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**Annotatie bij EHRM 15 juni 2017 (Independent Newspapers (Ireland) Limited / Ireland), nr. 28199/15, *European Human Rights Cases*, 2017-12, nr. 213
ECLI:CE:ECHR:2017:0615JUD002819915
(Nußberger (President), Møse, Potocki, Grozev, O’Leary, Ranzoni, Hüseyinov)
T. McGonagle**

1. *Ceci n’est pas un jugement (très) important concernant la diffamation.* The case *Independent Newspapers (Ireland) Limited v. Ireland* involved a finding of defamation by the Irish national courts and an award of damages (€1,872,000) that was more than 50 times the average annual wage in Ireland at the time. The case therefore appeared to have the makings of a memorable defamation case when it came before the European Court of Human Rights. However, after the fashion of the renowned artist René Magritte (*Ceci n’est pas une pipe*), appearances are not always what they seem.
2. The Court has itself classed the case as a ‘Level 2’ judgment, meaning that it considers the judgment to be of medium importance. In other words, although the judgment does not make a significant contribution to the case-law, it still goes beyond merely applying existing case-law. The point that is probably of most interest in the case – mainly for lawyers and academics specialising in defamation law – is how the Court dealt with a particular feature of Irish defamation law, i.e., the practice of juries awarding damages in defamation cases and the rules governing such practice.
3. Some general contextual detail concerning Irish defamation law is perhaps useful before examining the specifics of the case. At the relevant time, the operative legislation was the 1961 Defamation Act, which partly codified the tort of defamation developed under common law jurisprudence. By 2004, when the applicant company published the defamatory articles that led to the present case, the Act was very time-worn and long due an overhaul. Indeed, there had been several calls for legislative reform over the years, including by the influential Law Reform Commission and the Legal Advisory Group on Defamation. The Law Reform Commission is an independent statutory body whose main purpose is to keep the law under review and make recommendations for law reform. It published its much-cited Consultation Paper and Report on the Civil Law of Defamation in 1991. The Legal Advisory Group on Defamation was an *ad-hoc* group set up by the Minister for Justice, Equality and Law Reform in 2002 to provide advice on the reform of Irish defamation law. It issued its Final Report in 2003. The United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression had also criticised the defamation regime in Ireland (UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, Report on the mission to Ireland, UN Doc. E/CN.4/2000/63/Add.2, 10 January 2000). In 2009, a new Defamation Act finally repealed its 1961 forerunner and generally modernised Irish defamation law.
4. The present case concerned a complaint relating only to the quantum of damages. The applicant company did not dispute the national courts’ finding that the articles it had published were defamatory. The European Court of Human Rights accordingly took it as an established fact that the articles had “formed part of a sustained and unusually salacious campaign” against Ms L. and amounted to defamation of a serious nature (para. 83). The Court’s review of the case

was therefore “more circumscribed than in other freedom of expression cases which have concerned the decision determining liability alone or both that and the sanction” (*ibid.*).

5. Nevertheless, the Court also noted that the damages awarded, first by the jury in the High Court, and as subsequently substituted by the Supreme Court, were unusually high by domestic standards, and indeed much higher than relevant precedents. It re-affirmed that “as a matter of principle, unpredictably large damages’ awards in libel cases” can have a chilling effect on freedom of expression and thus “require the most careful scrutiny” (para. 85; see also para. 104).

6. The Court’s leading judgment on the question of freedom of expression and damages for defamation is *Tolstoy Miloslavsky v. the United Kingdom* (13 July 1995, Series A no. 316-B; for a general overview and analysis of the Court’s case-law on defamation, see: T. McGonagle, *Freedom of expression and defamation: A study of the case law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2016, available at: <https://rm.coe.int/16806ac95b>). In that case, the Court held that “an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered” (para. 49). It also referred to the need for “adequate and effective safeguards [...] against a disproportionately large award” (para. 51). Having regard to the size of the award (GB £1.5 million) and the lack of such safeguards, the Court found that there had been a violation of the applicant’s right to freedom of expression (para. 51).

7. Another leading case, *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (no. 55120/00, ECHR 2005-V (extracts)), incidentally involving the same applicant company as in the present case, addressed very similar issues under the same legal regime. In that case, the Court considered the concrete indications given to the jury by the trial judge to be adequate and effective safeguards against disproportionate awards. It found no violation of Article 10 of the European Convention on Human Rights.

8. In the present case, the Court’s scrutiny focused in turn on the awards of damages at first instance (High Court) and at the level of appellate review (Supreme Court). The trial judge in the High Court, in keeping with standard judicial practice as shaped by case-law, could only give very limited and therefore “inevitably quite generic” directions to the jury on how to assess the appropriate level of damages (para. 90). In light of the Supreme Court’s judgment in *Barrett v. Independent Newspapers Ltd.* ([1986] IR 13), a jury should take a number of considerations into account when assessing damages: “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”, bearing in mind that “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” (cited in the present judgment, para. 39). The trial judge in the present case stated that he was not allowed to suggest a figure or a range of figures to the jury. He did, however, remind members of the jury that they should bear in mind reality, the cost of living and the value of money; that the amount they would award should be appropriate and fair. The jury awarded the plaintiff €1,872,000 in damages without providing reasons (as such jury awards are not reasoned).

9. On the one hand, judicial reticence when it comes to assessing damages may help to preserve the jury’s discretion in this matter. The thinking here is that “defamation is rooted in community values” and the jury should be representative of the community (McKechnie J., in *Leech v. Independent Newspapers (Ireland) Ltd.* [2014] IESC 79 (19 December 2014), citing McMahon and Binchy, *Law of Torts*, 4th Ed., Bloomsbury Professional, Dublin 2013, at para. 34.329). On the

other hand, the jury's discretion is not without limit and crucially, the European Court of Human Rights did "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" (para. 92).

10. On appeal, the Supreme Court set aside the jury award. There was no suggestion that the trial judge in the High Court had made any error, in terms of domestic law, in the guidance he had given the jury on the assessment of damages (para. 101). Rather, 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" (para. 93).

11. When setting aside the jury award, the Supreme Court could have ordered a retrial and returned the assessment of damages to a newly constituted jury. Instead, however, it opted to substitute the award of damages with its own award. It was the first time the Supreme Court had taken this course of action. Dunne J., for the majority, set a new award of €1.25 million. Although this was considerably lower than the original jury award, she did not explain how she arrived at that figure. McKechnie J., in his partly-dissenting opinion, stated that he would have (partly intuitively) awarded €1 million. It should be borne in mind that the highest award previously upheld by the Supreme Court was IR£300,000 in *Proinsias de Rossa v. Independent Newspapers Plc.* ([1999] 4 IR 432 (30 July 1999) – the judgment that led to the case of *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland, op. cit.*). That sum was itself 20 times the average annual industrial wage in Ireland at the time. The nature of the defamatory statements in that case were held to belong to the category of "gravest and most serious libel[s]" (para. 109). The defamatory statements suggested that Mr. de Rossa, a prominent politician, "was involved in or tolerated serious crime and personally supported anti-Semitism and violent Communist oppression" (*ibid.*).

12. The objectively and comparatively high award in the present case proved a cause of concern for the Court. It stated that "In principle, very strong justification would be required for such a heavy sanction, even allowing for the margin of appreciation [...] that the domestic courts enjoy when they are required, as here, to strike a balance between conflicting Convention rights" (para. 95).

13. The Court accepted that in the context of jury awards (which are not reasoned), "the assessment of damages in libel cases may be inherently complex and uncertain" (para. 99). "On the contrary", however, "judicial control exercised at appellate level should, through the statement of reasons for the award, reduce uncertainty to the extent possible" (*ibid.*). This puts the onus – clearly and firmly - on the appellate court to provide a well-reasoned judgment.

14. The Court found that by "quashing the jury's award and substituting its own, the Supreme Court was engaging in its own fresh assessment" (para. 100). Although the Supreme Court applied the *Barrett* principles, which "went some way to explaining the final quantum of damages", the Court held that "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" (*ibid.*). It continued: "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, [...] along with the exceptional nature of the final award from a domestic perspective pointed to a need for *comprehensive reasons* explaining the final award" (emphasis added, *ibid.*). This is the key and enduring finding of the Court in the present judgment.

15. The Court's concluding remarks prompt two concluding analytical remarks to this case-note. First, the Court did not in any way question Ireland's choice of a system of trial judge and jury for defamation cases or the legitimacy of such a system (para. 104). Nevertheless, jury awards tend to be high and unpredictable. This can be explained, at least in part and certainly in the past, by the limited nature of judicial guidance on the assessment of damages. Notwithstanding the representative character of juries, high and unpredictable awards of damages can have a very real chilling effect on freedom of expression. The prospect of high costs and high damages can lead media organisations to opt not to defend defamation actions and to settle out of court instead. The Court acknowledged the explanation by the applicant company and third parties in the present case that the very high award of damages "had the capacity to act as a benchmark for future defamation awards and out-of-court settlements" (para. 100). A former UN Special Rapporteur on freedom of opinion and expression has warned more generally about a "libel chill" in Ireland, cautioning: "Writers, editors and publishers may become increasingly reluctant to report and publish matters of public interest because of the large costs of defending such actions and the big awards granted in these cases. This creates a restraint on the freedom of expression, access to information and the free exchange of ideas" (UN Special Rapporteur, Report on the mission to Ireland, 2000, *op. cit.*, para. 73).

16. Secondly, as the Court noted, the issues in the present case were "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" (para. 105).

17. In judicial, scholarly and policy discussions on Irish defamation law, there has been strong support for enhanced guidance to juries when it comes to the assessment of damages (see further: M. McGonagle, *Media Law* (Second Edition), Thompson Roundhall, Dublin, 2003, pp. 130-137). For instance, in her dissenting opinion in the *de Rossa* case, Denham J. stressed that: "[M]ore specific guidelines on the level of damages would help juries and the administration of justice by bringing about more consistent and comparable awards of damages and awards which would be seen as such. Specific guidelines would also inform an appellate court in its determination as to whether an award is reasonable and proportionate" (Denham J., dissenting opinion in *de Rossa*, *op. cit.*, para. 188).

18. In its 1991 Consultation Paper on the Civil Law of Defamation, the Law Reform Commission recommended *inter alia* "that there be a statutory provision setting out the factors to be considered by the court when assessing damages". A Commission on the Newspaper Industry recommended that the instructions issued to a jury for the purpose of assessing damages (including all considerations liable to affect such an assessment) "should in every case be fully and amply given" (Report of the Commission on the Newspaper Industry, Pn. 2841, June 1996, Dublin, p. 61, para. 7.35). Leading academic commentators have also repeatedly made similar recommendations (see, for example: K. Boyle & M. McGonagle "Defamation – The Path to Law Reform", in M. McGonagle (Ed.), *Law and the Media: The Views of Journalists and Lawyers*, Dublin, Round Hall Sweet & Maxwell, 1997, p. 74; K. Boyle & M. McGonagle, *A Report on Press Freedom and Libel*, Study commissioned by the National Newspapers of Ireland, Galway, University College Galway, 1988, Recommendation 13, pp. 31-32). These recommendations, notwithstanding minor differences in formulation and emphasis, share the aim of helping to reduce the likelihood of arbitrary and inordinately high damages being awarded in libel actions.

19. The persistent concerns about the lack of guidance for juries in their task of assessing damages for defamation have been addressed in Section 31 of the Defamation Act 2009, which sets out in some detail the factors that shall be taken into account when making an award of general damages. The section draws on *inter alia* earlier recommendations by the Law Reform Commission and the *Barrett* principles. The introduction of this section into the Defamation Act was explicitly welcomed by the European Court of Human Rights in the present case (para. 106).

20. The Irish Minister for Justice and Equality is reviewing the operation of the Defamation Act 2009. The review process involved a public consultation at the end of 2016. Submissions to the consultation are available online

[http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009 -](http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_-_Public%20consultation)

[Public%20consultation](http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_-_Public%20consultation)). In its submission to the public consultation (prior to the delivery of the European Court of Human Rights' judgment in the present case), Independent News and Media devotes a section to 'Juries'. It likens the current practice of jury awards of damages in defamation cases to a game of "Russian roulette" and concludes that it "firmly believes that defamation trials by jury should be abolished in favour of a hearing before a judge" (Independent News and Media (Editorial), Submission to the review of the Defamation Act 2009 – publication [sic] consultation, 31 December 2016, para. 5.6, p. 14). Submissions by other parties also included focuses on the question of damages. It remains to be seen whether and/or to what extent the Court's judgment in the present case and the various submissions to the public consultation on the Defamation Act will guide further legislative development. The judgment does, in any event, hold a clear lesson for Contracting Parties whose legal systems use juries in defamation actions: clear and comprehensive judicial guidance to juries is a very important safeguard against arbitrary and/or disproportionate awards of damages which could have a chilling effect on freedom of expression.

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