the photographs that accompanied it and the accompanying captions, the trial judge found that the photographs and captions "inclines a reasonable viewer towards the impression that the plaintiff was a major organiser of orgies". He went on to describe the 2012 article as characterising the respondent as "a principal organiser of orgies in the State with a lurking undertone of criminality".

16. The trial judge went on then to consider the 2013 article and the photographs that accompanied it. In that regard he stated that "the journalist relied on his own "investigation" in 2012 to implicate the plaintiff inaccurately and unfairly in what one might call an industry of providing sexual services, for the 2013 edition".

17. In relation to the said 2013 "investigation" the trial judge stated at paras. 20-21:-

> "20. A reasonable person who glanced at the 2013 edition and the 12 page investigation was likely to form the view that the characters (including the plaintiff) identified in the 2013 edition were immersed in economic activities involving the provision of sexual services or activities.
>
> 21. The context in which the plaintiff is placed in the 2013 edition is particularly awful once it is accepted, as this Court does, that there is not a shred of evidence to support a suggestion or innuendo that the plaintiff was involved in prostitution, pimping or any such type of illegal activity."

18. Addressing the question of the distinction sought to be drawn by the appellant between the false description of the respondent as an organiser of such parties, as opposed to the correct description of him being someone who attended such parties, and the allegation that it was his attendance only which caused any reputational damage, the trial judge stated in para. 24 of his judgment:-

"24. It is worth noting at this stage that the Court accepts the evidence given by the plaintiff that he attended four of the relevant parties with his then partner ("L") over a period of some 18 months. This fact did not hinder a vigourous cross-examination of the plaintiff which sought to have accepted by the plaintiff and this Court that: –

> (i) There was no distinction in perception between attending a party at which there may have been multiple sex partner participation by people other than the plaintiff and the unsubstantiated allegation made against the plaintiff that he organised some or all of the parties.
>
> (ii) The slight on the plaintiff's reputation arose inexorably from his voluntary attendance at the four parties rather than

the full-scale coverage and suggestions given in the editions as described.

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

19. The trial judge then expressed "The Court's View" as follows:-

> "25. The attempt by counsel for the defendant to blur the difference between organising chess or quiz events and organising what came to be known as sex parties can be described as a debating style point. In other circumstances, it might have had traction were it not for the circumstances in which the allegations of organising sex parties were made in the editions.
>
> 26. Nothing arises from exploring general attitudes to those who have attended a party at which there was an opportunity to engage in sexual activity with others who were not partners. The plaintiff found the relevant parties distasteful and limited his attendance to four occasions before ceasing all interest in them after eighteen months. No witness was called by counsel for the defendant. Therefore, based on the impression which I formed at trial from listening to the plaintiff and his supportive friend, I do not accept the suggestion made on behalf of the defendant that the rugby club at which the plaintiff was a coach or the social group in which he mixed would have ostracised him as occurred due to his attendance at those four parties, if they had become public knowledge other than by way of the editions.
>
> 27. There was no evidence that anyone in the plaintiff's social group learnt or was bothered to learn about the parties to which the plaintiff was brought to by L and which he attended with misgivings. Counsel for the plaintiff was right in submitting that there are occasions on which people attend parties reluctantly and appear in photographs with a smile which feign enjoyment.
>
> 28. The plaintiff's explanation for his attendance at the parties is accepted by this Court having listened to and observed the plaintiff carefully. The plaintiff has had misfortunes but has shown that he owns up to responsibilities. The defendant did not take its opportunity to call evidence to rebut the plausible account given by the plaintiff for the reason to accompany and keep L in their relationship.
>
> 29. Most people who were correctly apprised of the plaintiff's circumstances and the factors leading to the plaintiff's attendance at the four parties, would not have ostracised the plaintiff as transpired."

20. The trial judge made further findings at paras. 32-36 of his judgment in relation to the effect of the 2012 article which are relevant to the appellant's grounds of appeal, as follows:

> "32. The 2012 edition inevitably caused conversation among the friends and acquaintances of the plaintiff. A quote from a renowned psychologist in 2004 that "gratuitous gossip is confessional calumny, the slaughter of reputations, the death of marriages and the trauma of social exclusion" is quite apt save for the fact that the plaintiff had long separated from his wife by 2012. The gossip and talk did indeed lead to family and social exclusion of the plaintiff with continuing effects on his reputation. The plaintiff mentioned that an observer at the trial in Cork in March 2017 asked "why didn't you invite me?" without thinking how hurtful that is to the plaintiff.
>
> 33. It is wrong for any person to think, conclude or joke as that observer suggested that the plaintiff organised or willingly attended the parties. One of the ongoing effects can thus be seen and it is important that this judgment and ultimate award marks how wrong such observations are in view of the finding of the repeated defamation of the plaintiff by the defendant through its considerable newspaper circulation.
>
> 34. It is over five years since the publication of the first edition and it is apparent that the plaintiff requires one or more of the remedies sought. The ongoing damage and hurt caused to the plaintiff should be alleviated by an award of damages. Such an award is one way of sending a message that the plaintiff should not be blaggarded while compensating him for the continuing injury to his reputation.
>
> 35. Depression, clouds of darkness and suicidal ideation are terms which hardly do justice to the effect of the 2012 edition on the plaintiff. The plaintiff lost access to his children and their names were changed when they moved school following the publication in July 2012. He was shunned by extended family and ostracised within his social and sporting circles. It is difficult to think of more serious consequences for a father, team coach and member of an established family in the community than those which occurred following publication of the defamatory material which led reasonable members of the plaintiff's circle to conclude that he was at least one of the biggest organisers of orgies in the State."

Meanings

21. Leaving aside for the moment the appeal on the ground of fair and reasonable reporting of a matter of public interest, and the appeal against quantum of damages, a central plank of the appellant's appeal is the submission that there was no evidence on which the trial judge could properly conclude that the respondent's reputation was damaged by him being wrongly identified as an organiser of sex parties, and that the respondent himself had accepted in cross-examination that it was his attendance at the parties, and not the allegation that he was an organiser, that was damaging to his reputation. It was submitted accordingly that where there was no evidence that the damage to reputation resulted from what was erroneously reported in the article, there can be no defamation, and therefore no basis for any award of damages.

22. In its notice of appeal, the appellant states that the trial judge failed to set out clearly and engage with what he considered to be the defamatory meaning of the statements published, and that he failed to properly evaluate and analyse the evidence. Specifically, it is submitted that the trial judge erred in finding that the 2012 article could be understood to mean that the respondent was the "principal organiser of orgies in the State with a lurking undertone of criminality". It is also submitted that the trial judge erred in finding that the photographs of the respondent attending at some of these parties "for which he posed voluntarily" would leave a reasonable reader with an impression that "the plaintiff was a major organiser of orgies". It is further submitted that the trial judge erred in finding that the 2013 article could be understood by the reasonable reader to mean that the respondent was "immersed in economic activities involving the provision of sexual services or activities". Other errors relied upon in the grounds of appeal are that the trial judge erred in concluding that any reasonable reader would form the impression that the respondent was involved in the sex trade and that he had attended and/or organised the parties at the centre of these proceedings for financial gain. It is submitted

that insufficient weight or indeed any weight was given by the trial judge to what is described as the respondent's own admission under cross-examination that the accepted and popular meaning of a "swingers' party" is one at which consenting adults partake in voluntary sexual activities.

23. The appellant submits that when viewed in its totality the evidence indicated that any reputational damage resulted only from the true factual statement of the respondent's attendance at these parties and the accompanying photographs to which he consented showing him to be present, and not the false statement that he was an organiser of them. It is submitted that the evidence was that he consented to such photographs being taken at the parties, and to their being distributed among a large group of people who attend such parties, and consequently to a wider public.

24. The appellant also takes issue with the trial judge's dismissal as a "debating style point" of the appellant's submission that there was no distinction to be drawn in terms of reputational damage between organising swingers' parties, and attending same, and his ignoring the respondent's own acceptance of that proposition under cross-examination.

25. Running through the appellant's submissions in relation to liability is this theme that it was the reporting of the respondent's voluntary attendance at these parties clearly depicted in the accompanying photographs taken at some of the parties he attended that caused any damage to the respondent's reputation, rather than the erroneous description of him as an organiser of such parties.

26. In challenging the trial judge's findings in this regard, the appellant accepts that the role of this Court on appeal is constrained in some respects in relation to findings of fact made by the trial judge by reason of the principles in *Hay v. O'Grady* [1992] 1 IR 201. However, it is submitted that such constraints apply only where there is shown to be credible evidence to support the trial judge's finding. It is submitted that there was no credible evidence to support certain relevant findings made by the trial judge, and others findings which were contrary to the respondent's own evidence.

27. In contending that there was no credible evidence upon which the trial judge could rely for his finding that the respondent's good name and reputation was damaged by the false statement in the articles that he was an organiser of sex parties, the appellant relies upon some of the evidence given by the respondent himself under cross-examination, and criticises the judgment of the trial judge for failing to identify particular words within the articles which he deemed to be defamatory or, as it is put by the appellant, what is "the true sting" of the articles when they are read as a whole.

28. The appellant relies upon a passage from the cross-examination of the respondent for its submission that the trial judge erred in concluding that the respondent's reputation was damaged by the false statement that he was an organiser of, as opposed to him being simply an attendee at, these parties. It is contended that the respondent accepted during his cross-examination that it was his attendance at these parties that was damaging to his reputation, and not that false allegation that he organised them. The passage appears on Day 2, pp. 24-25 where counsel for the appellant explores this distinction with the respondent:

> Q. Mr Nolan, have you ever attended, for instance, a table quiz in a GAA club?
>
> A. Yes.
>
> Q. Have you attended a few of them?
>
> A. Table quizzes.
>
> Q. Yes?
>
> A. A couple of quizzes, yeah
>
> Q. Yes. Would you be concerned if somebody reported in a newspaper that you had attended table quizzes in a GAA club?
>
> A. No, I wouldn't.
>
> Q. Right.
>
> A. Why should they report about me going to a table quiz?
>
> Q. Well, would you be concerned that it breached your privacy rights?
>
> A. Um, no, I don't see any harm in it going to a table quiz if you're asking me that question.
>
> Q. Yes. Nor do I, Mr Nolan.
>
> A. Okay.
>
> Q. Would it be a private event that you think a newspaper would be prohibited from commenting upon?
>
> A. No.
>
> Q. Right, so we agreed to all that. Would you be concerned if a newspaper fell into error and said that you organised a table quiz in a GAA club when, in fact, you had merely attended it?
>
> A. No, I wouldn't.
>
> Q. Why not?
>
> A. A table quiz is a completely different thing than what this is.
>
> Q. Yes. So because a table quiz is an inoffensive ordinary, but now, socially acceptable activity, it really doesn't matter whether you attended or whether you organised it. Isn't that correct?
>
> A. Yes.

Q. So, it is not the organisation of an event that's the issue. It is the nature of the event that is the issue, isn't that right?

A. Okay, yes.

Q. Similarly, if you'd attended chess parties or backgammon parties or table tennis competitions in somebody's house, you wouldn't be concerned if somebody said that you had organised such events, as distinct from merely attending them, would you?

A. No, I wouldn't, no.

Q. Because those events are unobjectionable and they are socially acceptable. Isn't that correct?

A. Yes

Q. So the problem for you, Mr Nolan, is not that the newspaper says that you are organising an event when you are only attending the event. The problem for you is the event?

A. The event in this situation is private.

Q. We are going to come to the privacy but the problem for you in this case is that the event is sex parties. Isn't that right, Mr Nolan?

A. People go to these parties, your honour, they either do what they want to do or they don't. It's up to themselves. My whole problem with everything that is going on here is the way I've been portrayed.

Q. But you see the point I'm making to you, Mr Nolan, and I think you do get it, is that there isn't a big difference in perception between attending an event and organising an event?

A. Yes.

Q. Do you understand that?

A. Yeah, yeah I do. You are talking about the table quizzes.

Q. Yes. Provided the event as unobjectionable?

A. Yeah.

Q. Nobody really thinks particularly differently of a person who merely attends the event, as against a person who actively organises an event?

A. Okay.

Q. Isn't that correct?

A. Yes.

Q. So actually, Mr Nolan, people don't think in particularly different terms of people who attend sex parties on the one hand, a category that you accept that you are in, and people who organise sex parties on the other hand, a category that you dispute that you are in.

29. This skilful cross-examination of the respondent is beguiling in its logic and simplicity. But its syllogistic character is apt to disguise rather than enlighten. Such deductive reasoning which leads the respondent from his first position to his final and inexorable surrender to the proposition that there is no difference in perception between attending these events and organising them, should not distract from the fact that the important consideration in relation to meaning is to be determined by the trial judge (or the jury as the case may be) not so much based on the respondent's subjective view as to meaning but rather by what the reasonable reader of the articles, in combination with the photographs and general presentation of the articles and taking the words in their ordinary meaning, would consider the meaning to be.

30. In the context of these particular articles, taken in combination with the photographs, captions and general presentation, the distinction sought to be drawn by the appellant between the damage to the respondent's reputation by being reported as having attended these parties, and any caused by being described as an organiser of them, becomes blurred to extinction in my view. It was conceded that the reference to him being an organiser of these parties was incorrect. Whether he attended the parties voluntarily or was an unwilling participant, or whether he felt coerced in some way by his then partner seems to me to be irrelevant once there was a proper basis for the trial judge to conclude that his reputation was damaged by being identified as an organiser of such parties. In that regard I would point to the evidence of Mr Power which the trial judge was entitled to consider to be credible. Mr Power was clear that the reputational damage to the respondent emanated from the false statement that the respondent organised such parties, and not from the fact that he attended them.

31. I reject the appellant's submission that, because under cross-examination the respondent submitted to the proposition put that there is no distinction between it being reported that he attended these parties and that he organised them, there was no damage to his reputation that arose from having wrongly been identified as an organiser of the parties, and that any damage that occurred arose from him being shown to having attended such parties. The trial judge was entitled to not be bound by the respondent's surrender to that proposition, and to form his own objective view based on all the evidence which included the evidence of Mr Power, just as a jury would have done had this case been heard by a jury, as to whether to the reasonable reader of the articles in their context bore the meanings contended for by the respondent, or indeed any of the meanings contended for in his statement of claim. It is that objective view as to the meaning of the articles that is important. That view is not formed by reference to what the respondent himself stated he understood the meaning to be, or whether he does or does not accept that there is the distinction to be drawn between attending and organising the parties. His own view is likely to be subjective, and therefore risking the frailty and unreliability that may sometimes attach to a subjective view, in contradistinction to an objective view.

32. A party can frequently parse and analyse a trial judge's written judgment and find some phrase or sentence that could have been more clearly expressed, or perhaps a word that might have been used loosely, or which is capable of different meanings in different contexts, and thereby attempt to satisfy an appellate court that the trial judge erred. This has happened in the present case, and I take just one example from the submissions made on this appeal. In written submissions and oral submissions counsel referred to the use by the trial judge of the word "glanced" in para. 20 of his judgment. I have already set out that sentence, but do so again for convenience:

> "20. A reasonable person who glanced at the 2013 edition and the 12 page investigation was likely to form the view that the characters (including the plaintiff) identified in the 2013 edition were immersed in economic activities involving the provision of sexual services or activities". [Emphasis provided]

33. Criticism made is of the use of the word "*glanced*", and it is submitted that the use of that word indicates an incorrect approach in the trial judge's examination of the articles. It is submitted that the putative reasonable reader of the articles will not simply "glance" at the articles but will "read" them. It was submitted that this has led the trial judge into fundamental error in his assessment of the articles, and that if he had adopted the stance of a prudent reasonable reader, and not a person who would simply glance at the articles, he would have had to reach a conclusion that the articles did not bear the meanings that he attributed to them such as that the respondent was "a major organiser of orgies", "a principal organiser of orgies in the State with a lurking undertone of criminality", and was "immersed in economic activities involving the provision of sexual services or activities".

34. Reading the judgment as a whole there is no basis for finding any serious error on the part of the trial judge by his use of the verb "glance" rather than another verb such as "read", and certainly none that would justify setting aside his findings. In fact, however, in the present case the way the pages of the newspapers are set out by the juxtaposition of photographs with captions and headlines would, objectively, enable a mere 'glance' to capture the defamatory statement that the respondent "runs" or "organises" swingers' parties. A closer reading will undoubtedly satisfy further curiosity on the part of the reader or the person who has "glanced". But the way that the trial judge expressed himself is not in my view an error, and certainly not such as to lead to a conclusion that the trial judge's examination of the articles and his conclusions are "seriously flawed" as submitted.

35. I am satisfied that the trial judge was correct to conclude that there was a meaningful distinction between being named as a person who attended such parties, and a person who organises such parties. He was also entitled to conclude that by referring in the 2012 article to the respondent's conviction in 2002 for laundering money for a notorious drug dealer, and showing a picture of that criminal as part of the 2012 article, the appellant had characterised the respondent as "a principal organiser of orgies in the State with a lurking undertone of criminality". One might ask rhetorically what purpose was sought to be served by referring to the respondent's criminal conviction and association with that named person back in 2002, other than to imply by innuendo "an undertone of criminality" into the matters being reported in 2012.

36. I find no basis for interfering with the trial judge's conclusion that it was the erroneous reporting of the respondent as the organiser of these parties that caused injury to his reputation and good name. There was credible evidence to support that conclusion.

37. Complaint is made also by the appellant that the trial judge failed to identify which of the meanings contended for by the respondent were made out to be defamatory, despite the fact that at the conclusion of the hearing an issue paper was provided to the judge by the parties in much the same way as would be provided to a jury had there been one. The trial judge made no reference in his judgment to this issue paper. In my view, the trial judge should not be criticised in this regard. While he obviously accepted an issue paper from the parties at the conclusion of the hearing when it was offered to him he was not obliged to. Neither in my view did he have to specifically address the issues in it, as would a jury.

38. In any event, this is not a case where a few words or even a sentence in an article is defamatory. In such a case the trial judge might be criticised for not identifying clearly the particular words that give rise to the defamatory meaning claimed to exist. In the present case it is not so simple because it is the 2012 article as a whole, including its accompanying photographs and captions and headings, and the 2013 article, which combine to create the defamatory meaning found by the trial judge. I am satisfied that reading the judgment as a whole the trial judge made it clear that the meaning which was defamatory was that the respondent was the organiser of sex parties, and not simply a person who attended same. That meaning is certainly within several of the meanings contended for in para. 20 of the respondent's statement of claim.

Defence of privilege under s. 18 of the Act - lawful and legitimate reporting on matters of public interest
39. In this regard the defence particularised this defence by stating:

"The article the subject matter of these proceedings was published in good faith, as part of the defendant's lawful and legitimate reporting on matters concerning and affecting the public at large."

40. In replies to particulars the appellant expanded somewhat on that pleading, *inter alia*, as follows:

> "The articles published by the defendant are articles concerning the issue of modern Irish attitudes to sexual and personal relationships. The articles included information and discussion regarding the issue of 'swinger parties' and 'wife swapping parties' and some of the persons attending same including but not limited to the plaintiff.
>
> The articles generally also discussed other issues including but not limited to how the internet has affected sexual relations in Ireland including the sex trade and general attitudes to particular types of sex in Ireland which is of public concern. The articles contain information regarding the sex trade in Ireland including issues regarding those engaged in sex and the reasons they are engaged in this industry. It also discusses the broader issues of how sex and sexual relations have changed in Ireland including since the introduction of the Internet.
>
> In the premises it is contend [sic] that the public had an interest to receive this information and was entitled to know it, there was a public interest value in publishing it and the defendants were exercising a legitimate function and/or duty of reporting a matter of serious public importance."

41. In the High Court the appellants relied upon its contention that the respondent was a public figure. The basis for considering him to be such were that he had been a prominent GAA footballer having represented his county at senior level albeit many years previously, and that he had achieved public notoriety in 2002 as a result of media reporting of his conviction for money laundering for a notorious criminal for which he received a suspended sentence and a fine.

42. The trial judge concluded as follows in relation to the public interest plea:

> "37. As for the public interest argument advanced, the Court stresses its duty to vindicate the rights of citizens. It will not be thwarted by the vacuous plea that there is a public interest in publishing salacious material without regard to the truth. Little, if anything, was done by the defendant to portray an accurate context for the plaintiff's attendance at the parties in the 2012 edition. No consideration was given to the plaintiff's pleas in advance of publication in 2012 about the potential effect on the relationship with his estranged wife and children by the publication of information which portrayed him as having a major role in organising orgies. Moreover, there was no suggestion that the journalist or anyone on the part of the defendant enquired about anything and not least the welfare of the plaintiff in the year elapsed between the 2012 edition and the 2013 edition with the heading "World of Vice Exposed".
>
> 38. Lest there be any doubt, the intrusion into the plaintiff's private life did not have any overriding consideration of the public interest. The defendant recklessly published prurient photographs and pieces which carried the import as described. The plaintiff had no option after the 2013 edition but to seek a commitment from the defendant to cease its apparent crusade to defame him with impunity. The defendant wrongly sought such impunity by reference to the plaintiff's 10 year old suspended sentence and fine for acknowledged money laundering."

43. It has been submitted that the trial judge has erred by not considering that the respondent was a public figure, and that the publication of his involvement in the parties in question was fair and reasonable. The appellant points to the fact that in opening the case to the High Court the respondent's counsel himself described the respondent as "a football star in the 1990s". It is suggested that this statement alone was sufficient to indicate that he is a public figure, and that this is only added to by the media coverage in 2002 surrounding his conviction for money laundering and his association at that time with a notorious criminal. In these circumstances it is submitted that the trial judge was in error in not concluding that the reporting was fair and reasonable, and to reject that ground of defence.

44. It is submitted that the subject matter of the articles was a topic of general and important public debate, and therefore a matter of public interest, and that this was actually accepted by the respondent in his own evidence. That is a reference to the respondent's answer "yes" when counsel for the appellant put it to him in cross-examination: "Over the last 30 or 40 years there have been many public debates about sexual activity and what might be called the liberalisation of attitudes to sex. Isn't that right?"

45. The respondent submits that the trial judge was correct to reject this defence firstly because the appellant called no evidence to advance its contention that it reported in good faith on a matter of public interest; and secondly in any event that it is clear that the appellant in fact acted in bad faith because (a) the journalist who visited the respondent's house prior to the publication of the 2012 article never put to the respondent the allegation that it was going to publish and seek his response, and (b) because a number of the photographs that were published were in fact taken at a dinner party the respondent was attending, and not at one of the sex parties about which the article was reporting.

46. It is in my view clear from the judgment that the trial judge was satisfied that the subject matter of the articles did not cover a matter of public interest, and could not therefore be defended on the basis of privilege. That is clear from the trial judge's description of the plea as "vacuous". As I have said already in a different context, some might say that the trial judge could have expressed himself differently, or indeed have expressed his conclusions more extensively. But that is not to say that he erred. I am satisfied that the failure of the appellant to give any evidence whatsoever to substantiate the defence is sufficient to determine that it has not been made out by the appellant. It is clear from the section that the evidentiary burden is upon the appellant in this regard. That burden was not discharged, and for that reason I would uphold the trial judge's conclusion.

47. If it was necessary to so conclude, I would consider that matters relied upon by the appellant to characterise the respondent as a public figure and, therefore, that the article was reporting on a matter of public interest were insufficient to constitute him as such. His prowess as a footballer at county level in 1998 is not sufficient to characterise him as a public figure. That is not altered in my view even if one adds to his former prowess as a footballer the fact that ten years previously he had been the subject of media coverage in relation to his money laundering conviction. I would have dismissed this ground of appeal on that basis also.

Damages

48. In relation to the general damages awarded in the amount of €250,000 the appellant submits that this level of damages was disproportionate, and failed to take account of the fact that the respondent was a willing participant in the parties, and consented to the taking of photographs showing him at such parties. It is also submitted that the trial judge failed to take account of relevant case law both in this jurisdiction and from the European Court of Human Rights, as to the importance of upholding the right to freedom of expression, while taking account of the defamation that has occurred. The appellant also submits that the trial judge erred in so far as he took into account "depression, clouds of darkness and suicidal ideation" about which the respondent gave evidence, but in circumstances where he called no medical evidence.

49. The trial judge considered the question of assessing general damages in some considerable detail. He heard submissions from the parties on the question which he stated he found of assistance. He considered numerous cases where damages were awarded, and went so far as to annex to his judgment the cases in question and the awards made. He noted also that appeal courts here had "applied restraint and proportionality while deferring to the undoubted right of juries to send message by an award to compensate a defamed person". He went on to state:

> "… my review of the awards and judgments in the Superior Court indicates willingness to award damages to put the plaintiff back into the position as if the defamation never occurred by vindicating the plaintiff in the eyes of the public through sending a message in the form of significant quantum to correct the wrong."

50. The trial judge went on to express some doubt about the wisdom of comparing awards in previous cases since each case has its own unique facts, but that "all that can be achieved is an award of such a size as to compensate and to impress upon the public the nature of the defamation which has occurred".

51. The trial judge also acknowledged that the assessment of damages in a defamation case is a different exercise than that in a personal injuries claim, and referenced in that regard the judgment of Dunne J. in *Leech v. Independent Newspapers (Ireland) Limited* [2015] 2 I.R. 214. He referenced also the provisions of s. 31 of the Act which sets out matters which the Court shall have regard to when assessing damages. At para. 62 of his judgment the trial judge stated:

> "62. It can be extrapolated from many decisions that the damages award must be convincing and given in such a way as to vindicate the rights of the person who has been defamed. The quantum should be sufficient to demonstrate to

observers that the defamatory articles should not have been published while other elements such as special damage and loss of opportunity may be taken into account also."

52. The trial judge went on to refer to five criteria identified by Dunne J. in *Leech* which may be had regard to when assessing damages, namely the gravity of the libel, the extent of the publication, the conduct of the defendant, the impact of the defamation, and freedom of expression (as it may apply). Having done so, the trial judge expressed his view that "the defamation of the plaintiff in the editions was very serious". Even though he allowed for the fact that it might have been worse, he nevertheless stated that "on a scale of 1 to 100, it reaches 75 when one takes account of all the circumstances and particularly those factors identified at s. 31(4) (a), (b), (c), (f) and (h) of the 2009 Act".

53. The trial judge then concluded on the question of general damages as follows:

> "66. The impact on the defendant was immense as already outlined. It is a credit to the plaintiff, his former wife, children, mother and friends to have regained some accord despite the total disrespect shown by the defendant and its employees.
>
> 67. In advance of awarding compensatory damages it may help to repeat that the research exercise undertaken by this Court since the trial was to identify if possible any common theme in the awards by juries which represent commonly held views. I am indeed conscious of the opinion of McKechnie J. (dissenting in part on the preserve of the unique role for a jury) in *Leech v. Independent Newspapers (Ireland) Ltd* where he said at para. 102:-
>
> > 'How can a transcript convey the depth of a person's feelings who has been publicly humiliated; whose sense of esteem and personal worth have been undermined, even shredded in some cases; whose presence even amongst strangers may result in being shunned or rebuffed?' which resonates when reading reports or records of previous awards too.'
>
> 68. In brief I discern that ordinary people sitting on juries recognise that damages for defamation send out a message of caution not only to the person who defames but also to the wider public for the benefit of the defamed. It is my view that the starting point in a defamation of the kind presented rose to €250,000 because of the elapse of time between the 2012 edition and the even more defamatory 2013 edition. In arriving at this point I take into account that I am going to award aggravated and punitive damages as well."

54. An important feature of the appellant's submission that the award of damages is disproportionate is their contention that the respondent had voluntarily attended these parties and had consented to photographs being taken of him there. However, that contention has been rejected. The defamation for which the respondent is entitled to be compensated is the serious erroneous statement that he was the organiser of such parties. The serious nature of that misstatement is not in my view diluted or minimised by the fact that he was a willing participant there, or the fact that he consented to photographs being taken of him while present.

55. The appellant submits that the trial judge failed to take any account of the fact that the respondent's reputation was already significantly tarnished by the fact of his conviction for money laundering in 2002 when assessing damages commensurate to the reputational damage caused to the respondent by the articles. However, the respondent correctly points out that the appellant cannot rely on that factor since it has failed to comply with O.1B, r. 10 of the Rules of the Superior Courts, which provides:

> "(10) In a defamation action, in which the defendant does not by his defence assert the truth of the statement complained of in accordance with s. 16, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the defamatory statement was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnished particulars to the plaintiff of the matters as to which he intends giving evidence."

The appellant did not furnish any notice in compliance with this rule. It was therefore not entitled to call evidence in chief in relation to the character of the respondent. It is not in a position to complain on this appeal that the trial judge ought to have taken account of the previous bad character of the respondent or the damage already inflicted on his good reputation as a result of the money laundering conviction back in 2002.

56. In so far as the trial judge referred to the "depression, clouds of darkness and suicidal ideation" suffered by the respondent, he was in my view entitled to take account of the respondent's evidence in that regard even though no medical evidence was called in support. This is not a personal injuries action where such expert evidence would be a requirement before compensation could be awarded. The assessment of damages for defamation is a different exercise. Where no evidence was called by the appellant to dispute the respondent's own evidence of the effect of the defamatory statements and the fall-out from same upon him, these were factors that the trial judge was entitled to have regard to in assessing what level of general damages was appropriate and proportionate. They are part of "all of the circumstances of the case" referred to in s. 31(3) of the 2009 Act.

57. In addition, the appellant takes issue with the methodology employed by the trial judge whereby he used a scale of 1 to 100 and placing this case at 75 on that scale. I see no objection to a trial judge assessing the level of seriousness by the use of such a scale. It seems to me to bring a certain clarity to the level of seriousness considered to exist in any particular case, just as a doctor may ask a patient to describe the level of pain on a scale of 1 to 10. It is obviously a matter for any particular trial judge to use whatever method he or she finds useful for this purpose.

58. The appellant referenced this Court's judgment in *Christie v. TV3* [2017] IECA 128 where it significantly reduced an award of damages made in the High Court to a solicitor who had sued in defamation following the broadcast of a news bulletin in which an image of him appeared accompanied by text referring to him mistakenly as his named client who had been convicted of fraud. That judgment was delivered after the hearing of the present case in the High Court but before judgment was delivered. It appears that the trial judge had the opportunity to consider the judgment in *Christie*, and indicated in his judgment that he had incorporated "the views and judgment of the Court of Appeal", but without addressing it in detail. The appellant submits that his judgment is at odds with the principles in *Christie* in which this Court significantly reduced the damages award. It has been submitted that the defamation in the present case is at a lower level even than that in *Christie*, and that the level of damages in the present case should be reduced significantly also.

59. In my view *Christie* was decided on very, and relevantly, different facts to the present case. This is clear even from the opening paragraph of the judgment of Hogan J. in *Christie* where he states that the plaintiff had been "unintentionally defamed by an evening news bulletin" broadcast by TV3, but that "TV3 had promptly broadcast an apology" and had "made an offer of amends pursuant to s.

22 of the Defamation Act 2009". These features alone of that case serve to illustrate that it is not a proper comparator for the purposes of assessing general damages in the present case. That is not to say that the principles articulated therein are not of general application, particularly so far as the balance to be struck concerning potentially competing constitutional rights is concerned. Thus, as para. 33 Hogan J. states that "the law of defamation involves the striking of a balance by the Oireachtas of two potentially competing constitutional rights, namely, the protection of the right of a good name (Article 40.3.2) and right of free speech and expression (Article 40.6.1) … . This constitutional balance necessarily implies that an award of damages for defamation must be measured and proportionate". That statement by Hogan J. is characteristically clear and succinct and is, I suggest, uncontroversial. But later paragraphs in the same judgment explain the reasons why in that case the Court was justified in reducing an award of €200,000 to a sum of €60,000, before applying a further discount so that the ultimate award was €36,000. Those reasons do not exist in the present case.

60. The appellant relied also on the judgment of the ECtHR in *Independent Newspapers (Ireland) Limited v. Ireland* (Application No. 28199/15) where one of the complaints was that the level of damages awarded was excessive and in violation of the newspaper's right to freedom of expression under Article 10 ECHR. The appellant refers to this judgment in support of a submission that there is an obligation upon the trial judge to explain clearly the reasons for making an award of damages, and submits that the reasons appearing in the trial judge's judgment in the present case are inadequate.

61. I cannot agree that the reasons for the trial judge's assessment of damages are inadequately expressed. In my view his reasons are clear. He considered the judgment of Dunne J. in *Leech*. He considered the provisions of s. 31 of the Act of 2009. He examined a number of earlier cases in which damages had been awarded, and even attached to his judgment a schedule of 12 such cases to which he had regard. As I have said already he had regard to the five factors identified by Dunne J. in *Leech* which a trial judge should have regard to. He considered that the impact on the respondent was "immense". He placed the case at point 75 on the 1 to 100 scale of seriousness to which he referred. In my view there was credible evidence before him to justify these findings. He had the opportunity to see and hear the plaintiff and his witness, Mr Power. The appellant did not go into evidence. The trial judge must be given a wide margin of appreciation in relation to his assessment of damages in those circumstances. This Court will interfere only where it is satisfied that the award is so disproportionate as to warrant intervention. This is not such a case. The defamation was very serious. It is not minimised by the fact that the respondent was a voluntary attendee at such parties. The serious defamation and consequent damage to reputation as made out by the evidence resulted from the erroneous naming of the respondent as an organiser of sex parties with a clearly implied undertone of criminality. As I have already stated, I do not accept that there is no meaningful distinction to be drawn between a person who simply attends such parties and one who organises same. I have dealt with that already. This was a serious defamation, on two separate occasions, where no apology was offered and no offer of amends was made after the respondent's solicitor's letter following the 2013 publication. The respondent is not to be faulted for remaining silent following the 2012 article in the hope that there would be no repeat. There were two publications which contained the defamatory material. This man's reputation and the regard in which he was held within his community was seriously traduced and damaged. I will return to the question of the award of general damages in the amount of €250,000 after I have considered the respondent's cross-appeal in relation to his claim for damages for breach of his constitutional right to privacy, since to an extent it seems clear that the trial judge considered that any breach of that right to be effectively merged with the claim for defamation, and in that regard I refer to what the trial judge stated at para. 50 of his judgment which appears at para. 67 below.

62. I am satisfied that the trial judge did not err in making an award of €30,000 under the heading of aggravated damages, as well as €30,000 for punitive damages. The trial judge has explained his reasons for doing so, and I consider that the facts of this case justify such awards. On the evidence that he heard, and taking all the facts and circumstances of the case into account I find no error on the part of the trial judge in this regard.

The cross-appeal – breach of constitutional privacy right

63. As noted earlier the trial judge had concluded in relation to the claim for defamation that "the intrusion into the plaintiff's private life did not have any overriding consideration of the public interest", which certainly suggests that he was satisfied that the article itself was an intrusion into the respondent's private life. There is no doubt in my mind that the photographs accompanying the articles were equally so. The trial judge's conclusion in relation to the respondent's claim for damages for breach of privacy is contained at paras. 42–44 of his judgment where he stated:

> "42. The essence of the plaintiff's claim to privacy relies on a rather loose agreement or understanding with unidentified individuals that the photographs taken in 2010 and 2011 at the four parties would not be disclosed to anyone outside the group who attended the parties without the consent of those attending.
>
> 43. The plaintiff consented to the taking of photographs by a stranger who attended the party. It was also clear that the photographs were freely available among up to 26 people of which he might have only known four at most.
>
> 44. Therefore I cannot find that the right to privacy has been engaged. Unlike the situation in *Herrity v. Associated Newspapers (Ireland) Limited* [2009] IR 316, no issue arises about the lawfulness of the defendant acquiring the photographs…".

64. The trial judge distinguished the present case from those in which the alleged breach of privacy emanates from some unlawful act, such as in *Herrity*, and also *Mosely v. News Group Newspapers Limited* [2008] EWHC 1777(Q.B), noting that in the latter the defendant had bribed and threatened sources, used hidden cameras in private property in order to record material of a sexual nature, and alleged that the parties which the plaintiff had attended involved "Nazi or concentration camp role-play; an allegation that the court found to be totally untrue".

65. As also noted by the trial judge at para. 48 of his judgment the defendant in the present case was contacted by a source "who voluntarily provided information in relation to the parties which the plaintiff admitted attending". In fact, the source was the respondent's then partner who attended these parties with him. It appears that following the break-up of their relationship, she contacted the appellant newspaper and provided the photographs which appeared in the two publications concerned. As the respondent's evidence showed, some of the pictures published were in fact of the respondent at a private Halloween party, and not one of the so called "swingers' parties" which were the subject of the published articles.

66. The trial judge stated at para. 49 of his judgment:

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

page 359: –

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

67. At para. 50 of his judgment the trial judge went on to state:

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

68. It would seem therefore that the trial judge considered that since the damages that a successful claim in defamation would attract would exceed any damages that might be awarded for a breach of privacy, the respondent need not concern himself with the latter.

69. The trial judge was also satisfied in any event that having permitted photographs to be taken of him at these parties, and in the knowledge that they could be disseminated among those attending those parties, and perhaps more widely among persons interested in such parties, he in effect had waived any right of privacy that might otherwise attach to them; and in addition that in any event the existing defamation law was the method by which the State had chosen to protect his privacy rights in relation to same, and he should not succeed in a separate claim for damages for breach of his right to privacy.

70. The difficulty I have with these conclusions is that the trial judge had already concluded that the defamation was the false statement that the respondent was the organiser of the parties in question, and not that he had attended the parties. The photographs show him attending such parties and are therefore not part of what he was compensated for by the award of damages for defamation. Therefore, it cannot be said that the damages in the tort claim have vindicated the respondent's constitutional right to privacy in relation to the publication of the photographs. It would, of course, be different if the claim had been in relation to a pure loss of reputation. In those circumstances the respondent would not have been able to seek any additional head of redress such, as for example, a declaration that his right to a good name as protected by Article 40.3.2 had been infringed by the publication in question, unless he could also show that the existing law of tort was inadequate to protect these constitutional rights in the sense explained by Henchy J. in *Hanrahan v. Merck, Sharpe Dohme* [1988] ILRM 629. That, however, is not the case here, precisely because the respondent also has a separate claim for infringement of his constitutional right to privacy which on its facts is quite separate and distinct from any reputational claim.

71. The question, of course, remains whether the respondent must be seen to have waived his right to privacy in the photographs by agreeing to them being taken in the first place, and in the knowledge that they might be disseminated not only to those others attending the particular parties, but to a wider audience, albeit limited to persons interested in such parties. There is also the fact that the respondent's evidence was that one of the photographs was not taken at a 'swingers' party at all, but rather at a private Halloween party. No evidence was called by the appellant to contradict that evidence.

72. Another question is whether, even if the damages awarded in respect of the defamatory statement, including aggravated and punitive damages, might indeed be sufficient to compensate also for the breach of privacy, the respondent may nevertheless be entitled to a declaration that his constitutional right to privacy was breached.

73. The respondent submits that the trial judge fell into error in a number of ways which are set forth as follows in his written submissions:

> (i) finding that the plaintiff's right to privacy had not been engaged;
>
> (ii) not viewing the facts from the starting point that the plaintiff's former partner with whom he had been in a committed relationship had provided intimate private details of their sex life to the defendant newspaper;
>
> (iii) if he had done so, the trial judge would have found a most egregious breach of the plaintiff's right to respect for his private life in circumstances where he found there was no public interest in the publication;
>
> (iv) the learned trial judge correctly held that the plaintiff's understanding was that the photographs would not be disclosed outside the group but failed to proceed to find that the publication was therefore wrongful; and
>
> (v) the learned trial judge erred in failing to find that some of the photographs were wrongly stated to have been taken at a swingers' party when the evidence was that they had been taken at a Halloween party attended by five people.

74. Certain other factual matters established by the plaintiff's evidence, though not referred to in the trial judge's judgment itself, are also relied upon by the respondent, namely:

> (i) the content of the articles came into the possession of the defendant following email contact from the plaintiff's former partner [L] who requested "full confidentiality" if she disclosed pictures of an ex-county footballer who "swings and likes to dress in women's clothes";
>
> (ii) every potentially identifiable person in the photographs has their face pixelated apart from the plaintiff;
>
> (iii) the plaintiff was door-stepped by Mr Donald, a journalist employed by the defendant, and told Mr Donald of the enormous harm he would suffer if the articles were published but the defendant ignored his pleas and proceeded to publish regardless;
>
> (iv) the 2012 article clearly acknowledged that the swingers' parties were private parties. They were referred to as

"underground" and a "carefully guarded secret";

(v) the plaintiff had an expectation [that] any photographs taken would not be shared beyond those at the party; and

(vi) the defendant called no witnesses, and the circumstances in which it obtained the content and the photographs and what it knew remains a mystery.

75. The respondent has referred to a number of authorities in support of his claim that he is entitled to a finding that his privacy rights were infringed by the publication of these photographs, and to damages, notwithstanding the award of damages for defamation, and notwithstanding that he had consented to the photographs being taken, and that he knew that they might be shared among those other persons attending such parties. Among the authorities to which the court has been referred are: *Herrity v. Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316; *McKennitt v. Ash* [2008] QB 73; *Douglas v. Hello Ltd* (No.3) [2006] QB 125; *Campbell v. MGN Ltd* [2003] QB 633; *PJS v. News Group Newspapers Ltd* [2016] AC 1081; and *Von Hannover v. Germany* [2004] 40 EHRR 1.

76. The appellant relies heavily on the consent of the respondent to being photographed at the parties, and on what the trial judge referred to as "a rather loose agreement … with unidentified individuals that the photographs taken … would not be disclosed to anyone outside the group who attended the parties". The respondent also accepted in his cross-examination that most of the other persons attending these parties were complete strangers to him. The respondent to the cross appeal argues therefore that the right to privacy was not a right on which Mr Nolan himself placed any great importance as he willingly attended the parties with others who were total strangers to him. Mr Nolan maintained his position that while he was content that the photographs be taken and that they might be distributed amongst that group, he had been told that they would not be put into the public domain. No evidence was adduced by the appellant to seek to contradict that evidence.

77. The newspaper relies also on its own right to freedom of expression also protected by the Constitution, and the presumption in favour of its protection both under the Constitution and under Article 10 of the European Convention on Human Rights. It submits that in the present case there are no exceptional or special circumstances that would justify permitting that right to be overborne by the respondent's right to privacy in the photographs. In that regard reliance is placed on what was stated by Dunne J. in *Herrity v. Associated Newspapers Limited* at p. 340 when she stated:

> "There is a hierarchy of constitutional rights and as a general proposition, I think, that cases in which the right to privacy will prevail over the right to freedom of expression may well be far and few between."

78. While that particular sentence has been highlighted by the appellant, I would in passing note what follows immediately thereafter, namely:

> "However, this may not always be the case and there are circumstances where it seems to me the right to privacy could be such that it would prevail over the right to freedom of expression. One of those circumstances arises on the facts of this case where the freedom of expression asserted is the publication of material obtained unlawfully … No one expects to see their private telephone conversations printed in a newspaper to excite prurient curiosity or to provide amusement for the paper's readers."

79. While in the present case there is no question of the photographs having been obtained unlawfully, I will return to the question whether, in circumstances where the respondent is not a public figure in the true sense, and his attendance at such parties is not itself a matter to be viewed as a matter of public interest, the publication of these rather salacious photographs in a national newspaper was motivated more by a commercial desire on the part of the newspaper to "excite prurient curiosity or to provide amusement for the paper's readers" and sell more copies of its newspaper, than in the *bona fide* pursuit of a constitutional right to freedom of expression on a matter of public interest, in the proper sense of that term. In other words, while the publication certainly attracts constitutional protection under Art. 40.6.1, it may nonetheless be said to do so in somewhat weak fashion. The publication is some distance from the core objective of Art. 40.6.1, namely, as the provision itself states, criticism of Government policy and, by extension, providing a forum for informing the public, and discussion of, contemporary affairs.

80. The appellant is sceptical about the respondent's evidence that there was an understanding or "rule" among those attending these parties that any photographs taken of those attending would not be disseminated beyond that group. The appellant submits that the trial judge was correct to describe the "rule" as a "rather loose agreement", and submits that the respondent's reliance upon the "rule" is untenable for a number of reasons. Firstly, there is no credible evidence of such a "rule"; secondly, even if there was such a "rule" the respondent himself had expressed to Mr Donald a willingness to breach it by naming everybody who had attended if the newspaper wold refrain from publishing the 2012 article; and thirdly, the respondent had admitted during cross-examination that he had consented to the photographs being distributed not only among those persons actually attending the particular parties at which the photographs were taken but among a wider community of people "who are into the scene" which he also said was "very big I think" (see Day 2, p. 66-68).

81. In some of the cases that have come before the courts in relation to a breach of privacy the breach has occurred in relation to material that has been obtained by unlawful means (see, *e.g. Kennedy v. Ireland* [1987] IR 587; *Herrity v. Associated Newspapers (Ireland) Limited* [2011] 1 IR 228). In such cases the very fact that the material was unlawfully obtained has been a significant factor in the court determining that the right to privacy was not outweighed by another right such as freedom of expression, or, indeed, by the common good. In *Kennedy*, it was conceded by the defendant that there was no lawful justification for the "tapping" of two journalists' telephones. The Court (Hamilton P.) was satisfied that it constituted a breach of the plaintiffs' constitutional rights to privacy. In that regard he stated at p. 593:

> "There has been, as is admitted on behalf of the defendants, a deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringement of the constitutional rights to privacy of the three plaintiffs".

82. Describing this constitutional right, Hamilton P. stated at p. 593:

> "the nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they are written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words "deliberately, consciously and unjustifiably" because an individual must accept the risk of accidental interference with his

communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference. No such circumstances exist in this case."

83. In his judgment in *Norris v. The Attorney General* [1984] IR. 36 at p. 71, Henchy J. acknowledged that the right to privacy could be "hedged in by overriding requirements such as 'public order and morality' or 'the authority of the State' or 'the exigencies of the common good' ", but nevertheless stated:

> "… There is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.

Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range … and which may be compendiously referred to as the right of privacy."

84. These early authoritative statements as to the content and extent of the constitutional right to privacy are firmly embedded in our jurisprudence, and internationally. Where a breach of that right has occurred which is not justified by some other lawful consideration, or trumped by a different constitutional right enjoyed by the party responsible for the breach, and where the Court is called upon to recognise and vindicate that right where no other remedy can do so, the Court must act, whether by declaratory order or damages, or both.

85. In her judgment in *Herrity*, Dunne J. considered the leading cases on the right to privacy, and distilled from those cases certain principles which provide a clear guide to how a court called upon to vindicate a party's privacy rights should proceed. At pp. 336-7 she stated:

> "… What does emerge from the decisions to which I have referred and in particular from the decision in *Cogley v. Radio Telefis Eireann* [2005] IEHC 180, [2005] 4 I.R. 79 are the following principles: –
>
> (i) There is a constitutional right to privacy;
>
> (ii) The right to privacy is not an unqualified right;
>
> (iii) The right to privacy may have to be balanced against other competing rights or interests;
>
> (iv) The right to privacy may be derived from the nature of the information at issue – that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally;
>
> (v) There may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make a complaint in relation to the manner in which the information was obtained;
>
> (vi) The right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions."

86. In the present case it is important to keep in mind that these photographs were provided to the appellant newspaper by the former partner of the respondent after their relationship ended. It is not clear from the evidence who took the particular photographs, and in that sense it is unclear who actually owned them. But what is clear in my view from the evidence in the case is that it was implicit that, whoever took them, any such photographs showing the plaintiff attending such a party would remain private, and would never be published in a newspaper without his consent, and indeed the consent of any other attendees who could be identified in any particular photograph. The photographs had come into the possession of L in the context of a private intimate relationship which had come to an unhappy end. It is the case that the respondent's former partner had contacted the newspaper after their relationship had ended to inform it that she had a story about an ex-GAA county footballer who attended swingers' parties and who, she said, liked to dress in women's clothes, and who was at the same parties as a named hurling star about whom the same newspaper had run a story on him attending swingers' parties. In offering this story and the photographs this former partner had requested full confidentiality for herself. But she had no authority to hand over these photographs.

87. This is not a case where the newspaper itself took the photographs, either openly or clandestinely, such as occurred in *Cogley*. The photographs of the respondent attending these parties were taken with his knowledge and agreement, but the parties were private parties. It was not a public arena, such as at a disco or other such event in a public space such as a dance hall. While the respondent agreed to the photographs being taken, and knew that they might be distributed among a limited number of people who attended such parties, this, in my view, cannot be considered to be a consent to the photographs being published in a national newspaper, or even to the risk that they might be. It did not constitute a waiver of his right to privacy in respect of them. In my view the trial judge was correct to characterise the publication of these photographs as an intrusion upon his right to privacy. In truth these were private photographs taken for private purposes which were never intended to be made public.

88. The appellants must also be taken to have been aware that publication of the photographs was an invasion of the respondent's privacy. This is supported by the fact that the faces of the other persons in the photographs were pixelated so as to conceal their identity. The appellant had also been made fully aware by the respondent prior to publication that the respondent did not want the article to appear in the 2012 edition of the newspaper, and to be identified therein. They therefore knew that by identifying him, including by showing photographs of him, they did so without his consent.

89. While there may not have been any illegality in the manner in which the appellant acquired these photographs, as was the case in *Kennedy* and *Herrity*, that feature is not in itself sufficient to confer a carte blanche to do as they wish with the photographs. I am completely satisfied that there was no overriding public interest to be served by publication of the photographs. The reasons given by the appellant for asserting a public interest in the story are insufficient. I have already addressed that question when dealing with the claim in defamation, and need not repeat it. The respondent was not a public figure, as contended, in respect of whom it might be considered that there was some valid public interest in exposing him as a person who attends such parties. He is, and was, a private person notwithstanding the limited publicity surrounding his conviction some ten years previously, or his even earlier status as a footballer who had achieved some success at inter-county level, who was simply engaging in an aspect of his private life in a private space when these photographs were taken. Even though he was aware that the photographs might be disseminated among those

attending the parties, or even among a wider circle of persons interested in such parties, this did not constitute a waiver of his right to privacy in respect of them, and certainly did not protect the newspaper who published them solely for the commercially driven purpose of providing colour to the associated text in the articles, and for purely commercial gain, and not in any bona fide public interest or the common good. The appellant's claim in that regard was in my view aptly described as "vacuous" by the trial judge.

90. There is about every person, be they a public figure or not, a carapace of privacy, recognised and protected by law, which protects a private space within which a person's life may be lived without unwanted intrusion by others, including the media, and without fear that elements of that life that are within that private space will without their consent be exposed to public view for some commercial purpose such as the curiosity and gratification of a voyeuristic readership or other audience.

91. What happened to this respondent was a gross intrusion by the newspaper into that private protected space within his life. Whether he was a willing participant at these so-called swingers' parties, and whether or not he enjoyed them, or simply went along because his partner wished him to, is really beside the point. They were parties held in private houses in which photographs of him were taken. He was not and is not a public figure. The publication of the photographs was a grave breach of his right to privacy. The fact that they were provided to the newspaper by the former partner of the respondent, and not taken by an employee of the newspaper itself does not absolve the appellant from its obligations not to unlawfully breach this constitutional right to privacy. In my view the justification for publication based on the "vacuous plea" of a public interest in articles to which the photographs were associated does nothing to mitigate the seriousness of the breach. The appellant was made aware that serious harm would result for the respondent, and, indeed, that occurred as predicted by him. The breach was deliberate, conscious and premeditated. In my view it cannot be excused.

92. I would allow the respondent's cross appeal and declare that his constitutional right to privacy was breached by the appellant.

Damages

93. In so far as the trial judge melded together the question of damages for defamation and any award in respect of the unlawful intrusion upon the appellant's privacy. I would not consider the award to be excessive overall. The award of punitive and exemplary damages was also justified on the facts of this case for the reasons given by the trial judge. It is fair to consider that in making an award of general damages in the total sum of €250,000 for defamation, the trial judge took into account the publication of the photographs which accompanied the articles themselves, and in doing so, in effect, reflected the breach of privacy.

94. I would not alter the overall level of the award of damages. However, I do feel for the reasons stated (a) that the respondent is entitled to a declaration that the publications of the photographs in the Sunday World editions of the 15th July 2012 and the 3rd March 2013 constitute a serious breach of his constitutional right of privacy, and (b) that such breach should be recognised by a meaningful award of damages under that particular heading. His constitutional right to protection of this privacy right in respect of these photographs is not vindicated in this instance by the remedy available to him for defamation and the award of damages under that heading, since the latter claim has been found proven only on the basis that he was falsely named as an organiser of the parties.

95. For that reason alone, I would vary the High Court order by recalibrating the award of damages made by the trial judge in order to reflect an award both for defamation and for breach of privacy, and by making the declaration referred to. I would therefore award the sum of €200,000 for general damages for defamation, as well as the amount of €30,000 for punitive damages, and €30,000 for exemplary damages, and would in addition to making the declaration referred to at (a) above in para. 93, make an award of €50,000 damages for breach of the respondent's constitutional right to privacy.