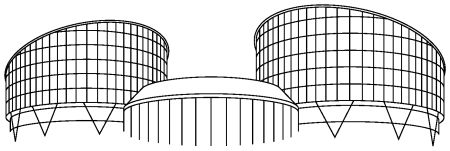

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF INDEPENDENT NEWSPAPERS (IRELAND) LIMITED v. IRELAND

(Application no. 28199/15)

JUDGMENT

STRASBOURG

15 June 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Independent Newspapers (Ireland) Limited v. Ireland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 23 May 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28199/15) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish company, Independent Newspapers (Ireland) Limited ("the applicant company"), on 29 May 2015.

2. The applicant company was represented by Meagher Solicitors, a law firm in Dublin. The Irish Government ("the Government") were represented by their Agent, Mr P. White of the Department of Foreign Affairs.

3. The applicant company alleged a violation of its right to freedom of expression due to a disproportionately high award of damages against it in a defamation case that reflected the inadequacy and ineffectiveness of domestic safeguards designed to prevent such awards.

4. On 11 February 2016 the application was communicated to the Government.

5. Third-party comments were received jointly from NewsBrands Ireland and Local Ireland, bodies representing national and regional newspapers respectively, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant company is the publisher of an Irish daily newspaper, the *Herald*. At the time of the events giving rise to this case, the title of the newspaper was the *Evening Herald*.

7. Between 30 November and 17 December 2004, the *Evening Herald*, published a series of articles about the awarding of Government contracts to a public relations consultant, Ms L. The articles pointed out that she was a supporter of, and well acquainted with, a prominent political figure, Mr C., both of them coming from the same city. She had been hired as a consultant by the Office of Public Works beginning in November 2001, when Mr C. was the minister with responsibility for this department of Government. When he was appointed in mid-2002 to the more senior political post of Minister for the Environment, Heritage and Local Government, Ms L. was then hired as a consultant by that Government Department, and was still working for it at the time the articles appeared.

8. The *Evening Herald* called into question the manner in which the tendering procedure had been conducted, the qualifications of Ms L. for the work involved, the high level of remuneration she received, as well as the amount of work that was in fact done by Ms L. It referred to eight trips abroad on which Ms L. had been part of the ministerial entourage, in particular a trip to New York to attend a United Nations conference. The newspaper stated several times that the relevant United Nations department could find no trace of Mr C. having taken part in the conference, even though his Department maintained that he had attended it. A later article stated that the United Nations did in fact have a record of the Minister's attendance.

9. The story was developed in eleven articles published over a period of two weeks in nine editions of the newspaper. It became headline news and formed the subject-matter of an editorial decrying apparent favouritism in the award of Government contracts and calling for an inquiry.

10. The articles referred to rumours of an intimate relationship between Mr C., who was at that time separated from his wife, and Ms L., who was married with two teenage children. There were also references to Ms L.'s attractive appearance and her lifestyle. Various photographs were included, including one that showed the two standing side by side in evening wear as if a couple. This image was obtained by altering the original photo, which contained four people. One of the front page articles was accompanied by a large photomontage containing the same image of Ms L. in evening wear, but modified to suggest that the skirt had a slit that reached almost to her hip. The montage showed her standing very close to the Minister, whose image had been taken from another photo, with the New York skyline

behind them. The headline read "The Minister, [Ms L.] and the Mystery Meeting".

11. The Supreme Court found that the articles complained of amounted to a serious and sustained attack on Ms. L.'s business and personal integrity and were part of a sustained campaign building up over a period of just two weeks. She had been accused of engaging in an adulterous relationship for the sake of obtaining lucrative contracts and at the end of that period, she had gone from a person who would not have been known to the general public at all to someone who was notorious (see further paragraphs 23-33 below).

12. The issue of the contracts awarded to Ms L. was taken up by other parts of the Irish media, and led to questions in the Irish parliament (*Dáil Éireann*). A report issued in 2005 at the request of the then Prime Minister (*Taoiseach*) found that while there had been certain shortcomings in the way that the contracts had been awarded and in the monitoring and recording of the work done, there had not been any specific infringement of the relevant norms, guidelines or practices.

A. Defamation proceedings in the High Court

13. Ms L. sued the applicant company for defamation. The case was heard before a jury in the High Court over seven days in June 2009. The two issues put to the jury were whether the articles, as a whole, including the accompanying photographs, meant that Ms L. had an extra-marital affair with Mr C., and whether the last article in the series meant that Ms L. had travelled to New York at Government expense in the company of Mr C. for a United Nations conference, but that she had not in fact attended it.

14. In accordance with Irish law (see paragraphs 38-42 below for further details), the jury was directed that if it found in favour of Ms L. on either issue, or both, it should assess damages.

15. In his charge to the jury, the trial judge explained that in an action for defamation, damages serve three functions: to afford consolation for the distress caused by the defamatory statement; to repair the harm to reputation, including business reputation; and to vindicate the person's reputation. He stated that the jurors could take account of Ms L.'s standing in society and in the business community, the nature of the libel (the insinuations that she had betrayed husband and family and that she had misused public funds), the mode and extent of publication (carried repeatedly in a widely-read daily newspaper), the absence of an apology, and the fact that the applicant company pleaded the defences of justification and fair comment throughout the trial. If the jury were to make an award, it must be appropriate and fair to both parties. The rules governing the trial judge's directions to the jury are known as the *Barrett* rules, laid down by the Supreme Court in 1986 (see paragraph 39 below).

16. The trial judge did not give any specific guideline to the jury regarding the appropriate level of compensation, stressed the limited nature of the guidelines he could provide and indicated, in broad terms, that, when assessing damages the jury must bear in mind reality, the current times, the cost of living and the value of money. He added a cautionary note:

> "On one famous occasion I told a jury that the plaintiff, if he won, hadn't won the [national lottery] and they immediately awarded a million euro. Now, that wasn't what I meant when I was saying that to them."

He explained that the law did not permit him to suggest a figure or a range of figures to the jury:

> "The amount of damages, ladies and gentlemen, is a matter for you, should you choose to award them. I can't suggest a figure to you, I am not permitted to suggest a figure to you. I can't give you a range of figures, I am not permitted to give you a range of figures. I can give you what help I can, and I will, in coming to an appropriate figure for damages. But, ultimately, the figure is yours."

17. He warned the jurors not to be "overcome by feelings of generosity and give [Ms L.] a ridiculously large amount of money". Any award must be of an appropriate amount. He continued his charge to the jury as follows:

> "... [T]hat appropriate figure must also take into consideration the Defendant. You must also be fair to the Defendant too ...[Y]ou must consider the Defendant as well because your decision must be a fair decision and must be fair to both parties. ... You must come to a figure that is an appropriate figure and that is, I fully realise, ... not an easy thing to do. I would like to be able to tell you what other figures have been given in the recent past in similar cases, but I can't do that and I mustn't do that. If any of you think you remember newspaper headlines over the past twelve months or so of damages awarded in cases, every case is different. Put those out of your mind completely ... It is this case and what is appropriate in this case that is important and you have to reach that decision yourself and without as much help as I would like to be able to give you, but I am not permitted to give you."

18. After the jury had retired, the plaintiff's counsel requested the trial judge to retract the reference to the lottery, as he feared it would be understood by the jury as a warning to keep any award significantly lower than one million euros. He contended that no figure should have been suggested. Counsel for the applicant company disagreed, taking the view that the jury would have clearly understood the trial judge's remark was not to make any suggestion about the appropriate level of damages in the instant case. The trial judge declined to revisit this aspect of his charge to the jury as it could cause confusion in jurors' minds, who might think that in withdrawing the reference the trial judge might have been suggesting less or more than that figure. He observed to counsel:

> "I do find myself in difficulties because of the Supreme Court's ruling [in the *De Rossa* case] in that I can't even indicate to a jury upper and lower in the most general terms, which I would like to be able to do because I think it would save a lot of trouble and I can't do it because of the decision of the Supreme Court."

He concluded the exchange with counsel on this matter as follows:

> "I did think that I had traversed the question of damages and, each successive case I do, I get more long-winded about it because I started with very short charges and I used to be very surprised, one way or another, at the amounts juries brought in."

19. On the first issue the jury found that the newspaper had alleged an extra-marital affair between the plaintiff and Mr C. On the second issue, it found that the meaning of the article was not defamatory.

20. The jury assessed damages at EUR 1,872,000 and the trial judge gave judgment in this amount. He granted a stay on payment pending appeal, with the proviso that the applicant company make an interim payment of EUR 750,000 to Ms L., with an additional EUR 100,000 in legal costs. These payments were made, the Supreme Court having refused on 27 July 2009 to set aside the High Court's order on interim payment.

21. The applicant company accepted the jury's decision that it had defamed Ms L. The *Evening Herald* published an apology to her in its edition of 19 January 2010. It appealed the amount of damages, arguing that no reasonable jury could have made such an award, that it was disproportionate to the damage caused and amounted to an unlawful interference with the applicant company's rights under the Constitution and the Convention. In its subsequent submissions to this Court on just satisfaction, it considered that a much lower sum – EUR 175,000 – would have been sufficient compensation in the circumstances.

22. In the event that the Supreme Court set aside the award of damages on appeal, Ms L. sought to have the matter remitted to the High Court for a fresh assessment by a new jury. In its notice of appeal, the applicant company also sought an order directing a retrial on the issue of damages. It appears from the case file that, in its subsequent submissions before the Supreme Court, in the event that the latter set aside the High Court award, it argued that the Supreme Court should itself decide the amount of compensation.

B. Review by the Supreme Court

23. The Supreme Court gave its ruling on 19 December 2014. All three judges found that the award to Ms L. was excessive and must be set aside. The majority decided to substitute its own assessment of damages (EUR 1.25 million), while the other judge took the view that the case should be re-tried before a different jury. As this would not happen, he indicated that he would have assessed damages at EUR 1 million.

24. The judgment of the majority was given by Dunne J., with whom Murray J. concurred. She noted that the case did not come within the current law on defamation (the Defamation Act 2009, see paragraphs 51-53 below), but had to be decided in accordance with the previous law. Under that

regime, the trial judge was limited in the directions that could be given to a jury regarding the appropriate level of damages. It had not been suggested that the trial judge had committed any error in his charge to the jury on the question of damages. Rather, the complaint was that the award was so disproportionately high that it should be set aside. She referred to the relevant Supreme Court case-law, which held that it was the duty of the trial judge to direct the jury that damages must be confined to an amount that will fairly and reasonably compensate the plaintiff for injured feelings and loss of standing. Furthermore, as a fundamental principle of the law of compensatory damages, the award must be reasonable and fair and bear a due correspondence with the injury suffered; a disproportionately high award would be set aside. She rejected the applicant's argument that larger libel awards should be subjected to more searching scrutiny on appeal than had been customary in the past. Nor did she accept that the relevant legal test should be whether a reasonable jury would have thought such an award necessary to compensate the plaintiff and to re-establish her reputation. She stated:

> "If such were the test to be applied, it would remove from the jury award the "very unusual and emphatic sanctity" referred to [in previous case-law].
>
> Consequently, while awards made by jury must, on appeal, be subject to scrutiny by the appellate court, that court is only entitled to set aside an award if it is satisfied that in all the circumstances, the award is so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award."

25. She further recalled the need for the law to reflect a due balancing of the constitutional right to freedom of expression against the constitutional protection of every citizen's good name, which, as stated in case-law, brought the concept of proportionality into constitutional jurisprudence. Referring to this Court's judgment in *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (no. 55120/00, ECHR 2005-V (extracts)), she observed that it did not alter or reconfigure Irish law in respect of awards of damages in defamation. She stated:

> "[T]he position in Irish law is that an appellate court will be slow to interfere with the verdict of a jury on the assessment of damages but nevertheless awards by juries are subject to scrutiny and if an award is so disproportionate in the circumstances of the case having regard to the respective rights of freedom of expression on the one hand and on the other hand the requirement under the Constitution to protect the good name of every citizen that no reasonable jury would have made such an award then the award will be set aside on appeal."

26. She reviewed the terms used by the trial judge in his charge to the jury. He had told them they could consider the plaintiff's position in the business community. They could also consider the nature of the libel, which contained the suggestion that she was immoral, had been unfaithful to her husband and had betrayed her family. The mode and extent of publication

were relevant, as were the absence of an apology and the company's decision to stand over the articles to the end.

27. Dunne J. then considered the applicant company's argument that the amount of damages awarded against it should be compared to awards that had been set aside as excessive in previous defamation cases. She agreed that the comparison might provide some assistance in assessing the gravity of the libel. But she also underlined the need for caution, given the wide variety of factual circumstances of such cases and also the passage of time since previous appellate decisions. As for comparison with personal injury awards, she recalled the different function of damages in the two types of case. In defamation, the function of damages was both to compensate the injury to reputation and to vindicate the person's good name, a consideration which was not relevant in personal injuries cases.

28. The judge then set out the relevant factors for considering the proportionality of the damages awarded to Ms L. The first was the gravity of the libel. The more closely the libel touched the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of their personality – as was the case here – the more serious it was likely to be. She described the libel as a serious and sustained attack on the business and personal integrity of Ms L. It could be fairly compared with a previous case involving the defamatory allegation against a prominent businessman of bribing a Government minister in order to obtain a licence to operate a radio station (the *O'Brien* case, summarised in *Independent News and Media* judgment at §§ 54-63). It could not, however, be regarded as being in the category of the gravest and most serious libels to come before the courts, as was the libel in the *De Rossa* case (the case that led to the *Independent News and Media* case, it having been alleged that Mr De Rossa personally supported anti-Semitism and violent communist oppression). But the libel of Ms L. was nonetheless a very serious one. The allegation of adultery must have been a course of real hurt and distress to her.

29. The next factor was the extent of publication. Ms L. had cited eleven articles concerning her. There had been some more articles focussing on the role of the Minister. It was a sustained campaign over a number of days. The newspaper had a daily circulation throughout the State of 90,000 copies; its readership would be higher still. Ms L. had gone from being unknown to the public to being notorious. The publication had therefore been particularly widespread and extensive.

30. The third factor was the conduct of the defendant. It had run a defence of justification that the jury had rejected. It had not offered any apology to Ms L. before the verdict, which was a point the jury could have taken into account. The articles had been accompanied by photographs that had been cropped and manipulated to lend force to the implication that Ms L. got her contracts by virtue of the fact that she was having an affair

with the Minister. That too could have been taken into consideration by the jury.

31. The fourth factor was the impact of the defamation on Ms L. The articles had attacked her moral character and her professional reputation. They had implied that she was unfaithful to her husband and had played a part in the break-up of Mr C.'s marriage. They had conveyed the impression that she was prepared to engage in an adulterous relationship in order to advance her professional standing and career. Her ability to do the work she was hired for had been called into question. A new business initiative she was involved in ended when the partner had withdrawn following the publication of the articles, and her consultancy work for the Government had come to an end. Ms L. had given evidence of her own personal hurt and distress at the articles, and described the impact on her husband and sons, one of whom had had to change school in his final year while he was preparing to sit important public examinations. Ms L. had received personal abuse in her hometown. Overall, the articles had had a profound effect on her in every aspect of her family and professional life, which was a consideration that was also relevant to the jury's award.

32. She then assessed the sum awarded in damages:

> "The award of damages in this case in the sum of €1,872,000 is a very large award by any standard. ... Overall, I am satisfied that the defamation in this case was a very serious defamation. Undoubtedly, if one was to place the defamation in this case on a scale of seriousness, it would certainly be towards the higher end of the scale. A somewhat unusual feature of this case was the sustained campaign in the Evening Herald in respect of Ms. L. The consequences of it affected her in her day to day life, personally and in her business life. Her newly launched business was destroyed before it could become established. I have no doubt that from her point of view it was a very serious matter. Nevertheless, I do not think it could be classed as one of the most serious libels to come before the Courts ... [T]he award made to Ms. L in this case was one of the highest ever awards made in a case of this kind in this country. Even accepting that this case is one that comes towards the higher end of the scale, I am satisfied that the award made by the jury in this case was excessive and must be set aside."

33. She continued:

> "I am conscious of the firm instructions of Ms. L to her legal representatives that in the event that this Court came to the conclusion that the amount of the award was excessive that the Court should in those circumstances remit the matter to the High Court for assessment by a jury again. Whilst I understand those to be her instructions I am satisfied that in the context of this case it would be desirable for all parties to bring an end to the litigation between the parties and in those circumstances it seems to me that the approach to be taken by the Court should be to set aside the verdict of the jury on damages and to substitute a sum in the figure of €1,250,000 for damages."

34. The other, partly-dissenting judgment was given by McKechnie J. He stated that the issue was whether the award was reasonable and fair and bore a due correspondence with the injury suffered, which was essentially a matter of proportionality. He rejected the suggestion that the jury should be

informed of awards made in personal injury actions. The nature and purpose of the two types of damages were inherently different. As for comparison with previous defamation awards, he opposed this for practical reasons. Even with the greatest of care, he did not see how cross referencing to a previous award could aid in determining the compensation to be paid to a particular plaintiff in respect of a particular publication for a particular injury. At most, he could accept that some benefit could be obtained if the comparison was applied within the same or similar class of defamatory remarks.

35. He observed that since the jury represented the community, and defamation was rooted in community values, jury awards in defamation cases enjoyed an eminence and distinction significantly higher than other types of award, including jury awards in non-defamation cases. This point was supported by numerous *dicta* of the Supreme Court. He said:

> "... Appeal judges, when conducting such a review, are not the jury and cannot assume the jury's role. Intervention will be justified only where the award obviously falls outside permitted parameters which, in determining, the court must have due regard, *inter alia*, to the uniqueness of the jury's representative function in this particular judicial process. ... Therefore, an award will not be disturbed easily or second guessed purely to fine tune it."

36. He analysed the libel in detail and also concluded that the award was not proportionate, failing to reflect the necessary objective relationship between wrongdoing and harm. Although he considered that the issue of damages should be submitted for consideration by a fresh jury, in the light of the majority's decision to set aside the jury verdict and substitute its own award, he offered his own view on the appropriate level of damages, placing it at one million euros.

37. The applicant company duly paid an additional EUR 500,000 in compensation to Ms L. On 26 February 2015, the Supreme Court ordered that the applicant company should bear the legal costs incurred by Ms L. in the appellate proceedings. According to the applicant company, this came to EUR 240,448.16.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Irish law and case-law on defamation

38. As indicated in § 43 of the Court's judgment in *Independent News and Media*, pursuant to Irish law applicable at the relevant time, the jury assessed damages following its finding of defamation. It did so on the basis of directions provided by the trial judge. The Supreme Court could review and quash the award of a jury of the High Court. Although it had the power, under Article 34.4.3 of the Constitution as well as by statute, to substitute its own award for a jury's award of damages on appeal in a civil case (see

Holohan v. Donohue [1986] ILRM 205), its use in defamation cases was very rare (see in this regard the judgment of McKechnie J., paragraphs 96-98). Instead, the usual course was to refer the matter back to the High Court for a further trial on damages before a different jury. In the new trial, the second jury would not be informed of the Supreme Court decision to quash the earlier award, of the amount of that original award, or of the appellate court's reasoning when quashing the award and ordering a retrial.

39. In *Barrett v. Independent Newspapers Limited*, cited above, in which the Supreme Court set aside an award of IR£ 65,000 as excessive, Henchy J. summarised the principles to be applied as follows:

> "... it is the duty of the judge to direct the jury that the damages must be confined to such sum of money as will fairly and reasonably compensate the plaintiff for his injured feelings and for any diminution in his standing among right-thinking people as a result of the words complained of. The jury have to be told that they must make their assessment entirely on the facts found by them, and they must be given such directions on the law as will enable them to reach a proper assessment on the basis of those facts. Among the relevant considerations proper to be taken into account are the nature of the libel, the standing of the Plaintiff, the extent of the publication, the conduct of the Defendant at all stages of the case and any other matter which bears on the extent of damages. ... a fundamental principle of the law of compensatory damages is that the award must always be reasonable and fair and bear a due correspondence with the injury suffered."

40. In *Lennon v. HSE* [2015] IECA 92, the Court of Appeal held that the right to trial by jury in defamation proceedings is a statutory right.

41. In *Hill v. Cork Examiner Publications Ltd* [2001] IESC 95, in which the Supreme Court allowed an award of IR£ 60,000, Murphy J. stated on the subject of directions to the jury;

> "Judges in charging juries as to their responsibilities in determining damages ... can say or do little more than recall that damages are designed to compensate for the consequences of a wrong doing and not to punish the wrong doer. It will always be said - perhaps unhelpfully - that the sum awarded should be reasonable to the plaintiff and also reasonable to the defendant. In relation to the extent to which a trial judge could and should give guidance as to an appropriate measure of damages was considered by this Court in *De Rossa* ... Whilst other jurisdictions have accepted the concept of such guidelines that concept has been rejected in this jurisdiction. Apart from any other consideration there would appear to be insuperable difficulties for any judge to assemble the appropriate body of information on which to base such guidelines."

42. In *De Rossa v. Independent Newspapers* (the case which, as indicated previously, led to the *Independent News and Media* case), Hamilton C.J., allowing an award of IR£ 300,000, held that the *Barrett* rules introduced a requirement of proportionality in so far as jury damages are concerned. He also emphasised that "neither the common law, nor the Constitution, nor the Convention give to any person the right to defame".

Dissenting, Denham J. held that providing more information to the jury would not fetter its discretion:

> "If this is perceived as a more active approach by the judge I believe it is in the interests of justice. The legislature could legislate but in its absence more guidelines would I believe help juries and the administration of justice. Guidelines would assist in achieving consistent and comparable decisions which would enhance public confidence in the administration of justice ... The place of the jury, which is at the core of a trial on libel, is not diminished by informing it of issues relevant to the proportionality of damages. It does not detract from its function but rather enhances it."

43. In *Dawson v. Irish Brokers Association*, Supreme Court, unreported, 27 February 1997, setting aside a jury award of IR£ 515,000 which he considered so excessive as to call for the intervention of the Supreme Court and ordering a retrial, O'Flaherty J. stated:

> "... the defendants in defamation cases should never be regarded as custodians of bottomless wells which are incapable of ever running dry. ... Further, unjustifiably large awards, as well as the costs attendant on long trials, deals a blow to the freedom of expression entitlement that is enshrined in the Constitution."

44. In answer to a question posed by the Court about appeals in defamation cases against the quantum of damages, the parties informed the Court of developments in a number of defamation cases concluded or still pending before the Irish courts.

45. In 2000, in the *O'Brien* case, the Supreme Court set aside the original jury award of IR£ 250,000. In the re-trial in 2006 the second jury awarded the plaintiff EUR 750,000, which was almost three times the award which the Supreme Court had set aside as disproportionately high.

46. The case of *McDonagh v. Sunday Newspapers Ltd.* [2015] IECA 225 involved allegations published in a widely-read newspaper in 1999 that the plaintiff played a major role in the sale of illegal drugs and also was involved in loan sharking (lending money at excessive rates of interest). In a decision of 28 February 2008, a jury in the High Court found the article to be defamatory in both respects and assessed damages at EUR 900,000. On 19 October 2015 the Court of Appeal ruled that the jury's verdict in relation to drug dealing was perverse and could not be allowed to stand since the evidence in the case strongly substantiated the allegation. On the loan sharking allegation, it set the verdict aside for the reason that the jury had not been properly directed on the relevant evidence. It ordered a re-trial on this issue alone. In 2016, the Supreme Court granted Mr. McDonagh leave to appeal that decision.

47. The case of *Kinsella v. Kenmare Resources Ltd.*, which was also tried under the old regime, arose out of an incident during a business trip to Africa in which the plaintiff had sleep-walked naked through the accommodation he was staying in, opening the doors of other bedrooms including that of a female colleague. The defendant company later made a

statement to the press in 2007 insinuating that the plaintiff had made inappropriate sexual advances to the woman. In November 2010 the High Court jury found that the plaintiff had been defamed and assessed damages at EUR 9 million for compensatory damages as well as EUR 1 million for aggravated damages. The case is currently under appeal before the Court of Appeal.

B. Reform of Irish defamation law

1. Law Reform Commission ("LRC")

48. The LRC consultation paper of March 1991 provisionally recommended, inter alia, that parties to defamation actions in the High Court should continue to have the right to have the issues of fact determined by a jury with the damages in such actions being assessed by the judge following the jury's determination whether nominal, compensatory or punitive damages should be awarded. The LRC also indicated that although damages awards in Ireland were, at that time, lower than in the neighbouring common law jurisdiction, it was felt that some awards by Irish juries were themselves unreasonably high and that, as a result, when settling a case, Irish plaintiffs would forego a trial and settle only in return for a substantial sum.

2. Report of the Legal Advisory Group on Defamation ("LAG")

49. The LAG was established by the Minister for Justice, Equality and Law Reform in 2002 with a view to examining reforms of the libel laws to bring them into line with other States. As regards the respective roles of the judge and jury, the recommendations in its report of March 2003 were summarised as follows:

> "The function of assessing damages in defamation proceedings heard before a jury should remain with the jury;
>
> Parties to proceedings should be able to make submissions to the court and address the jury concerning damages;
>
> Judges would be required to give directions to a jury on the matter of damages;
>
> In making an award of damages, regard would have to be had to a non-exhaustive list of matters including, for example, the nature and gravity of any allegation in the defamatory matter, the extent to which the defamatory matter was circulated and the fact that the defendant made or offered an adequate, sufficient and timely apology, correction or retraction, as the case might be.
>
> ...
>
> There should be an avoidance of doubt provision to the effect that, in a defamation appeal from the High Court, the Supreme Court could substitute its own assessment of damages for the damages awarded in the High Court."

50. The LAG also recommended that:

> "a statutory provision should be introduced which would require the judge in High Court proceedings to give directions to the jury on this matter. Such a provision should be general in nature but would, in an appropriate case, allow a judge to refer to the purchasing power of the likely award, the income which it might produce, the scale of awards in previous defamation cases and the appropriate level of damages in all the circumstances of the case. These provisions should be in addition to the basic provision which would specify a broad range of factors to which regard should be had when making an award of [non-pecuniary] damages. It was felt that provisions of this kind would be consistent with recent developments within the United Kingdom and other common law jurisdictions... and would accord well with the freedom of expression entitlement enshrined in both the Constitution and the European Convention on Human Rights."

C. The Defamation Act 2009

51. The aim of the Defamation Act 2009 was to update Irish defamation law, taking account of the relevant domestic and Convention jurisprudence. While it was not applicable in the present case, the following provisions are nonetheless of relevance:

> "13.—(1) Upon the hearing of an appeal from a decision of the High Court in a defamation action, the Supreme Court may, in addition to any other order that it deems appropriate to make, substitute for any amount of damages awarded to the plaintiff by the High Court such amount as it considers appropriate."

52. Section 26 of the Act provides for a defence of fair and reasonable publication on a matter of public interest.

53. In relation to damages, Section 31 of the Act provides as relevant:

> "(1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.
>
> (2) In a defamation action brought in the High Court, the judge shall give directions to the jury in relation to the matter of damages.
>
> (3) In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case.
>
> (4) Without prejudice to the generality of *subsection (3)*, the court in a defamation action shall, in making an award of general damages, have regard to—
>
> (*a*) the nature and gravity of any allegation in the defamatory statement concerned,
>
> (*b* the means of publication of the defamatory statement including the enduring nature of those means,
>
> (*c*) the extent to which the defamatory statement was circulated,
>
> (*d*) the offering or making of any apology, correction or retraction by the defendant to the plaintiff in respect of the defamatory statement,
>
> (*e*) the making of any offer to make amends under *section 22* by the defendant, whether or not the making of that offer was pleaded as a defence,

(*f*) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement,

(*g*) the extent (if at all) to which the plaintiff caused or contributed to, or acquiesced in, the publication of the defamatory statement,

(*h*) evidence given concerning the reputation of the plaintiff,

(*i*) if the defence of truth is pleaded and the defendant proves the truth of part but not the whole of the defamatory statement, the extent to which that defence is successfully pleaded in relation to the statement,

(*j*) if the defence of qualified privilege is pleaded, the extent to which the defendant has acceded to the request of the plaintiff to publish a reasonable statement by way of explanation or contradiction, and

(*k*) any order made under *section 33*, or any order under that section or correction order that the court proposes to make or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation."

54. On 1st November 2016, the Minister for Justice announced a public consultation process as part of the statutory review of the 2009 Defamation Act pursuant to section 5 of the Act. She stated:

"While this review is a statutory requirement, it also examines significant issues for our society. Defamation law needs to strike the right balance between two important rights – the right to freedom of expression in a democratic society, and the right to protect your good name and reputation against unfounded attack."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

55. The applicant company complained that the amount of damages awarded against it was excessive and signified the absence of adequate and effective safeguards in domestic law, in violation of the right to freedom of expression under Article 10 of the Convention. This provision states, in so far as relevant:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ...for the protection of the reputation or rights of others, ..."

A. Admissibility

56. The Government argued that the application was manifestly ill-founded. The complaint was essentially about the magnitude of the damages assessed by the jury, but that was a factual determination by the High Court that should not now be revisited. The decisive issue was whether domestic law contained sufficient safeguards for freedom of expression in the context of defamation. It had already been established in the *Independent News and Media* case that the requisite safeguards were present in domestic law. The proceedings in the present case had begun only four years after this Court's assessment of the domestic system in that case. The applicant company had not suggested that the domestic courts had misapplied the relevant jurisprudential principles, nor had it put forward any reason for the Court to depart from its previous positive assessment of the safeguards provided by Irish law.

57. The applicant company maintained that the application was admissible.

58. The Court observes that although in the *Independent News and Media* judgment it approved the safeguards in domestic law both in principle and as they were applied in that case, the issue in the instant case is whether those safeguards were adequate and effective in preventing a disproportionate award of damages in defamation against the applicant company. The application is therefore not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor does the Court consider it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

59. The applicant company submitted that there had been a disproportionate interference with its freedom of expression. At the end of the proceedings, it had had to pay Ms L. a very high sum in damages (more than fifty times the average annual wage in Ireland) as well as her high legal costs, including those incurred on appeal. It was a very far-reaching interference with its right to freedom of expression that was not "prescribed by law" within the meaning of this Court's case-law, since the domestic legal framework failed to meet the criteria of accessibility, foreseeability and clarity. The domestic law in force at the time allowed the jury in a defamation case practically unlimited discretion in assessing damages. According to the applicant company, as seen in the present case, the trial judge was not permitted to offer any useful or meaningful guidance to the

jury, such as relevant comparisons or even a range of figures. While the 2009 Act provided for guidance to be given to juries in relation to damages, it did not fundamentally alter the domestic system. There was even a risk that the amount given to Ms L. would be taken as setting a benchmark in future defamation cases.

60. The reality in Ireland was that jury awards in defamation cases were completely unpredictable. Furthermore, in the absence of reasons for jury decisions, there was no way for a publisher to foresee the potential quantum of damages in any defamation proceedings. This uncertainty had not been cured by appellate review in the present case. The Supreme Court had, without offering any explanation and with very little reasoning, assessed damages at a very high level, far in excess of what it had allowed in previous cases involving more serious libels. Its judgment had been strongly influenced by the level of damages assessed by the jury. Although the case might be regarded as exceptional, there was a major inherent flaw in the domestic system. This was clear from the *O'Brien* case (see paragraph 45 above); following the quashing of the original jury award, the jury in the second trial – unaware of the earlier proceedings in the case – had set damages at a much higher level. The appellate safeguard was thus ineffective in practice.

61. The unpredictability of the domestic system meant that there was a strong and continuous chilling effect on the news media in Ireland, hindering them in reporting on matters of legitimate public concern. They had to face the uncertainty of potentially enormous damages in defamation. In a country the size of Ireland, with relatively small press companies, awards on the scale seen in this case could threaten the financial existence of companies, to the detriment of freedom of speech and the vibrancy of democracy. The uncertainty was aggravated by the fact that in Irish defamation law the jury decided on the meaning of the impugned words, independently of the meaning intended by the publisher.

62. The *Independent News and Media* judgment should not be decisive for the outcome of the present case. In every case the interference with freedom of expression must be examined in its own right. The assessment of damages could not be shielded from the Court's review by characterising it as a finding of fact. Moreover, the present case could be distinguished because the Supreme Court had set aside the jury's assessment of damages as excessive. But it had then failed to apply the proportionality safeguard identified in the *Independent News and Media* judgment. Instead, it had taken an approach that was wholly inadequate and too deferential to the jury's assessment.

63. The applicant company criticised the damages awarded to Ms L. by the majority of Supreme Court for failing to bear a reasonable relationship of proportionality to the injury to her reputation. The award was far higher than in any previous defamation case in Ireland, notably the case that was

identified as a comparator by the majority in the Supreme Court – the *O'Brien* case – as well as the *De Rossa* case, even though the libel in that case was regarded as more serious. This was inexplicable. The Supreme Court did not attempt to tie the level of damages to any actual loss suffered by Ms L. There was only vague reference in the majority judgment to "loss of business opportunity", which was so nebulous that it could only increase the chilling effect on the media. Given the dearth of reasoning, the applicant company considered the Supreme Court award to be arbitrary.

64. The applicant company drew a comparison with the law of England and Wales, where such a level of damages for defamation would not be permitted. It considered the comparison instructive, given the close similarity between the two common law systems. In the other jurisdiction, the ceiling on libel awards in 2004 was about GBP 200,000. In 2016, the ceiling was about GBP 275,000. Such an amount could be awarded only in the most serious cases of defamation.

65. The award to Ms L. was also much higher than the general compensation that would be granted in Ireland for personal injuries. There were clear guidelines in that area of domestic law for assessing damages, with a maximum award (in 2016) of about EUR 450,000 for the most serious injuries. Although the Supreme Court did not accept a comparison with personal injury cases, it could not be justified that a person facing lifelong pain and suffering should be granted so much less than a person who had been defamed, even where the defamation was very serious. In England and Wales, it was the practice of the courts to treat awards for personal injury as a relevant comparator for assessing damages for defamation. Comparisons were also permitted in Northern Ireland so as to ensure the reasonableness of the quantum of damages in defamation cases.

66. The applicant company concluded that the interference with its freedom of expression had been disproportionate and unjustified, such that it could not be considered to come within the margin of appreciation of the domestic authorities.

(b) The Government

67. The Government did not accept that the interference with the applicant company's freedom of expression lacked an adequate legal basis for the purpose of Article 10 of the Convention. Media companies in Ireland were familiar with the domestic rules on defamation and damages. The applicant company should have expected that the level of damages might be very high if the jury found that it had acted in a reprehensible manner against the plaintiff. Moreover, in the *Independent News and Media* case the Court had considered that the criterion of lawfulness was satisfied; there was no reason to reach a different conclusion in the present case.

68. In the Government's view, the Court should not second-guess the Supreme Court's assessment of damages, which was arrived at following

detailed consideration of the facts and the balancing of the rights of the parties. Rather, given the high level of damages involved, the Court's review should focus on the relevant procedural safeguards, already held to be adequate in the *Independent News and Media* case. In the present case the safeguards had been correctly applied. The trial judge had given clear instructions to the jury about damages. The Supreme Court had engaged in a robust review of the jury's award and set it aside as disproportionate, replacing it with an amount that it regarded as proportionate to the injury suffered by Ms L.

69. The most recent domestic cases referred to by the applicant company (*McDonagh* and *Kinsella*, see paragraphs 46-47 above) were not relevant to this Court's analysis since the second limb of the domestic safeguards – appellate review – had not yet been applied.

70. Rejecting the applicant's criticism of the unpredictability of defamation awards, the Government argued that the jury's assessment of damages in a defamation case was a finding of fact and thus relatively unknowable in advance. The exercise involved a multi-layered analysis of a range of very nuanced and case-specific issues, an intuitive response to the evidence presented before the tribunal of fact. Moreover, the Supreme Court had set out in detail the factors that determined the assessment of damages in the case.

71. The Government considered it significant that the function of the jury in defamation cases had been affirmed under the 2009 Act (see paragraphs 51-53 above). While Irish media companies had argued for limiting the role of the jury, the legislature had decided against this. A very wide margin of appreciation should be allowed to States regarding the procedural mechanisms to be used in civil trials. The idea of setting an upper limit to damages in defamation had been considered by the Irish authorities but not retained. That did not mean that juries enjoyed limitless discretion. They had to assess damages in line with the *Barrett* rules, and awards were subject to appellate review.

72. The amount of damages awarded against the applicant company could only be assessed in the context of all of the relevant factors in the case. A very important factor was the utterly unethical nature of the impugned articles. The reports had focussed on a private person rather than the senior political figure. Ms L. had been hounded by the newspaper and cast in an extremely bad light. The reporting was salacious and sensationalist, accompanied by manipulated photographs. Such material must be considered to have low value for the purpose of Article 10; it could weigh only lightly in the balance. Furthermore, the applicant company had exacerbated matters by defending the case and declining to offer an apology until after the trial. Of far greater weight was the extensive damage to Ms L.'s reputation. The Government underlined that the right to a good name was especially important in Ireland, given its status as a right

expressly stated in the Constitution. For this reason, there was no valid comparison with the law of defamation in the United Kingdom.

73. The Government referred to Ms L.'s right, under Article 8 of the Convention, to respect for private and family life. The impact of the libel on her had been enormous, causing also great harm and distress to her family. The Government considered that this aspect of the case, which engaged the positive obligation on States under Article 8, distinguished it from other defamation actions.

74. In the view of the Government, the suggested comparison with awards in personal injury cases was wrong, for the reasons given by the Supreme Court, whatever the practice followed in other domestic systems might be. It was likewise wrong to compare different defamation awards, since each defamation case turned on its unique facts. While the majority in the Supreme Court had made reference to earlier cases (*De Rossa* and *O'Brien*), considering the former to have involved a more serious libel and the libel in the latter as being of comparable gravity, this did not undermine the assessment of damages due to Ms L. The gravity, or "sting", of the libel was not necessarily the most important factor in assessing damages. The other factors referred to in the judgment were also relevant, and could justify the fact that the award in this case was significantly higher than in the two earlier cases. In any event, the applicant company's suggestion that EUR 175,000 would have been sufficient compensation in this case could not be accepted. The Supreme Court's award was not disproportionate, nor was it beyond the resources of the applicant company, which was an extremely affluent corporation.

75. The Government rejected the applicant company's criticisms about a chilling effect. The newspaper had breached the ethics of journalism, and had given more importance to titillating the interest of the public than to reporting on an issue of public interest. This negated any claim for heightened protection under Article 10. Deterring this type of journalism should be considered a good thing. Nor was there any broader chilling effect on public-interest journalism in Ireland, given the defences available to the press in Irish defamation law: truth, honest opinion and qualified privilege. Domestic case-law also recognised a defence for public-interest publications that could not be proven to be true but which had been published in accordance with the standards of journalistic ethics. Therefore, genuine public-interest journalism was protected by the law.

76. Replying to the comments of the third parties, the Government considered that they failed to have regard for the rights of others whose reputations could be greatly damaged. They regarded the figure given for the cost to the Irish media of defamation cases since 2010 (see paragraph 78 below) to be speculative and lacking evidence. The negative comparison drawn between Irish defamation law and continental legal systems failed to take account of the fact that defamation was a purely civil issue in Ireland.

In contrast to other Contracting States, there was no criminal offence of libel in Irish law. In the event a defamatory statement was published by error, the 2009 Act provided a defence of fair and reasonable publication on a matter of public importance.

(c) The third parties

77. The third parties argued that newspaper publishers faced great uncertainty, given the unpredictable nature of unreasoned jury awards in defamation cases. It was not possible for them to ascertain with any degree of precision the extent of their financial liabilities in the event that they fell into error. This hindered press freedom, since it forced newspapers to become more cautious before publication and led to a marked reluctance to publish stories of grave public interest for fear of very high awards of compensation, even for minor mistakes. Even if a publisher successfully defended an action, legal costs were very high and it could be impossible to recoup them from an impecunious plaintiff. There was therefore a strong incentive on publishers to settle defamation cases, even when they believed the material published was true or represented honest commentary. The 2009 Act, allowing the jury to be informed of awards in previous cases, could well exacerbate the situation, since it would be informed that the award in this case was appropriate for a libel that the Supreme Court stated was not of the most serious kind. The possibility of an appeal did not cure the problem, since the assessment of the appellate court was also unpredictable, as shown in this case in which the Supreme Court had granted compensation far in excess of previously-approved awards.

78. Irish law stood in stark contrast to that of England and Wales, as well as to civil law systems in Europe. The third parties estimated that since 2010, defamation actions had cost Irish newspapers more than 30 million euros. The effect of the Irish defamation law on the Irish news media was to curtail the right of Irish citizens to be informed about matters of public interest and concern. This was to the detriment of truth, honesty, fairness and justice. The law imposed exceptionally onerous legal penalties on newspapers even in the event of unwitting error and despite a willingness often to recognise that error and acknowledge it publicly. The chilling effect of this was so severe for the print and electronic news media in Ireland that it required the intervention of the Court.

2. The Court's assessment

79. It is common ground between the parties that the award of damages against the applicant company constituted a restriction on the exercise of its right to freedom of expression. It is likewise not disputed that the interference pursued the aim of protecting the reputation of Ms L. The Court considers that, given the particular nature of the libel and its impact on

Ms L., the interference was also aimed at protecting her right to respect for private and family life.

80. As to whether the interference was prescribed by law, the applicant company argued that it was not, criticising the domestic legal framework for a lack of accessibility, foreseeability and clarity. The Court recalls that in the *Independent News and Media* case it considered that the interference at issue there, which was of exactly the same type, satisfied the criterion of lawfulness (at § 109 of the judgment). It further refers to its judgment in the case of *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A no. 316-B, where it stated (at § 41):

> "... national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations. A considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case. ... It follows that the absence of specific guidelines in the legal rules governing the assessment of damages must be seen as an inherent feature of the law of damages in this area.
>
> Accordingly, it cannot be a requirement of the notion of "prescribed by law" in Article 10 of the Convention that the applicant, even with appropriate legal advice, could anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case."

81. In these circumstances, the interference in the instant case can be considered as having been prescribed by law. The criticism by the applicant company and the third parties of the unpredictability of awards will be considered further in the next stage of the Court's analysis.

82. As to whether the interference can be regarded as "necessary in a democratic society", the Court will approach the question as it did in the *Independent News and Media* case, examining the adequacy and efficacy, in the circumstances of the present case, of the domestic safeguards against disproportionate awards. At the same time it must have due regard to the general principles established in its Article 10 case-law which provide that, where national courts are required to strike a balance between conflicting rights, as here, they must be allowed a certain margin of appreciation. However, the exercise of this margin and the balance struck at the domestic level goes hand in hand with European supervision. In exercising its supervisory function, the Court's task is not to take the place of the national courts but to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on and whether the reasons given to justify them are relevant and sufficient. Where the balancing exercise has been conducted by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 90-92, ECHR 2015 (extracts); *Delfi AS v. Estonia* [GC],

no. 64569/09, § 131, ECHR 2015; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012, and *Público - Comunicação Social, S.A. and Others v. Portugal*, no. 39324/07, § 45, 7 December 2010.

83. Like the *Independent News and Media* and *Tolstoy Miloslavsky* cases, the complaint in the present case relates only to the quantum of damages. The applicant company does not contest the finding that it defamed Ms L. It follows that the Court's review is more circumscribed than in other freedom of expression cases which have concerned the decision determining liability alone or both that and the sanction (*Tolstoy Miloslavsky*, cited above, § 48). It takes as an established fact that the articles about Ms L., which formed part of a sustained and unusually salacious campaign, were defamatory in the serious manner and to the extent described in the judgments in the Supreme Court.

84. The starting point when assessing whether the interference complained of was necessary in a democratic society is whether the amount of damages was unusual by domestic standards. This it clearly was, and the parties did not dispute it. In the High Court, the quantum of damages was much higher than any previous award in a defamation case. Likewise, the final award was far in excess of any the Supreme Court had previously allowed to stand. The unusual size of the award, at first instance and on appeal, is such as to trigger the Court's review of the adequacy and the effectiveness of the domestic safeguards against disproportionate awards (*Independent News and Media*, cited above, §§ 113, 115 and 118, and *Tolstoy Miloslavsky*, cited above, §§ 49-51).

85. As the Court has indicated previously, it is not necessary to rule on whether the impugned damages' award had, as a matter of fact, a chilling effect on the press. As a matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny (see, amongst other authorities, *Independent News and Media*, cited above, § 114, and *MGN Limited v. United Kingdom*, no. 39401/04, § 201, 18 January 2011).

(a) First instance

86. At first instance, the safeguard took the form of the guidance to the jury on how to assess the damages to be awarded. The trial judge's charge to the jury was formulated in accordance with the *Barrett* rules (see paragraph 39 above). He explained, in a non-technical way, the functions of damages in defamation and the relevant factors to be taken into account. As to the quantum of damages, he refrained from suggesting any figure or range of figures. He informed the jury that he was not permitted to give any such guideline, illustrating in an anecdotal way the risk of misunderstanding if any level of award were to be hinted at (see paragraph 16 above). Instead, he provided a number of rather general indications regarding the amount of

damages, referring the members of the jury to the current value of money and the cost of living, and telling them to bear in mind reality. He impressed on them the need for damages to be appropriate to the harm suffered by Ms L. He warned them against displaying generosity, and stated that any award must be fair to both parties.

87. The applicant company considered that these remarks were too vague to ensure that the jury's award would remain in proportion to the seriousness of the libel. It saw no valid reason why juries should not be given more specific guidance, such as information about the awards made in previous defamation cases and also in personal injury cases.

88. Concerning the latter type of case, the Court takes note of the reasons given by the Supreme Court for rejecting the comparison (see paragraphs 27 and 34 above). As it stated in the *Independent News and Media* case, the fact that a different practice is followed in other common law jurisdictions cannot be decisive for the respondent State. The Convention does not require complete uniformity among the High Contracting Parties and States remain free to choose the measures which they consider best adapted to address domestically the Convention matter at issue (The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 61, Series A no. 30)

89. As for information about damages awarded in previous defamation cases, the Court notes that the majority judgment of the Supreme Court acknowledged that there could be some merit in such comparisons in the context of appellate review, but stressed the need for a degree of caution in making comparisons between cases. In the High Court, the trial judge explained to the jury that the withholding of such information at the trial stage stems from the fact that each defamation case must be approached on its unique facts.

90. The Court has recognised that a considerable degree of flexibility may be necessary to enable juries to assess damages tailored to the facts of the particular case (see *Tolstoy Miloslavsky*, § 41). Nevertheless, it has also stressed the important role played by the trial judge's direction in a trial by jury, whether civil or criminal (see, for example, *Simon Price v. United Kingdom*, no. 15602/07, § 34, 15 September 2016, and *Dallas v. United Kingdom*, no. 38395/12, § 75, 11 February 2016). In the specific context of defamation cases, while the jury's assessment of damages may be inherently complex and uncertain, the uncertainty must be kept to a minimum (see *Independent News and Media*, cited above, § 114) and the nature, clarity and scope of the directions provided to the jury – considering moreover the "unusual and emphatic sanctity" attached to jury awards in defamation cases under domestic law (see paragraph 24 above) – are key in this regard. In the instant case the trial judge had to operate under the strict constraints imposed by the Supreme Court's case-law. As a result, his directions remained inevitably quite generic, which, as is clearly reflected in his

charge to the jury and his subsequent exchange with counsel, caused him both frustration and regret (see paragraphs 17-18 above).

91. In the *Independent News and Media* case, the Court identified two concrete indications in the charge to the jury in those proceedings (see *Independent News and Media*, cited above, § 123). This served to distinguish that case from the *Tolstoy-Miloslavsky* case, in which the Court found that the scope of judicial control at trial did not offer adequate and effective safeguards against a disproportionately large award.

92. The Court observes that the traditional limitations on providing more specific guidance to the jury regarding the level of the award applied in the present case as they did in the *Tolstoy Miloslavsky* and *Independent News and Media* cases (see § 122 of the latter judgment). However, the type of concrete indications identified in the latter case are not to be seen in the present case. While it cannot be said that the jury's discretion was without limit, the Court does not consider that the direction given in this case was such as to reliably guide the jury towards an assessment of damages bearing a reasonable relationship of proportionality to the injury sustained by Ms L. to her reputation and private and family life. Therefore, and as evidenced by the Supreme Court finding that the jury award was excessive and disproportionate, the first safeguard referred to in § 113 of the *Independent News and Media* judgment proved ineffective.

(b) Appellate review

93. In setting aside the jury award, Dunne J. found for the majority that the amount was "so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award". McKechnie J. also held that the award "fail[ed] to reflect the necessary objective relationship between wrongdoing and harm". With the setting aside of the High Court award, it can be said that, to this extent at least, the appellate safeguard was effective.

94. That is not the end of the Court's analysis however. Under domestic law, the Supreme Court could choose either to order a retrial and return the assessment of damages to a freshly constituted jury or to undertake that task itself. It decided, exceptionally, to substitute its own award of damages. The process for arriving at that award is also part of the interference complained of.

95. The amount of the substituted award was higher than any award ever made by a jury or appellate court and was far in excess of amounts that the Supreme Court had previously approved (*De Rossa*) or set aside (*O'Brien*). In principle, very strong justification would be required for such a heavy sanction, even allowing for the margin of appreciation, referred to in paragraph 82 above, that the domestic courts enjoy when they are required, as here, to strike a balance between conflicting Convention rights.

96. The Court's task, as also indicated previously (see paragraph 82 above), is not to substitute itself for the domestic court, nor to second guess the final award, but the process followed by the domestic court must disclose relevant and sufficient reasons supporting the conclusion finally reached.

97. The applicant company contended that the Supreme Court award was unreasoned. In addition, it argued that despite setting aside the High Court award, the Supreme Court had been influenced by the jury's assessment of damages. It submitted that had the High Court award been lower than EUR 1.25 million, the Supreme Court would not have awarded that sum.

98. The Court observes that although the closing passage of the majority judgment does not provide an explanation for the final award, it follows from the judgment that the considerations which led it to conclude that the jury award was disproportionate also guided the majority, to some degree at least, in determining the final award. The majority judgment referred to the serious nature of the libel and the factors aggravating the injury to Ms L.'s reputation and rights. Referring at one point to Convention case-law on the balancing of rights, it sought to superimpose a proportionality analysis on the assessment of damages in the instant case. It cannot thus be argued that the award was entirely unreasoned.

99. However, in the present case, the Supreme Court substituted the excessive and disproportionate jury award. It did not explain, apart from reapplying the *Barrett* principles which had formed the basis for the charge to the jury and comparing, with caution, a previous defamation case, how it arrived at the figure of EUR 1.25 million. While the reduction was significant, the dissenting judge, who recognised that the exercise was "in part intuitive", applied the same principles but proposed an award which was EUR 250,000 lower. Although the Court has accepted that the assessment of damages in libel cases may be inherently complex and uncertain, it did so in the context of jury awards, which are not reasoned (see paragraph 80 above). On the contrary, judicial control exercised at appellate level should, through the statement of reasons for the award, reduce uncertainty to the extent possible.

100. When quashing the jury's award and substituting its own, the Supreme Court was engaging in its own fresh assessment. While applying the *Barrett* principles went some way to explaining the final quantum of damages, further clarification was lacking regarding why, in particular, the highest ever award was required in a case which the Supreme Court did not categorise as one of the gravest and most serious libels. The respondent Government highlighted a range of additional factors which could have influenced the final award but conceded that it could not say if those factors were actually considered by the Supreme Court. In the view of the Court, the quite legitimate but exceptional exercise by the Supreme Court of its

power to substitute its own assessment of damages for that of the jury, addressed in some detail by the dissenting judge, along with the exceptional nature of the final award from a domestic perspective pointed to a need for comprehensive reasons explaining the final award. As the applicant company and third parties explained, that award had the capacity to act as a benchmark for future defamation awards and out-of-court settlements.

101. In addition, it is noteworthy that the Supreme Court simply observed, in relation to the safeguards required by the case-law of the Court, that the judgment in *Independent News and Media* "did not alter or reconfigure Irish law in respect of awards of damages in defamation actions" (see paragraph 25 above). As regards the safeguard at first instance, namely the trial judge's charge to the jury, the majority judgment referred to his directions only to note that there was no suggestion that he had committed any error, in terms of domestic law, in the guidance he gave on the assessment of damages. The Supreme Court did not address the ineffectiveness in the instant case of that crucial safeguard against disproportionate awards. Yet the experienced trial judge had voiced strong misgivings at the constraints, deriving from Supreme Court case-law, restricting the terms in which he could direct the jury. The notice of appeal was directed exclusively at the damages awarded and expressly contended that they constituted an unlawful interference with the applicant company's rights under the Convention. However, the majority in the Supreme Court merely noted that there was no issue raised by the applicant company in the appeal regarding the charge to the jury.

102. Where, as in this case, there is a shortcoming in the operation of the safeguard at first instance, a defendant may have little option but to bring an appeal against the level of damages awarded, since only through appellate scrutiny can it be assured that the amount bears a reasonable relationship of proportionality to the harm suffered by the plaintiff. The Court notes that this may entail both considerable costs and inevitable delay before the decision is given, a fact emphasized by other defamation cases both concluded and pending (see paragraphs 45-47 above).

103. The fact that the usual practice at the relevant time was to order a re-trial before a new jury also emphasizes the primary importance of the first safeguard in the form of sufficiently clear and specific directions by the trial or re-trial judge to the jury.

104. As indicated in paragraphs 85 and 96 above, unpredictably high damages in libel cases are considered capable of having a chilling effect and they therefore require the most careful scrutiny and very strong justification. While the Court concurs with the respondent Government that the impugned articles relating to Ms. L. did not focus readers' attention on the public interest issue regarding the award of public contracts, the reference by the applicant company and the third parties to a potential chilling effect on the Irish media cannot be regarded as devoid of any foundation. The

effectiveness – or not – of the safeguard at first instance, the resulting unpredictability of the quantum of damages that is not solely a function of the unique facts of each case, the considerable expense and delay entailed by seeking appellate review and, where an award is set aside, a re-trial of the case, are all relevant considerations. In its 1991 report, the LRC highlighted the possible effect of unreasonably high jury awards on sums settled by parties out of court (see paragraph 48 above). The Supreme Court has itself previously highlighted the consequences for freedom of expression, enshrined in both the Constitution and the Convention, of unreasonably large awards and long and costly trials (see paragraph 43 above).

(c) Concluding remarks

105. The Court would stress that it is mindful of the respondent State's attachment to the institution of the jury in defamation cases. In the Supreme Court McKechnie J. commented on the uniqueness of the jury's representative function in this type of case, embodying the values of the community. For its part the Court considers that it is entirely legitimate to involve citizens in different aspects of the administration of justice (see, in the context of criminal law, *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010). What is at issue in the present case is not the respondent State's choice of a system of trial judge and jury, a choice that was recently reaffirmed in the 2009 Act that came about following careful reflection and debate at domestic level. Nor is it the task of the Court, as highlighted previously, to take the place of the national court. Rather, the issues are the nature and extent of the directions to be given to the jury by the trial judge to guide it in its assessment of damages and protect against disproportionate awards and, in the event that the appellate court engages in a fresh assessment, relevant and sufficient reasons for the substituted award.

106. In closing, the Court recalls that the proceedings in this case were conducted under a legal regime that has since changed with the adoption of the 2009 Act, which includes new provisions regarding the assessment of damages (see paragraph 53 above). In the majority Supreme Court judgment, Dunne J. commented as follows on the new legislation:

> "Prior to the 2009 Act, the trial judge was limited as to the directions that could be given to a jury on the subject of the quantum of damages. The assessment of damages was and remains a matter entirely for the jury but by virtue of the provisions of the 2009 Act it is now possible for the trial judge to give more detailed directions to a jury as to the assessment of damages."

The Court welcomes the Supreme Court's indication regarding the development of domestic practice towards the provision of more detailed guidance to the jury. Such a development is necessary to strengthen the primary safeguard at first instance and fully satisfy the requirements laid down in the *Tolstoy-Miloslavsky* and *Independent News and Media* cases.

107. In the light of the considerations set out above, and in view of the circumstances in the present case, the Court concludes that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

108. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

109. In respect of pecuniary loss, the applicant company claimed EUR 1,075,000, this sum representing the difference between the final award of damages and its own assessment of an appropriate amount of the compensation for Ms L., EUR 175,000.

110. The Government rejected the claim. They argued that the applicant company had not established a clear causal link between the violation of Article 10 and the sum claimed. Furthermore, since the submissions on the case dealt only with whether there had been a breach of the applicant company's rights and had not addressed the substance of the domestic case, and since Ms L. had not been heard in the present proceedings, there was no evidence before the Court to enable it to make a complete evaluation of what the quantum of damages should be. It was patently self-interested for the applicant company to try to validate in this way its own assessment of appropriate compensation. Any award under Article 41 should only be for the breach involved, and should not amount to second-guessing the decision of the Supreme Court on damages.

111. The Court has identified the deficiencies in the operation of the requisite safeguards in the present case (see paragraph 105 above). Given that the Supreme Court reduced the jury award, the violation at appellate level is, in essence, a procedural one. As the Government have argued, the applicant company is essentially requesting the Court to endorse that company's own view of the appropriate amount of damages. However, it is not possible to speculate as to the outcome of the proceedings concerned had there been no violation of the Convention (*HIT d.d. Nova Gorica v. Slovenia*, no. 50996/08, § 49, 5 June 2014). The Court therefore rejects the claim in respect of pecuniary damage.

112. The applicant company also claimed for Ms L.'s costs before the Supreme Court. It indicated that the sum in question was EUR 240,448.16.

113. The Government did not comment on this aspect of the claim.

114. The Court notes that the Supreme Court order of 26 February 2015 referred to the legal costs incurred by Ms L. after 20 January 2011. According to the summary bill of costs submitted by the applicant company, the amount of costs incurred after the date in question was EUR 225,712.98. However, on the basis of the material before the Court, it appears that the Supreme Court order followed an agreement between the parties that the applicant would bear the costs of Ms. L.'s appeal. In these circumstances, the Court declines to interfere with the effects of that agreement by means of an award for pecuniary loss against the respondent Government. It therefore dismisses the claim in respect of pecuniary damage.

115. To the extent that the applicant's claim for just satisfaction can be understood as including an amount for non-pecuniary loss, the Court reiterates that it is empowered to afford the injured party just satisfaction as appears to it to be appropriate subject to the formal and substantive conditions laid down in Article 41 and the relevant Rules of Court. It is doubtful that those conditions are met in the present case. The Court finds, not least given the impossibility of speculating as indicated previously, that it would not in any event be necessary to make an award under this head in the circumstances of the case.

B. Costs and expenses

116. The applicant company claimed a total of EUR 55,100. This comprised EUR 40,100 to instruct two senior counsel and one barrister before the Supreme Court, plus EUR 15,000 for the services of one senior counsel and one barrister to introduce the present application with the Court.

117. The Government did not comment.

118. The Court recalls its established case-law to the effect that an applicant is entitled to the reimbursement of costs and expenses insofar as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (*O'Keeffe v. Ireland* [GC], no. 35810/09, § 207, ECHR 2014 (extracts)). The Court finds that the documents provided by the applicant company are insufficiently detailed to enable it to determine to what extent the requirements referred to above have been met. In particular, the hours spent by counsel working on specific tasks as well as their hourly rates have not been stated. Nevertheless, regard being had to the documents in its possession and the above criteria, the Court awards EUR 20,000 in total, plus any tax that may be chargeable to the applicant company, in respect of the costs and expenses incurred by it in the domestic and Convention proceedings.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the amount of EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses; and
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 15 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President