[2019] IEHC 949

THE HIGH COURT

[2014 No. 3892 P]

BETWEEN

PADRAIG HIGGINS

PLAINTIFF

AND

THE IRISH AVIATION AUTHORITY

DEFENDANT

Judgment of Mr. Justice Bernard J. Barton in respect of the rulings made on the 5th and 6th day of November, 2019

Introduction

1. This is the judgment of the Court on the Defendant's application pursuant to s. 23(1) (b) of the Defamation Act 2009 (the 2009 Act) for leave to make a correction and apology to be read by way of a statement before the Court and for directions in relation to the following questions:

   (i.) At what point in the proceedings should the terms of the statement be approved and read;

   (ii.) If approved, is the statement to be read in the presence of the jury; and

   (iii.) May the amount of Defendant's offer in the sum of €25,000 be mentioned to the jury.

   To contextualise the application a brief background to the case may be found useful.

Background

2. The Plaintiff is a senior commercial airline pilot and is employed by Aer Lingus as an Airbus captain. The impugned statements giving rise to the proceedings are contained in an exchange of emails published by the Defendant between the 21st June, and the 26th July 2013. The emails passed between and/or were copied to Mr. John Steel, the Defendant's Manager of General Aviation Standards, and Ms. Diane Park, Ms. Mary Ann Chance and Mr. Robert Webb, senior officials employed by the United Kingdom Civil Aviation Authority. The Defendant accepts that the impugned statements were defamatory and that they bore the following meanings attributed to them by the Plaintiff, namely that he:

   "(a) flew an aircraft without the appropriate flight crew licence;

   (b) flew an aircraft over British Airspace without obtaining the relevant clearance or did so when he was not licensed to do so;

   (c) somehow concealed the flight and/or the accident from the relevant authorities by the suggestion that the civil aviation authority (UK) needed "assistance" in "tracking down and contacting the individuals, including their licence and details";

   (d) did or would fly an aircraft without clearance from the relevant Irish authorities;

(e) was required to and did not clear his flight plans with either the Gardaí or the Revenue Commissioners;

(f) was in breach of Irish criminal law;

(g) was in breach of Revenue law;

(h) put the safety and life of himself, and a passenger, at risk by flying an aircraft when not properly licensed to do so."

3. On the 4th March 2015, the Plaintiff's solicitors wrote a letter demanding delivery of a Defence within 21 days. The Defendant's solicitors replied by letter dated the 25th of May in which they communicated an offer on behalf of the Defendant to make amends pursuant to s.22 of the 2009 Act. The offer was unconditional and applied to each of the impugned statements. Thereafter, further correspondence was exchanged until the 22nd June 2015 when the Plaintiff's solicitors wrote to accept the offer: the acceptance was unconditional.

4. While there are a number of cases where an offer of amends under s. 22 of the 2009 Act has fallen for consideration, see *Ward and Anor v. Donegal Times Ltd and anor*. [2016] IEHC 711 and *Christie v. TV3 Networks Ltd* [2017] IECA 128, this is the first case where the damages to be paid on foot of the offer are to be assessed by a jury, a development which arose as a result of a previous decision of the Supreme Court in this suit on an application for directions brought by the Plaintiff. See *Higgins v The Irish Aviation Authority* [2018] IESC 29. The following questions had been in issue between the parties:

   (i) Whether in High Court proceedings the damages in respect of an offer to make amends and;

   (ii) whether the adequacy of any measures undertaken to ensure compliance with the offer pursuant to s. 23 (1) (c) and:

   (iii) whether the approval of a statement of correction and apology to be made pursuant to s. 23(1) (b),

   were matters for a judge or the jury,

5. The Plaintiff's motion was issued in October 2015, the parties having failed to resolve their differences, and sought directions with regard to the assessment of damages and the adequacy of any measures undertaken to ensure compliance with the offer to make amends (the adequacy of measures) to be determined by "a judge and jury". The motion was heard by Moriarty J. on the 15th March 2016. He delivered a reserved judgement on the 12th May 2016 wherein he determined that the damages were to be assessed by a jury, and the court so ordered, however, the issue of the adequacy of measures appears not to have featured in the arguments or, if it did, such was not the subject of any determination or direction by the court.

6. From this decision the Defendant appealed to the Court of Appeal; the appeal was dismissed. From this order the Defendant appealed to the Supreme Court but this appeal was also dismissed. The questions of whether the assessment of damages under s. 23(1)(c) and whether the approval of the correction and apology statement under s. 23 (1) (b) were matters for the judge or the jury were finally settled by the Supreme Court for the reasons set out in the judgment of the court delivered by Dunne J. on the 10th July 2018. Where the parties cannot agree on the damages or costs to be paid by the party making an offer of amends, the assessment of the damages under s23 (1) (c) in High Court proceedings, where the right to trial by judge and jury has been exercised, is a matter for the jury. However, (a) where measures have been agreed between the parties a direction pursuant to s. 23(1) to the party making the offer to take such measures and (b) the approval of the terms of a statement of correction and apology to be made before the court pursuant to s. 23(1) (b) are matters for the judge.

7. Given the issues which fall for determination on the subject application, the observations by Dunne J. at para. 49 have proved prophetic and merit repetition:

> *"Undoubtedly, the Act of 2009 was intended to reform the law of defamation by, inter alia, the introduction of a new 'offer of amends' procedure aimed at facilitating early and speedy resolution of defamation proceedings. Apart from the lack of clarity about the central issue which has led to these proceedings and appeals, it is not at all clear from the provisions of the Act of 2009 how it was envisaged that the new procedure was meant to work in practice to achieve its objective. It is surely desirable that where changes are proposed which may have very far-reaching effects, that they should be carefully tailored to achieve their intended object and be clearly expressed. These proceedings, on an issue of statutory interpretation of one provision, which could have been resolved decisively one way or another by a single phrase, have been the subject of hearings in three Courts over a period of more than two years and cannot claim to have resolved all the issues raised by the limited statutory delineation of a novel procedure, having potentially far reaching impact on defamation proceedings. If this matter is to be the subject of further review or amendment it would be very desirable that consideration is given to setting out very clearly the mechanism envisaged and how it would function in a range of different circumstances."*

8. The questions which arise for determination on this application, including whether a statement pursuant to s.23(1)(b) of the 2009 Act may be made at all once the trial has commenced and, if so, whether or not such should first be made in the absence of the jury, serve very well to illustrate the problems envisaged and necessitate further consideration of the relevant statutory provisions.

Offer to make Amends; Relevant Statutory Provisions

9. As observed by the learned judge, the offer of amends procedure introduced by ss. 22 and 23 of the 2009 Act represents one of a number of significant changes to the reform of defamation law brought about by the Act. These provisions replace the 'unintentional defamation' provisions of s.21 of the Defamation Act, 1961.

Section 22(1) of the 2009 Act provides:

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

(2) An offer to make amends shall—

(a) be in writing,

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

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

(i) part only of the statement, or
(ii) a particular defamatory meaning only."

10. The provisions of sub ss. 3 and 4 are not material to the issue before the Court, (sub s 3 provides that the offer to make amends may not be made after a defence has been delivered and subs. 4 provides for the withdrawal of an offer before acceptance and the making of a new offer) however, subs. (5) provides:

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

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

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

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

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

11. The provisions of s.23 which were enacted to give effect to an offer to make amends under s. 22 envisage a number of scenarios as follows;

(i) Where the parties have agreed the measures to be undertaken by the party making the offer, the court may, on the application of the party to whom the offer was made, direct the measures to taken in order to ensure compliance with the terms of the offer (s.23 (1)(a)).

(ii) Where the parties do not agree the measures to be undertaken, the party who made the offer may seek the leave of the court to make a correction and apology

by way of a statement before the court in such terms as may be approved by the court (s.23(1)(b), and;

(iii) Where the parties do not agree the damages or costs such are to be determined by the court (damages by the jury), for which purpose the court shall have all such powers as it would have if it were determining damages and costs in a defamation action. In making such determination the court (which in carrying out an assessment of damages means the jury) is required to take into account the adequacy of any measures already undertaken to ensure compliance with the terms of the offer by the party making the offer (s.22(1) (c)).

12. As mentioned at the outset, while the Plaintiff accepted the Defendant's offer to make amends, the parties were unable to agree upon the measures to be undertaken either as to the wording of an apology or as to damages and costs to be paid, thereby triggering the provisions of s. 23 (1) (b) and (c). Between the acceptance of the offer in 2015 and February 2019, the Defendant submitted four draft apologies for approval by the Plaintiff, each of which resulted in an exchange of correspondence in the course of which the Plaintiff set out the terms of an apology acceptable to him. The process culminated in wordings which are broadly similar, but a measure of disagreement remained on the detail up to and including the commencement of the trial.

The Issues

13. In circumstances where the application for leave to make the corrective statement is made after the trial has commenced a question which falls for determination is whether the Defendant is now precluded from having the statement approved and read, a proposition advanced by the Plaintiff on grounds of procedure and substance. With regard to the former, the attention of the Court was drawn to the Rules of the Superior Courts (Defamation) 2009, S.I. No. 511 of 2009, promulgated for purposes of implementing the provisions of the 2009 Act, which inserted 'Order 1 B Defamation Act 2009' (Order 1 B) immediately following Order1A of the Rules of the Superior Courts 1986, as amended (the Rules). The new order makes provision for procedure in defamation actions, including applications under s.23. Rule 4(1) provides:

> *"Where no defamation action has been brought before the court in respect of the statement in question and an offer to make amends under s.22 is accepted, an application*
>
> *(i.) Under para. (a) of s.23(1) for an order directing the party and made the offer to take the measures concerned, or*
>
> *(ii.) Under para. (b) of s.23(1) for the leave of the court to make a correction and apology by means of a statement before the court in such terms as may be approved by the court and to give an undertaking as to the manner of their publication*

Shall be made by motion on notice to the opposing party and shall be grounded upon an affidavit sworn by or on behalf of the moving party."

Subsection 2 provides for an application pursuant to s.23(1)(c).

14. As appears, the rule provides for the procedure by which the relevant applications are to be brought, ordinarily appropriate to interlocutory applications. While the Rules are silent as to timing, the Plaintiff contends that consistent with the designated procedure the plain intention of Order 1 B is that the application under s.23 (1)(b) is to be brought before trial, a construction which, it was argued, chimed well with the practice direction of the Court in *Ryanair Ltd and Anor. v. Van Zwol* [2017] IEHC 798, namely that, insofar as possible and practicable, interlocutory applications in defamation proceedings should be brought by motion in advance and not at the commencement of the trial.

15. With regard to grounds of substance, the Plaintiff contends that the Defendant's failure to agree the wording of an apology and failure to move the application in advance of the trial goes to the question of damages. As the trial had commenced in the absence of an apology acceptable to the Plaintiff this was now an issue in the case for consideration by the jury when carrying out their assessment.

Agreed Matters

16. I pause here to mention that the Court posed a number of questions during the hearing of the application upon which the parties were invited to make submissions as follows:

    (a) what was involved in the approval of the terms of the statement of correction and apology by the Court under s. 23(1)(b) and;

    (b) having regard to the requirements of s.31 (4) of the 2009 Act, and in particular s.31(4) (e) whereby in assessing damages the jury are to take into account any offer to make amends under s.22, was the question of any discount for the offer of amends a matter for the judge or for the jury.

17. Subject to such view as the Court might take, the parties reached agreement on these questions as follows. With regard to the first, it was agreed that the Court was concerned with the sufficiency of the statement for the purposes of satisfying the statutory requirements of s.22 ss. (2) and (5), and s.23(1)(b) and not with the determination of a wording which would satisfy the Plaintiff; the practical effect of an approved statement is a matter for the jury. And with regard to the second question, it was agreed that as the offer of amends has to be considered by the jury when carrying out an assessment of damages, the discount and the percentage reduction of damages, if any, was also a matter for the jury.

18. As the agreement was made subject to such view as the Court might take, suffice it to say that the Court does not demur in any way and will proceed accordingly. Finally, with regard to the first question on which the Defendant seeks directions, namely the point at which the statement should be approved and ad, it was agreed that this exercise should take place before the opening address to the jury. The second and third questions,

whether the jury should be present when the statement is being read and whether the amount of the Defendant's offer may be mentioned to the jury remain for determination.

Submissions

Application for leave to make a Correction and Apology by way of a Statement before the Court; Defendant's Submissions

19. The Defendant's submissions may be summarised in brief as follows. It is an integral part of the offer to make amends procedure that where the parties are unable to agree the measures necessary to implement the terms of the offer that the party making the offer may apply to the court for leave to make a correction and apology by means of a statement in such terms as may be approved by the court. Accordingly, in circumstances where leave was sought it would be wholly wrong to deprive the Defendant of the opportunity to give effect to the offer to make amends, particularly in circumstances where very little separated the apology proposed by the Defendant under cover of a letter dated the 1st of February 2019 and the terms of an apology acceptable to the Plaintiff

20. The proposition advanced that it was too late to seek leave to make a statement advanced by the Plaintiff was misconceived and bad in law since it amounted to an invitation to the jury to assess damages on the basis no apology had been offered or made. I understood the net point of the submission to be that the Rules could not be used to circumvent or defeat the intent and purpose of s.23(1)(b) of the 2009 Act.

If Leave is granted, whether the Statement should be read in the Presence of the Jury

21. With regard to the question as to whether or not an approved statement should be read in the presence of the jury, it was submitted that as the case had commenced before a judge and jury, and that as the jury were required to take the correction and apology into account when assessing damages and determining what reduction, if any, was appropriate for making an offer of amends which had been accepted, it was appropriate that the jury should be present when the statement was being read. Other factors material to the cause of action were also relevant in this connection, particularly the purpose and significance of an apology, concerned as it was with vindicating the Plaintiff's legal rights.

22. In this connection the making of the statement in the presence of the jury would add weight to and would enhance the public vindication of the Plaintiff's good name, carrying with it the sentient which the statement was intended to convey. To prevent the Defendant from making the statement to the Jury before the opening address would run the risk of minimising the element of vindication so crucial to the outcome of the proceedings.

Offer of €25,000; Whether the Jury may be informed of the Amount

23. With regard to the question as to whether or not the amount of the offer made should be mentioned to the Jury, it was accepted by the Defendant that in *Ward & Anor v. The Donegal Times Ltd & Anor* [2016] IEHC 711 McDermott J. had stated, *obiter*, that he was not satisfied a jury should be informed of the figure offered and, in this regard, had relied upon a number of English authorities which had been opened to the court. See *Turner v. MGM* [2005] E.M.L.R 25 and *Kiam v. Neil and anor*. [1995] E.M.L.R 1.

24. However, it was argued that the differences between the relevant statutory provisions in England and Wales and those of the 2009 Act were material and rendered the conclusion reached by the court open to question. In Ireland, a statutory right to address the court on damages (in this case the jury) was conferred on the parties. I took this submission to mean that this provision carried with it a right to mention awards in previous cases and thereby amounts, a position wholly at variance with the well-settled rule of practice at the Irish Bar not to do so.

25. While it was indicated to the Court that the Defendant 'could live with' a ruling that the amount of the offer should not be mentioned to the Jury, if so ruled it was necessary in order to maintain a fair balance between the parties that the Plaintiff should desist from assailing the offer by referring to it in derogatory terms, such as describing it as derisory and, if necessary, be directed accordingly.

Plaintiff's Submissions

Application for Leave to make a Correction and Apology by way of a Statement before the Court

26. As mentioned earlier the Plaintiff seeks to have the application refused on two grounds:

    (i.) The application was procedurally defective in that it ought to have been moved prior to the commencement of the trial by motion on notice and;

    (ii.) The failure to move the application meant that the trial had commenced in circumstances where, as a matter of fact, there was no approved apology; the absence thereof went to damages and was thus a matter of substance.

27. Order 1B clearly provides for the making of an application under s.23 (1) (b), namely by motion on notice grounded on an affidavit, none such had been sworn. The application ought to have been moved prior to trial in the common law motion list as envisaged not only by the rule but also in accordance with the practice direction of the court in *Ryanair v. Van Zwol*, supra, regarding interlocutory applications in civil jury actions. Had there been compliance by the Defendant, as there ought to have been, the motion would have long since been determined by a judge sitting alone but no such motion was issued and there being no affidavit it followed that apart altogether from non-compliance with the rule there was no evidence before the Court on which the order sought could be made.

28. In any event, it was too late to make the application, the jury had been empanelled and the trial had commenced. The Defendant had only itself to blame for the position in which it found itself since the means to solving the problem was at its disposal once it became clear agreement could not be reached but it had failed to make the application in the manner specified. As a consequence, the trial had commenced without an apology, the absence of which was an issue which went to damages and was thus a matter of substance.

If Leave is granted, whether the Statement of Correction and Apology should be read in the presence of the Jury

29. Notwithstanding the foregoing, if the Court determines that leave should be granted it was argued that as the jury had no role in approving the terms of a statement of correction and apology it would be extremely odd, not to mention erroneous, if the word 'court' in s. 23(1)(b) were to be construed as meaning 'the jury' for this purpose. Accordingly, as it was the function of the trial judge to approve the terms of the statement it was neither a requirement nor appropriate that the jury be present when the statement was being read. Such a conclusion was also consistent with the position which would have pertained had the application been regular, namely if moved by way of motion on notice before a judge sitting alone as proscribed by the rules of court

30. The suggestion that reading the statement to the Court in the absence of the jury would minimise the element of vindication had to be balanced against the true purpose for which the Defendant sought to make the statement in the presence of the jury, namely to maximise the reduction in damages rather than with enhancing vindication of the Plaintiff's good name.

Offer of €25,000; whether the amount may be mentioned to the Jury

31. With regard to the amount of the offer which had been made to compromise the claim, it was submitted that while the fact that an offer had been made would undoubtedly feature in the evidence, no mention of the amount as such should be disclosed to the jury, a proposition for which the statement to this effect by McDermott J. at para. 56 of his judgement in *Ward* was cited as authority.

Decision

Application for Leave

32. The inability to reach an agreement on the measures necessary to implement the offer to make amends is evident from the correspondence which passed between the parties following acceptance of the offer in 2015, particularly with regard to the wording of an apology, damages and the identity of the parties to whom the apology is to be published. Despite a number of efforts to reach agreement on these issues during the intervening period and the commencement of the trial, the parties remained unable to reach agreement, though as stated earlier the final draft apologies are broadly similar.

33. Initially, there had also been disagreement on whether the approval of the terms of a statement and the assessment of damages were matters for a judge or a jury. Although the Plaintiff brought a motion for directions pursuant to Order 1 B rules 4 (1) and (2) in relation to those questions and in relation to the adequacy of measures, the only substantive question addressed was the meaning of 'the court' for the purposes of the assessment of damages and the approval of the terms of a statement of correction and apology, this notwithstanding the terms of the notice of motion and the averments made in the affidavit sworn to ground the application which extended to all issues. Although the proposition is no longer advanced, the Plaintiff's contention that approval of the terms of the statement was also a matter for the Jury was maintained in correspondence until January 2019.

34. It is significant in the context of the issues which the Court has to determine that by letters dated the 7th and 30th January 2019, the Defendant's solicitors intimated that unless agreement could be reached on the measures to be undertaken the Defendant would move to have the final proposed correction and apology approved by the Court at the commencement of proceedings : although the differences remained unresolved there was no demur by the Plaintiff to the proposed course of action.

35. As mentioned earlier, the contention advanced on behalf of the Plaintiff is that the application is procedurally defective to the point that it is now too late to seek leave and that although the various apologies exchanged between the parties will be before the jury, the case must proceed on the premise that there is no apology, the absence of which is an aggravating factor to be taken into account in the assessment of damages.

36. I cannot accept the Plaintiff's submission in this regard. The wording of O. 1B, r. 4 (1), which is concerned with applications under s. 23 (1) of the 2009 Act, provides:

> *"Where defamation action has been brought before the court in respect of the statement in question and an offer to make amends under section 22 is accepted, an application:*
>
> *(i) under paragraph (a) of section 23(1) for an order directing the party who made the offer to take the measures concerned, or*
>
> *(ii) under paragraph (b) of section 23(1) for the leave of the court to make a correction and apology by means of a statement before the court in such terms as may be approved by the court and to give an undertaking as to the manner of their publication shall be made by motion on notice to the opposing party and shall be grounded upon an affidavit sworn by or on behalf of the moving party."*

37. It is clear that the mode of application proscribed by Order 1 B r. 4 is mandatory, namely by motion on notice grounded on an affidavit sworn by or on behalf of the moving party. Although on a literal reading of the rule it would appear open to any party to move the application, when read in conjunction with the wording of s.23(1) (b) it is apparent the reference to the moving party is the party who made the offer of amends, in this case the Defendant. In my judgment, it follows that the application is procedurally irregular on two grounds

    (i) the absence of a notice of motion grounded on affidavit and;

    (ii) although silent as to timing, the rule prescribes a procedure appropriate to pre-trial inter-party applications and ought therefore to have been brought prior to the commencement of the trial.

38. However, the Rules envisage and provide for circumstances where, as here, there is non-compliance by a party to the proceedings. In my judgment, it would be wholly wrong to refuse the application for leave to make a statement of correction and apology on either

of these grounds, particularly in circumstances where leave of the Court is sought on foot of a provision enacted by the Oireachtas for the purpose of giving effect to an offer of amends within the meaning of s. 22 of 2009 Act accepted by the Plaintiff, an essential component of which is an undertaking to publish a correction and apology.

39. Recognising that non-compliance with the Rules is the first ground upon which the Plaintiff seeks to have the Court refuse the application, the remedy which, in my judgment, is appropriate to the complaint and that also disposes of the second ground as a consequence, is to be found in the provisions of O.124 (1) of the Rules of the Superior Courts, 1986 as amended, which provides as follows:

> *"Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."*

40. The purpose of the rule is to vest a specific jurisdiction in the Court to ensure that where there has been non-compliance with the Rules by any party to the proceedings an injustice will not result as a consequence. This jurisdiction, which is in addition to the inherent jurisdiction of the Court, is expressed in broad terms to enable the Court take whatever action is considered necessary to ensure the justice of the situation is met and to do so upon such terms as are considered appropriate.

Conclusion

41. Accordingly, the Court will exercise its discretion by acceding to the application upon the issuance of a notice of motion and a grounding affidavit to be sworn and filed in Court so that the trial may proceed, for which purpose a short adjournment will be granted. The alternative, to adjourn the trial and discharge the Jury in order that the application may be brought in the ordinary way would in my view be a wholly disproportionate response; in fairness a course such as not advocated by either party.

Whether the Offer of €25,000 may be mentioned to the Jury

42. Since the foundation of the State, it has been common practice by counsel when making submissions on the law to cite the decisions of the Superior Courts in England and Wales, particularly in common law and chancery suits or where the judgements of those courts are concerned with equivalent statutory provisions. Although these authorities are not binding on the courts in this jurisdiction, they have long since been considered to be persuasive, particularly in the absence of an Irish authority on a given point of law. Where there are differences in the law between our respective jurisdictions the decisions of the Superior Courts in England and Wales or other common law jurisdictions cited in support of a proposition must obviously be approached with caution.

43. In this regard, there are differences between the statutory law of defamation and practice in England and Wales and this jurisdiction, the most significant of which is the relatively recent abolition of the right to trial by jury in the former. The dicta of McDermott J. in *Ward* cited by the Plaintiff appears to be founded, at least in part, on the statements of Eady J. in *Turner* and Leggatt L.J. in *Kiam* to the effect that it is inappropriate to mention

the amount of an offer to a judge in the course of proceedings, particularly as it is the judge who is also the tribunal of fact and where appropriate is charged with the task of assessing damages.

44. There has been considerable judicial debate in relatively recent jurisprudence as to the merits or otherwise of mentioning to the jury the amount of damages awards in defamation or personal injury actions. The view that to do so will assist a jury in carrying out an assessment, particularly with regard to factors such as proportionality and will lead to a greater consistency in the level of awards, appears to have gained the upper hand and is to be preferred. See judgment of O'Donnell J. in *McDonagh v. Sunday World Newspapers* [2017] IESC 59 and the judgment of Irvine J. in *Kinsella v. Kenmare Resources plc*. [2019] IECA 54.

45. Suffice it to say that it was certainly a rule of practice throughout the entirety of my career at the bar, and subsequently as a judge, that the amount of an offer or awards for damages in previous cases should not be mentioned, particularly to a jury, if only to avoid descending into the inevitability of what the late Lord Denning M.R. described as "an auction" between the parties. Section 31(1) of the 2009 Act confers a right on the parties to make submissions on damages to the court and where the case is being tried by judge and jury in the High Court, the trial judge is required by sub s. (2) to give directions to the jury in relation to the matter of damages. On my view of them, these provisions are declaratory of the position at common law but as mentioned previously, for reasons mentioned earlier, I understood the Defendant's submission to be that in light of the statutory right to address the court on damages it is permissible to mention previous awards and that against this backdrop it should also be permissible to mention the amount of the offer.

46. Having regard to the provisions of s. 22 of the Civil Liability and Courts Act 2004, it would seem to follow that if personal injuries cases in the High Court were still being tried by juries it would be necessary for the jury as the fact-finding tribunal to have regard to the Book of Quantum, which in turn would likely necessitate address by counsel on the appropriate ranges of damages. Whatever the merits of providing guidance on the ranges of damages or mentioning previous awards to a jury in a defamation suit, the exercise of carrying out an assessment of damages by a jury should not be trammelled by knowledge of the amount which the Defendant offered the Plaintiff to compromise the claim.

47. This view also sits comfortably with the provisions of O.22 r.7 of the Rules which prohibits the disclosure to the jury of the fact of a lodgement or of the amount paid into court. Although the rule was promulgated at a time when there was an extensive right to trial by jury in causes of action at common law it was restated in the amendment of the Rules by S.I. 265/93, promulgated following the restriction on the right to jury trial provided for by the Courts Act 1988.

Conclusion

48. While the rule prohibits not only mention of the amount but also the fact of a lodgement to a judge or jury, having regard to the provisions of s.23(1)(c), which confers on the

judge and/or the jury all such powers as the court would have had if it were determining damages or costs in a defamation action, and having regard to s.31(4)(e), which requires the judge or the jury, as the case may be, when carrying out an assessment and determining the amount of any deduction to take account of any offer to make amends under s.22, the making of an offer to pay damages and costs would have to be disclosed. However, in my judgment, for the reasons stated earlier and for the reasons given by McDermott J. in *Ward* the Court will direct that the amount is not mentioned to the Jury.

Approval of terms; Whether the Statement of Correction and Apology are to be made in the presence of the Jury; Conclusion

49. A notice of motion and grounding affidavit having been filed the Court will now return to the approval of the terms of a statement of correction and apology to be read by counsel for the Defendant before the opening address to the Jury. As mentioned earlier the Court has been furnished with the draft apologies exchanged between the parties. Following further discussions between counsel, the Court notes that certain wording requested by the Plaintiff has now found its way into the final draft of the statement of correction and apology for which the approval of the Court is sought. The Court is not concerned with whether the statement contains an apology acceptable to the Plaintiff but rather with whether the statement complies with the requirements of s. 22 (2) and (5) and s. 23 (1) (b) of the 2009 Act.

50. Certain observations by the Court with regard to the wording of the proposed statement having been taken into account for this purpose, I am satisfied that the following statement of correction and apology complies with the statutory requirements, same to be read to the Court by counsel for the Defendant in the presence of the parties:

> *"This is an offer of amends for the purposes of s.22 of the Defamation Act, 2009 in respect of all of the statements made complained of in these proceedings.*
>
> *In 2013 the Irish Aviation Authority published several statements internally and to external agencies which contained false and defamatory statements concerning Captain Higgins. The IAA accepts that these statements were unsubstantiated and caused Captain Higgins upset and reputational damage.*
>
> *The IAA acknowledges that Captain Higgins is a person of high personal and professional integrity and did nothing to warrant this undesired attention. The IAA acknowledges Captain Higgins's role in contributing to improvements in air safety.*
>
> *The IAA hereby retracts all defamatory statements made concerning Captain Higgins. The IAA apologises unreservedly for this episode and regrets the length of time it took to reach a resolution.*
>
> *The IAA has agreed to pay Captain Higgins damages and legal costs associated with the above named proceedings.*
>
> *The defendant undertakes to publish this retraction and apology to the list of apology recipients attached to the plaintiff's solicitor's letter dated 30th July, 2015*

and in addition to the chairman of the Revenue Commissioners and the Commissioner of An Garda Síochána and in addition the defendant undertakes to ask the UK Civil Aviation Authority to remove the defendant's email of the 26th July, 2013 from its file. The defendant undertakes to publish the retraction and apology to those recipients within seven days from the date hereof."

51. Finally, with regard to the question as to whether the statement of correction and apology should be read out in the presence of the jury, I accept the Plaintiff's submissions that this is neither required nor appropriate. While the statement of correction and apology is likely to feature in the trial as early as the opening address, I am satisfied and the Court finds for the purposes of s. 23 (1) (b) that as the exercise of approval of the terms of the statement is to be carried out by a judge, the 'court' before which the statement is to be read means the judge before whom the parties appear for that purpose and not the jury.

52. I am fortified in reaching this conclusion by the consequence of compliance with the provisions of Order 1 B r.4 (1). In the ordinary way the application by motion on notice for leave to make a statement of correction and apology pursuant to s. 23 (1) (b) would be listed together with other interlocutory motions in a common law motion list and determined by a judge sitting alone. Accordingly, I direct that the statement as approved be read before the Court in the absence of the jury. And the Court will so Order.