APPROVED **[2024] IEHC 348**

THE HIGH COURT

Record No.: 2022/5253 P

Between:

ENOCH BURKE

Plaintiff

And

MEDIAHUIS IRELAND LIMITED, MEDIAHUIS IRELAND GROUP LIMITED, MEDIAHUIS SUNDAY NEWSPAPERS LIMITED, ALAN ENGLISH and ALI BRACKEN

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 13 June 2024

Introduction

1. On 9 October 2022, an article was published in the print and online editions of the Sunday Independent newspaper, a newspaper published by the first defendant ("**the Article**"). The Article was written by the fifth defendant. The fourth defendant is the editor of the newspaper. The headline in the printed article was "*Burke moved to new jail cell as he is 'annoying other prisoners*'". The online edition had a slightly different headline, "*Enoch Burke moved to new jail cell for his own safety as he is 'annoying other prisoners*'". The first seven paragraphs of the Article contained the following words:

> "*Enock Burke has been transferred from Mountjoy Prison's general population back to the jail's Progression Unit "for his own safety", after repeatedly expressing his outspoken views and beliefs to his fellow prisoners.*

It is understood Burke, who has been in jail for over a month for contempt of court, had to be moved because he was "annoying other prisoners".

A prison source explained: "He was in the Progression Unit for the first few weeks, then he was moved down to the main prison. He didn't last long down there because he was annoying the other prisoners on his landing – just being himself and being outspoken on his religious views and beliefs.

"He was moved back to the Progression Unit – C Base West is what we call it – for his own safety. His life wasn't under threat, he might have got a beating if he'd been left in the main jail."

***The evangelical Christian (right) is** not kept in isolation in the Progression Unit, and is in contact with a small number of other inmates who are considered model prisoners and participate in external training programmes.*

"It is a different calibre of prisoner there. It is a safer environment for someone like Enoch Burke," added the source.

Members of the Burke family staged a protest outside Mountjoy on Monday."

* emphasis in original

2. The Article was accompanied by a photograph of the plaintiff. The remainder of the Article described the progress of proceedings involving the plaintiff arising from his suspension from the school at which he was employed as a teacher, Wilson's Hospital School in Multyfarnham, Co. Westmeath ("**the School**"), his imminent appeals to the Court of Appeal against injunctions granted by the High Court, and the circumstances in which he had been imprisoned for contempt of court. The Article noted that the plaintiff "*would not be appealing the High Court orders committing him to prison for contempt*". His brother was quoted as having told reporters that the plaintiff had "*no intention*" of purging his contempt.

3. The plaintiff pleads that the first seven paragraphs of the Article are "*entirely baseless and utterly without foundation*" and that he has been seriously defamed and suffered serious loss and damage to his good name and reputation. He seeks damages, to include punitive and aggravated damages.

4. The plaintiff has discontinued his case against the second and third defendants. The remaining defendants ("**the defendants**") admit that portions of the Article are inaccurate. In particular, they accept that it was inaccurate to assert that the plaintiff was moved to a new jail cell on grounds relating to his safety and/or his annoying other prisoners. They also accept that it was inaccurate to assert that he had been transferred from the general prison population to the Progression Unit on grounds relating to his safety and/or repeatedly expressing his religious views and beliefs.

5. They deny, however, that the words in the Article were capable of being defamatory, or that they injured the plaintiff's reputation in the eyes of the reasonable member of society. They also rely on the defence of fair and reasonable publication provided for in section 26 of the Defamation Act 2009, as amended ("**the 2009 Act**").

Procedural Background

6. The Article appeared at the bottom of page 14 of the Sunday Independent on 9 October 2022, in the 'News' section of the newspaper. The published article was less than half the length of the main article on that page, which concerned a wholly unrelated story. It was published on the newspaper's website, independent.ie, at 2.30 am on 9 November 2022.

7. The following day, 10 October 2022, the plaintiff's mother, Martina Burke called and then emailed the fourth defendant twice about the Article. Her first email, sent at 12.07 pm, stated "*I need to speak to you urgently regarding an article published on yesterday's Sunday Independent regarding my son Enoch Burke. The article contains false and highly defamatory allegations.*"

8. The second email, signed by Mrs Burke and the plaintiff's father, Sean, in the form of a letter and sent at 3.22 pm, was more detailed. It identified the portions of the Article which were alleged to be defamatory. The portions identified were the allegations that the plaintiff had been "*repeatedly expressing his outspoken views and beliefs to his fellow prisoners*", and that he had been "*annoying other prisoners*". The email described these allegations as "*entirely false*". In addition, the email referred to the allegation that members of the Burke family had staged a protest outside the prison. This was described as "*false and defamatory*". It was stated that the Burke family had never staged a protest outside Mountjoy prison.

9. The email stated that the plaintiff's parents had spoken with someone in the Press Office of the Irish Prison Service and had been told that the information in the Article was "*significantly inaccurate and completely wrong*" and that there were "*no issues with Enoch Burke*". It set out the redress required from the defendants, including the removal of the Article from the website, the publication of a full retraction and apology, in terms to be agreed, an undertaking not to republish, and damages for the injury to the plaintiff's reputation, interference with his privacy and interference with the administration of justice. The reference to interference with the administration of justice appears to have been a reference to Mr Burke's then imminent appeals before the Court of Appeal.

10. The letter threatened legal proceedings if the defendants didn't confirm the requests sought by close of business on 10 October 2022.

11. The fourth defendant replied to this email at 4.17 pm on 10 October 2022. His reply stated that the letter was being treated seriously and that the allegations of fact which were disputed required investigation. His reply stated that should the Article transpire to be factually inaccurate, then "*we will correct the record*".

12. His reply contended that, without prejudice to whether the matters identified were true, the statements could not be defamatory. He noted that the right to protest is a right enshrined in law and to simply say that someone staged a protest could never be defamatory.

13. In respect of the other allegation he stated:

> "*In the same vein, to say that somebody has caused annoyance to other people through an outspoken expression of their views cannot be defamatory in the absence of any further allegation of how those views were being expressed or how such annoyance was caused. In any event, in the context of the events which gave rise to Mr Burke's initial workplace suspension and his subsequent actions that have ultimately seen him jailed for contempt of court, it is plainly true to say that Mr Burke's outspoken expression of his views, however, sincere, genuine and well-intended they might be, have caused significant annoyance to other people.*"

14. Mr and Mrs Burke emailed a further letter on 11 October 2022, confirming that they had received written confirmation from the Press Office of the Irish Prison Service that the Article was untrue. The Burkes' letter further identified the aspects of the Article which were said to be untrue, and reiterated the view that the Article was defamatory and interfered with the administration of justice. The letter stated that in light of the failure to provide the confirmations sought, the plaintiff would apply to the court without further notice to the defendants.

15. The fourth defendant replied the following day at 11.04 am, reiterating that the complaint was being taken very seriously and was being investigated. He stated that the online article was being removed, on a without prejudice basis, until enquiries had been completed. The fourth defendant stated that he had already set out his position regarding the allegation that the Article was defamatory, then set out his views as to why the Article was not prejudicial to the administration of justice.

16. On 14 October 2022, the plaintiff made an application in an intended action against all five defendants, High Court Record No.: 2022 No. 164 IA. By consent, all of the intended defendants undertook not to republish the Article without 72 hours prior notice in writing to the plaintiff of the intention to republish. The plaintiff undertook to issue the within proceedings in the form of the draft proceedings before the court in the intended application. He then issued the Plenary Summons in these proceedings on that same day.

17. On 1 January 2023, the defendants caused the following to be published in the Sunday Independent and on independent.ie:

> "***Correction and apology***
>
> *In an article published on October 9, 2022, in the Sunday Independent and online at independent.ie, several statements were made about Mr Enoch Burke including that Mr Burke had "been transferred from Mountjoy Prison's general population back to the jail's Progression Unit for his own safety, after repeatedly expressing his outspoken views and beliefs to his fellow prisoners" and that Mr Burke had to be "moved to new jail cell as he [was] 'annoying other prisoners'".*

We are happy to clarify that Mr Burke was never part of the general population in Mountjoy Prison and that a cell change that occurred around the time of our article was for operational reasons only and not for the reasons stated in the article.

The Sunday Independent and independent.ie are happy to clarify this matter and apologise to Mr Burke for the error."

18. The plaintiff discontinued the proceedings as against the second and third defendants on 8 December 2022. He delivered a Statement of Claim on that date. The defendants delivered a Defence on 8 February 2023. The plaintiff served a notice of trial without a jury on 12 June 2023 pursuant to Order 36, rule 6 of the Rules of the Superior Courts. The defendants did not serve a notice, in accordance with rule 6, signifying their desire to have the case tried by a jury. In the circumstances, the trial proceeded before a judge alone.

19. The plaintiff delivered an amended Statement of Claim dated 8 December 2023, by which a number of declaratory reliefs sought in the Plenary Summons and the original Statement of Claim were deleted. The defendants delivered an amended Defence dated 11 January 2024.

20. The case was heard over four days from 30 April 2024 to 3 May 2024. The plaintiff represented himself. With the court's agreement, his brother, Dr Isaac Burke, provided assistance as a McKenzie friend, but did not address the court. The defendants were represented by a solicitor and junior and senior counsel.

Preliminary issues

21. Before addressing the evidence which was given at the hearing, there are a number of preliminary matters which arose which can usefully be dealt with at the outset.

i. The plaintiff's status as a contemnor

22. At the time that the Article was published and the proceedings commenced, the plaintiff had been committed to prison for contempt of court for breach of an interim order of the High Court (Stack J) made on 30 August 2022 restraining him, *inter alia*, from attending at the premises of the School, attempting to teach any classes at the School, or trespassing on the School's property, in proceedings entitled *Board of Management of Wilson's Hospital School v Burke*, Record No. 2022/4507P. He was committed to prison on 5 September 2022 by order of the High Court (Quinn J). He was released on 21 December 2022 by order of the High Court (O'Moore J). He was again committed to prison for contempt on 8 September 2023 by order of the High Court (Heslin J). On that occasion, he was found to be in breach of a final order of the High Court (Owens J) made in the same proceedings by which the School was granted a permanent injunction restraining Mr Burke from entering or remaining on school premises without permission. It is important to note, however, that at the time the Article was published, there had been no final determination in those proceedings and, therefore, no permanent injunction had been granted.

23. At no point prior to the hearing of the action did the defendants raise any objection to the plaintiff prosecuting these proceedings by reason of his status as a contemnor. However, in oral submissions at the conclusion of the proceedings, counsel for the defendants referred to the plaintiff's status as a continuing contemnor, *i.e.* a person who has been found to be, and remains, in breach of a court order, describing it as the "*elephant in the room*". He then referred to it as a matter for the court "*to consider afterwards*". Following objection from the plaintiff, and my own observations that it was too late in the day for the defendants to make an application that the plaintiff was not entitled to seek relief, counsel clarified that that was not the application he was making.

24. In circumstances where it was confirmed that no application was being made to prevent the plaintiff prosecuting his claim and the proceedings have been heard, it does not seem to me to be in order for the court, of its own motion, to determine that the plaintiff should be debarred from obtaining relief on the grounds that he is in continuing breach of a court order. However, the issue having been raised, it is appropriate for me briefly to address the jurisdiction which the defendants tentatively invoked.

25. As noted by the High Court (Clarke J) in *Moorview Developments v First Active plc* [2008] IEHC 274 (at para 4.19):

> "*It is worth noting that the question of giving audience to persons in contempt involves the exercise by the court of a discretion in which ensuring obedience to court orders is afforded a very significant weight.*"

26. That judgment was considered by the Court of Appeal in Mr Burke's appeal of a number of orders made in his litigation against the school, *Board of Management of Wilson's Hospital v Burke* [2023] IECA 52. In that case, the court (Birmingham P) stated (at pp. 12 – 13):

> *"20. For my part – and I have no doubt that, in this respect, I speak for all members of the Court – it has absolutely been beyond doubt that the appellant was entitled to appeal the finding that he was in contempt of court. However, it did not appear to me that this was what he was in fact engaged in. There had been no appeal of the decision of Quinn J.. While there had been no direct or specific appeal of the finding of being in contempt of court, in exchanges with the appellant, I indicated that I recognised that there was an overlap between the issues that had led to the conclusion that he was in contempt of court and the issues he wished to canvass on the appeal. It was for this reason, I explained, that what had happened in the past, in terms of disobedience of orders up to that point, would not prevent the Court embarking on the appeal, but that the Court's concern was with what would happen in the future, while the matter was before this Court, including any period after judgment had been reserved and when the matter was being considered by the Court.*
>
> *21. On the basis that the appellant was indicating that he was not seeking positive orders in respect of what had occurred before Stack and Barrett JJ., but was seeking to set aside orders that had been made, this Court, having taken a short time to consider the matter, indicated that we would proceed with the hearing, but dealing only with the issues as they related to Stack and Barrett JJ.. We would not consider any request for positive orders which would be sought to be enforced while the appellant continued to breach court orders on an ongoing daily basis.*"

27. The jurisdiction is discussed in Arlidge, Eady and Smith on Contempt, 5th ed. (Bloomsbury, 2019) at 12-73:

> "*An effective sanction (deriving from common law) was the practice that one who was in contempt might not be heard further in the same litigation, for his own benefit, unless and until he had purged his contempt. In the words of Lord Brougham (*Curtis v Curtis (1845) Moo PC 252 at 256), *"It is a general rule of all Courts, that no party shall be allowed to take active proceedings, if in contempt. This was clearly a practice primarily coercive in nature rather than punitive. It was by no means universally applied."*

28. The passage quoted highlights one uncertainty about the practice. The authors of the text refer to it as a practice where a contemnor cannot be heard *in the same litigation*, whereas the citation refers to a contemnor not being permitted to take active proceedings *at all.* As it happens, the cases referred to in the discussion which follows in Arlidge, Eady and Smith all appear to involve a contemnor's participation in the same proceedings in which they have been determined to be in contempt of court. Moreover, the authors make clear that the authorities now establish that the question should be approached on the basis of a *discretion* to be exercised flexibly, rather than on the basis of a rule. Such is apparent from the leading UK authority, *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1. It is suggested in the text that the jurisdiction might be used to *postpone* a contemnor being heard, rather than to exclude them indefinitely.

29. It is noteworthy that the authors also query the extent to which the exercise of a discretion to restrict a person's access to the court might be consistent with Article 6 of the European Convention on Human Rights, a right to a fair and public hearing in the determination of a person's civil rights. The authors refer to the jurisprudence of the ECHR to the effect that the right of access to the Court could be subject to legitimate restrictions (see *Z v United Kingdom* (2002) 34 EHRR 3), and the decision of the Court of Appeal of England and Wales in *JSC BTA Bank v Ablyazov (No. 8)* [2013] 1 WLR 1331, in which the defendant had been found in contempt of court for, *inter alia,* failing to comply with disclosure orders. An order was made debarring the defendant from defending the proceedings unless he complied with the disclosure order. On appeal from that order, the Court of Appeal conducted a comprehensive review of the relevant authorities under Article 6. Rix LJ concluded:

"*If an adjudged contemnor is able, whatever the circumstances, to hold an order for committal at nought and yet at the same time demand that the litigation continue as though nothing had happened, because the court is powerless to say that the fugitive contemnor should face up to his responsibilities by surrendering to custody and should do so as a condition of being able to continue with the litigation, then the utility of the contempt of court procedure can be destroyed and a significant factor in the checks and balances which operate in the field of civil litigation is lost.*"

30. Different considerations no doubt apply where a litigant seeks to prosecute proceedings other than those in which that litigant has been found in contempt. Certainly, the calculus of the proportionality assessment would be greatly altered. The defendants appear to have recognised this position, as made clear in their oral submissions (Transcript, Day 4, p. 105, line 5):

"*Mr Burke comes from Mountjoy jail to vindicate his right to a good name, has done so over the past three days. Now the Defendants in these proceedings doesn't take issue with the right to bring an action before the Court, or otherwise because that is why we are all here, we have had our case….*"

31. In those circumstances, the question of whether there are any circumstances in which the continuing failure by a person to comply with a court order in one set of proceedings could be a basis for preventing that person from prosecuting separate proceedings, in particular, proceedings seeking to vindicate constitutionally protected rights, is a matter for another day.

32. As will be discussed further, however, the fact that the plaintiff has not been prevented from prosecuting these proceedings by virtue of his status as a contemnor does not mean that his status is irrelevant for the purpose of determining whether his reputation has been injured.

ii. Application under section 14 of the 2009 Act

33. Section 14 of the Act provides a mechanism by which a defendant in a defamation case can seek a ruling on whether the words complained of are reasonably capable of bearing the imputation alleged:

> *(1) The court, in a defamation action, may give a ruling—*
>
> *(a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and*
>
> *(b) (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning,*
>
> *upon an application being made to it in that behalf.*

34. Section 14(2) provides that if the court concludes that the statement is not reasonably capable of bearing the imputation pleaded or that the imputation pleaded is not reasonably capable of bearing a defamatory meaning, the action shall be dismissed in respect of that statement. Section 14(3) makes clear that the ruling is to be made by a judge in the absence of a jury, and section 14(4) provides that an application can be made at any time after the proceedings commence, including during the course of the trial of the action.

35. During the course of the trial, the defendants indicated that they were proposing to make an application pursuant to section 14, but they ultimately elected not to pursue it on the basis that it was unnecessary. I have no doubt that that was the correct approach for them to take. Section 14 allows for a preliminary determination by a judge as to whether a plaintiff pursuing a defamation action is, in effect, bound to fail, or whether the claim ought to be allowed to go to a jury. Although there would no doubt be some merit, in certain cases, in seeking a ruling in advance of trial even in a case to be heard by a judge alone, it seems to me that once the hearing commences, the utility of the procedure is confined to those cases being heard by a judge and jury. In any event, as we will see below, in defamation proceedings, context is all-important, and it is, therefore, only in very clear cases that a court

may be in a position to determine that a particular statement was not capable of bearing the meaning pleaded or of being defamatory.

iii. Section 31 of the 2009 Act

36. At the outset of the hearing, both parties requested that the court make a ruling on the defendants' entitlement to rely on certain evidence in mitigation. The issue arose by reason of section 31(6) of the 2009 Act and Order 1B, rule 10 of the Rules of the Superior Courts.

37. Section 31(6) provides as follows:

> *(6) The defendant in a defamation action may, for the purposes of mitigating damages, give evidence—*
>
> > *(a) with the leave of the court, of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement…*

38. Order 1B, Rule 10 provides as follows:

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

39. As an aside, I note that there is an apparent tension between the statutory provision and the rule of court. The statutory provision suggests that leave of the court is required to lead the evidence in question, whereas the rule appears to envisage that leave of the court is only required if particulars have not been furnished more than seven days in advance of the trial. It is not necessary to resolve that tension here, in circumstances where the defendants *did* furnish particulars and sought leave to give the evidence at issue.

40. On 22 April 2024, the defendants served a notice under Order 1B, Rule 10, setting out particulars of evidence in mitigation on which they sought to rely, together with a schedule of documents, comprising three judgments of the High Court and 33 articles published by the defendants, or its sister publication, the Irish Independent. The plaintiff objected to the defendants' reliance on the particulars and the scheduled documents on the basis that certain of the particulars and the majority of the documents post-dated the publication of the Article.

41. The plaintiff claimed that *any* evidence which post-dated the Article was inadmissible, as was any evidence regarding specific acts of misconduct, even acts which occurred prior to the publication of the Article. He relied on the decision of the Supreme Court in *Hill v Cork Examiner Publications Limited* [2001] 4 IR 219 and the rule in *Scott v Sampson* (1882) 8 QB 491 to the effect that evidence of general bad reputation was admissible, but not of particular acts of misconduct tending to show character or disposition. He quoted Gatley on *Libel and Slander*, 13th ed., (Sweet & Maxwell, 2022) which states, under the heading *'Evidence of subsequent bad character'* (at 34-084):

> "*The evidence must be confined to the general bad character of the claimant before, or at the time of, the publication of the libel. Evidence of bad character after that time is not admissible in mitigation of damages, otherwise "a person might slander another and then call some of the neighbours to say that they had heard implications which he himself had set afloat".*"

42. In the leading Irish text, *Defamation Law and Practice,* Cox and McCullough, 2nd ed. (Clarus Press, 2022), the authors discuss (at paragraph 13-266 *et seq.*) the complexity involved in the application of such a rule, and conclude (at 13-269) that those difficulties led to the enactment of section 31(6)(a) of the 2009 Act. They continue:

> "*Thus, the section permits not just evidence of reputation itself (which was the only thing permitted under the previous law), but now of any matter that would have a bearing upon the reputation of the plaintiff, as long as it relates to matters connected with the defamatory statement. However, it is a condition that such evidence may be given only with the leave of the court. The legislative intention seems to be sweep away the rigid exclusionary principles set out in* Scott v Sampson*, while yet giving the court*

the discretion to exclude material because (for example) it is of minor value, or because its admission would involve the court in the investigation of an unacceptably wide range of issues of tangential relevance."

43. In light of the plaintiff's objection, it seemed to me that there were therefore two questions which required to be addressed: should the evidence which the defendants were allowed to lead or put in cross-examination to the plaintiff be limited in time to evidence of matters which occurred before the Article was published? If not, were the particular documents upon which the defendants proposed to rely evidence sufficiently connected with the defamation that the defendants should be allowed to put them to the plaintiff or lead evidence in relation thereto?

44. In substance, the plaintiff argued that section 31(6) merely codifies the preexisting common law rules, whereas the defendants rely on the analysis in Cox and McCullough, which clearly understood section 31(6) as intending to effect a change in the law. The defendants' contention is clearly correct. The pre-existing position was subject to somewhat artificial rules and it was the intention of the legislature, as is clear from the terms of section 31(6), to effect a change in the law. The section is drawn in very wide terms, it refers to *"any matter"* being potentially admissible for the purpose of mitigating damages, not subject to any stipulation as to when the "*matter*" in respect of which it is sought to lead evidence may have arisen.

45. However, I also agreed with the plaintiff, and Cox and McCullough, that section 31(6) is not intended as a free-for-all. The evidence which might be admitted under that section is subject to a requirement that it be relevant to the issues which need to be determined by the court or a court and jury, if that is the mode of trial, and must, as stated in section 31(6), be connected to the defamatory statement. Mini trials on issues of other conduct said to be relevant are to be avoided. Matters which are disputed are, therefore, less likely to be admissible.

46. The evidence which is covered by section 31(6) goes to the question of the mitigation of damages. Logically, it seems to me that matters which occur after the date of publication of an alleged defamatory statement are capable of affecting the amount of damages, if any, which might be recoverable in the event that the alleged defamation is established. A

defamatory statement may have been published at a particular time but the damage to reputation caused thereby may have an ongoing impact and therefore matters occurring after the date of defamation have the potential to be relevant. To take a straightforward example, if a person is wrongly alleged to have engaged in particular dishonest conduct at a particular time, that person's reputation may be damaged by that allegation. However, if that person immediately thereafter engages in and is convicted of the same or similar dishonest conduct, they couldn't be heard to complain that the wrongful allegation has caused long-lasting damage to their blemish-free reputation. It would be manifestly absurd if that subsequent conviction was incapable of being reflected in an award of damages. Similarly, if a person were defamed by an incorrect statement, but immediately afterwards, the error in the statement was corrected to the knowledge of everyone to whom the initial statement had been published, then evidence of that subsequent correction would clearly be admissible in mitigation of damages.

47. The potential relevance of other conduct to a person's reputation was initially reflected in the exceptions to the rule in *Scott v Sampson*, for instance, that evidence of prior convictions can be given in evidence; it is now, in my view, addressed by the court's discretion to admit evidence pursuant to section 31(6).

48. It seems obvious that the further removed matters are in time from the date of the alleged defamation the less likely they are to be relevant or, to put it another way, to have a material effect in mitigating damages. It must, in any event, be shown that the matters to be relied on are relevant and connected with the defamatory statement.

49. In those circumstances I did not preclude *a priori* the defendant from leading evidence or cross-examining the plaintiff regarding most of the matters identified at one to eight of their Order 1B notice solely on the basis that the matters postdated the publication of the alleged defamatory statement. It remained necessary, of course, that any evidence they wished to put would otherwise meet the requirements of section 31(6) to be admissible pursuant to that provision. The particulars included matters such as:

- *The honestly held belief by [the defendants] that the Plaintiff had been transferred from one part of Mountjoy Prison to the other for his own safety for having expressed outspoken views and beliefs to his fellow prisoners.*

- *The Plaintiff's public profile as an individual known for having outspoken views on societal and religious issues which are of public interest.*

- *The Plaintiff's engagement with the court system and the justice system in Ireland, in particular but not limited to, his engagement with the prison authorities and an Garda Siochána, and his status as an individual who has refused to comply with orders of the Superior Courts made against him and who was, at the time of the publication of the article the subject matter of the proceedings, and who remains in contempt of court.*

- *The involvement of the Plaintiff and/or his family in public protests, including at various locations.*

- *The involvement of the Plaintiff and/or his family in public protests…*

- *Judgments of the High Court concerning the Plaintiff's employment status.*

- *Reportage of and concerning the Plaintiff published and edited by the Defendants in the public interest and for the public benefit.*

- *The Plaintiff's social media activity as published on his X (formerly Twitter) account.*

50. In truth, it was the reference to reportage, and the schedule of documents, which proved most controversial, insofar as the defendants sought to rely on a series of articles published by them in the Sunday Independent and the Irish Independent. These were evidence of nothing other than the fact that those articles had been written and published. They were not evidence of the truth of their contents, and therefore could never be evidence of the plaintiff's character or reputation. The articles could not, therefore, be taken into account by the court in considering the question of mitigation of damages if that arises. This is all the more so when the articles have been published by the defendants and in that regard, the comments of Gatley in their seminal text quoted above are apposite. I should say in that respect that I

did not review all of the articles tendered, rather I reviewed one of them for the purpose of determining the nature of the articles, and reviewed, as suggested by Mr Burke, the schedule. The article I read was a comment piece reflecting on matters which may or may not be connected to the alleged defamation and had, in my view, no evidential value. The rest of the articles listed in the schedule appeared to be in a similar vein, or were news articles about events subsequent to the publication of the allegedly defamatory article.

51. In those circumstances I declined to permit the defendants to put the newspaper articles in evidence, although I did not rule out evidence being given that newspaper articles were written insofar as that could be shown to be relevant, nor did I preclude the defendants from raising matters either in their direct evidence or in cross-examination with Mr Burke simply on the basis that they postdated the date of the alleged defamatory statement.

52. It is important to clarify that any evidence postdating the date of publication of the Article was potentially admissible for the purpose of considering the question of damages. It remains the case, however, that for the purpose of determining whether the Article tended to injure the plaintiff's reputation, the relevant date for assessment is the date of the publication of the Article.

The plaintiff's imprisonment for contempt of court

53. The circumstances leading to Mr Burke's imprisonment for contempt are described in a number of decisions of the High Court and Court of Appeal, some of which are referenced above. On 16 August 2022, the School informed the plaintiff that it had initiated a disciplinary process into allegations which might amount to serious misconduct. A disciplinary hearing was fixed for 14 September 2022. On 18 August 2022, the plaintiff was invited to a meeting to address the question of whether he should be placed on administrative leave. He attended the meeting on 22 August 2022 at which a decision was made to place him on administrative leave.

54. Notwithstanding this decision, the plaintiff attended the School on 25 August 2022 and refused to leave despite requests to do so. A direction to stay away from the School was issued to the plaintiff, but he continued to attend at the School. The School issued proceedings by Plenary Summons on 30 August 2022 and applied for interim relief on that

day. The High Court (Stack J) granted an interim order restraining the defendant from attending at the school and from attempting to teach any classes or any students at the school. During the course of his evidence in these proceedings, the plaintiff was heavily critical of the conduct of this application.

55. Mr Burke continued to attend the School despite the making of the interim order. The School then made an application for attachment and committal in light of the breach of the order. The Court (O' Regan J) made an attachment order on 2 September 2022. Mr Burke was brought before the court on 5 September 2022, and the High Court (Quinn J) made an order committing him to prison until he purged his contempt.

56. On 7 September 2022, Barrett J granted interlocutory orders in similar terms to the interim orders granted by Stack J on 30 August 2022, restraining the defendant from attending the school for the duration of his paid administrative leave, from attempting to teach any classes or any students at the school for that period, from interfering with the appointed substitute teacher's duties and teaching, from failing to comply with the directions of the board, and from trespassing on the property of the school.

57. Mr Burke issued a motion seeking, *inter alia*, to restrain any disciplinary proceedings against him and seeking to restrain the School from placing him on administrative leave. This was before the court on 12 September 2022 when the School gave an undertaking that the disciplinary hearing scheduled for 14 September 2022 would not proceed, and that Mr Burke would be given three days' notice of any further disciplinary meeting. In the circumstances, the court (Dignam J) made no order in respect of the reliefs seeking to restrain the disciplinary proceedings. Mr Burke's application to restrain the School from placing him on administrative leave was heard on 14 September 2022 and dismissed by order of Roberts J.

58. Mr Burke appealed various orders of the High Court, being the orders of Stack J, Barrett J, Dignam J and Roberts J referred to above. He did not appeal the order committing him to prison for contempt.

59. His appeal against those orders were pending at the time that the Article was published, but was ultimately by rejected by the Court of Appeal in an appeal heard and determined

after the Article was published. At no time prior to the publication of the Article did Mr Burke seek to purge his contempt.

The Trial

60. There were a total of four witnesses who gave evidence at the hearing, the plaintiff and his mother, Martina Burke, on behalf of the plaintiff, and the fourth and fifth defendants on behalf of the defendants. I have, of course, considered all the evidence given, but I propose setting out below a brief summary of what was said in evidence.

Enoch Burke

61. Mr Burke gave evidence of his qualifications and employment history. He has a BA in History, German, Sociology and Politics and a Master's degree in Education, both from NUI Galway. He also has a graduate diploma in German from the University of Dundee and a Diploma in Music from the Royal Irish Academy of Music. He worked for four years at the Galway Study Centre in Mill Street, in Galway. He has also carried out work for the State Examinations Commission since 2014, first as a written examiner of Junior Certificate German, and then as a Leaving Certificate examiner.

62. He commenced work in the School in 2018. He was given a contract of indefinite duration in the summer of 2020, in essence, a permanent contract.

63. He gave evidence that he was the only German teacher in the School when he commenced and that he took steps to promote the language within the school with, it seems, considerable success. He was also involved in extra-curricular activities in the school, particularly in debating and public speaking. He described the various competitions which his students had entered, their successes, and the assistance and encouragement he provided. He provided copies of letters of thanks he had received from a number of students and from parents of students in the school for the help that he had provided both in his normal teaching duties and in the extra-curricular activities in the school.

64. He then described the circumstances which led to his dispute with the School, and in particular what he describes as the "*demand*" by the School principal that he refer to a particular student by the pronoun 'they' or 'them'. He described this demand as "*very wrong*" and a "*breach of the constitutional right to freedom of religion, enjoyed by teachers, all staff in the school, and indeed by students in the school*".

65. The dispute with the School is not the subject of these proceedings and, indeed, has been the subject of separate judgments of the High Court and Court of Appeal. For present purposes, it suffices to say that Mr Burke's evidence was that he asked the principal to withdraw her demand at a school event held to commemorate the founder of the school and that "*solely because [he] asked that question*", the principal drew up a report alleging gross misconduct. He then refers to the fact that on foot of an order of the High Court (Stack J) he was taken from the school and "*brought to the Court and eventually conveyed to prison.*"

66. His evidence then described his experience in prison. He said that at all times when he was in prison, he was on a committal landing. He described the layout of the prison. He was never in the Progression Unit of the prison (although the committal landing he was on appears to have been in the wing of the prison containing the Progression Unit), or in the general prison population. He said that he was never moved from that committal landing, although he was moved from a cell on one side of the corridor to a cell on the other side. He was not with "model prisoners", rather he was with prisoners "*coming into the prison off the streets.*" It is worth noting that there was no evidence that there was a class of prisoner in the prisoner identified as 'model prisoner', rather Mr Burke seems to have understood the reference to model prisoners in the Article in the same way I do, as referring to those prisoners who had established that they were well behaved, and perhaps had earned, thereby, better treatment in the prison. He described his good relationship with other prisoners and his treatment by them and said that the "*kindness, the generosity, the goodwill of prisoners towards [him] never stopped.*"

67. He referred to another article published in the Sunday Independent on 11 September 2022 under the headline '*They're not liked here*'. The article was also by the fifth defendant and the headline referred to a quote from an unnamed person in the Castlebar area, referring to Mr Burke's family. He was heavily critical of that article, describing it as a "*tinkerish,*

trampish" piece of work, which, I am bound to say, I consider an objectionable description. He said that his family were well regarded and always had been in Castlebar.

68. He referred to having been brought back before three separate judges of the High Court in September after his committal, and his lodgement of an appeal to the Court of Appeal. He criticised each of the High Court judges who conducted those hearings.

69. He then referred to the circumstances in which he learned of the Article having been published. First, he explained that he was subject to a welfare check, that he was told that the Governor of the prison had asked a prison officer to check whether he was ok. He was unaware of the publication of the Article at that time, but says that it was confirmed to him afterwards that the request for the welfare check was prompted by the Article. On Monday 10 October 2022, he received a call from his mother asking whether he was ok. She then told him about the Article. He describes himself as having been "*shaken*". He described the "*sting*" of the Article as being that it was his "*normal manner of life to vex unbearably, or to the point that he was going to get beaten up, to vex unbearably the people I live and work with on a daily basis by the relentless expression of my personal religious views*".

70. The plaintiff went through the Article, describing it as "*completely and utterly false in every part*". He said he had, and had always had, an excellent relationship with prisoners in Mountjoy Prison and had not been annoying them. He gave evidence that:

a. He wasn't transferred from the general population; he was never there.

b. He wasn't transferred back to the Progression Unit; he wasn't really there either.

c. He never put his own safety or that of others at risk.

d. He was never repeatedly expressing views and beliefs to fellow prisoners.

e. He did not "*have to be moved*".

f. It wasn't the case that he didn't last long somewhere.

g. It absolutely wasn't the case that he "*was in danger of getting a beating*".

h. He wasn't in contact with model prisoners.

i. He didn't need to be put in a safer environment.

j. His family had never staged a protest outside Mountjoy.

71. He then referred to the extent of the publication of the Article and presented screenshots showing that it was in the top five most read articles on independent.ie until 6 pm on Monday, 10 October 2022. He said it was "*published to millions, tens of thousands of people were commenting on it*". He then referred to evidence of a number of tweets which were about or referred to the Article to show the extent to which he was ridiculed as a result of the Article. The evidential significance, or otherwise, of that material, I will address below.

72. Mr Burke then gave evidence about the impact he felt that the Article might have on him professionally. In particular, he said that a principal or Board of Management would feel precluded from considering him for promotion or employment in light of the allegations in the Article.

73. Mr Burke accepted in his evidence that he was a "*public figure*" because, as he put it, he had taken a stand on his constitutional rights and that he was linked in the minds of people as a "*man acting out of principle*". He referred to his Court of Appeal hearing, imminent at the date of the publication of the Article, and said that he should have been allowed to go into that hearing with his reputation intact, but that it was "*cruelly ripped away*" from him by the Defendants.

Cross-examination of Mr Burke

74. Counsel for the defendants cross-examined Mr Burke on the second day of the hearing. His first question simply asked Mr Burke to confirm that he was 35 years old. Mr Burke refused to say on the basis that he deemed it irrelevant. He refused in similar fashion when asked to confirm where he ordinarily lived. When told by the court that he had to answer the questions put, he again refused to say how old he was.

75. Counsel then asked Mr Burke about a protest he had participated in outside the Oireachtas in 2011 when, it appears, he was 21. He confirmed that he had been outside the Dáil holding a sign stating, "*Thou shall not lie with mankind, as with womankind: it is abomination"*, a quote from Leviticus, 18:22. He described it as a religious belief, a Christian teaching and said that it was prompted by a particular piece of legislation then going through the Dáil.

76. Mr Burke confirmed that he operated a website davidnorrisforpresident.com at a time when Senator David Norris was running as a candidate for the presidency. Despite the name of the website, it appears that the website was not supportive of Senator Norris's candidacy, but rather raised issues about the fact that Senator Norris was a homosexual running for the presidency. Mr Burke confirmed that he wrote everything that was on the website.

77. He also confirmed that he had been the Managing Director of a campaign group called Campaign for Conscience and was involved in a legal challenge to civil partnership legislation. He referred to each of these matters as the expression of his religious belief and rejected the characterisation of them as dictating to others as to how they should behave.

78. Mr Burke had, in 2020, also operated a website, katherinezappone2020.ie. The website included articles, written by the plaintiff, entitled "Zappone and witchcraft", "Zappone on Christianity", "LGBT activism", "Weakening parents" and "Criminalising homophobia". Mr Burke referred in evidence to Ms Zappone, who was, at the time that he operated the website, the Minister for Children and seeking re-election, as having pursued an "*extreme*" agenda as Minister. He confirmed that he had paid approximately €1000 buying advertising space from Google to redirect traffic to the website. He explained that without doing that, no one would have found the website.

79. He was asked about attending at the Mayo Pride March in 2018 with members of his family, holding posters saying, "*I have a right also to respect Christian belief*" and "*I have a right to freely express and practice my religious belief*". He confirmed that he had done so describing it as a "*needed message*".

80. He was then asked about the circumstances in which he came to be suspended from school, committed to prison, and subsequently dismissed, and about the judgment of the High Court (Owens J) in the School's action against him for trespass, *The Board of Management of Wilson's Hospital School v Burke* [2023] IEHC 288. Mr Burke maintained the position that no valid decision has been made to dismiss him and that his suspension arose on foot of his refusal to comply with an unlawful demand by the school principal and was, therefore, unlawful. Insofar as the High Court judgment contained findings of fact which were at odds with his characterisation of what had occurred, Mr Burke contended that this arose because he had been "*barred*" from the trial at the outset and therefore "*one of the main players didn't give evidence*".

81. A letter dated January 2023 from the Student Council of the School, addressed to Mr Burke, was put to him. The context of the letter was that Mr Burke, as he himself made clear, having been released from prison in December, showed up daily at the School, notwithstanding the injunction restraining him from attending there. The letter stated that Mr Burke's presence at the School was a disruption to school life. Mr Burke dismissed the letter as a "*set-up*" and claimed that his experience was that the student body was very supportive of him.

82. Counsel then addressed with Mr Burke his status as a contemnor. Although Mr Burke initially appeared to accept that he was in contempt of a court order, he did not accept that he was viewed as being someone who was in contempt of court orders, and at the conclusion of his evidence he made clear that he didn't see himself as a contemnor. Rather, he said, he was viewed as a teacher who stood on his constitutional rights and asked to be able to abide by them and that he was "*committed to Mountjoy Prison for that reason alone*". When counsel put to him that he was choosing to reside in Mountjoy Prison and that he could purge his contempt and be released at any time, he said the following (Transcript, Day 2, p. 121, line 25):

> A. *No, I can't do that, you see, this is the whole -- this is the whole point, it goes back to the very first day when I said I cannot do that, when I said it to Ms. Niamh McShane, I cannot do that, it's my religious belief. You see, that's a belief I have. God made them male and female. That's a Christian belief I have. It's a conviction I have. It's a good conviction, set down in the First Book of Moses, it's a scripture.*

That is there. It's reasonable. It's a good belief. It's good for society. I fully and wholeheartedly endorse it, believe it. That's what influences me, pervades my life can, my beliefs, my convictions, those good things that I have. They come from God, set down by my Heavenly Father, and I believe them. That's religion. You believe it in your heart and it manifests itself in your actions and your speech. Religion to me is something of the heart and it's truthful. It manifests itself in the life. Christ said: "I am the way, the truth." He said "the truth", "I am the truth."

Q. Okay.

A. And I must tell the truth.

83. Counsel asked Mr Burke about his court appearances, suggesting that they had been marked by "*interruptions, removals and distractions*". Mr Burke did not dispute that but described the courtroom as a "*stressful, high stakes, adversarial setting*" and said it would be illogical to extrapolate, from his behaviour in a courtroom, his behaviour on a day-to-day basis with the ordinary people with whom he engages.

84. Mr Burke rejected the proposition put to him by counsel that in light of his non-compliance with court orders, his misbehaviour in court, and the rulings, judgments and directions which describe his conduct, the Article was incapable of injuring his reputation.

85. Counsel asked Mr Burke about his contention that "millions" had read the Article. Mr Burke explained this figure by reference to the defendant's own advertising which referred to the Sunday Independent as having almost 700,000 readers for every edition, and the website as having 10 million users a month.

Martina Burke

86. Mrs Burke gave evidence to confirm the contents of an affidavit she had affirmed in the context of the plaintiff's application for an injunction and, in particular, confirming her engagement with the fourth defendant and with the Irish Prison Service described above.

87. Mrs Burke described herself as having been "*deeply embarrassed*" and "*humiliated*" by the Article. In cross-examination, she said that she didn't accept that her son was in contempt of court.

Alan English

88. The fourth and fifth defendants gave evidence on behalf of the defendants. In his direct evidence, Mr English gave details of his background, including his employment background. He confirmed that he has been editor of the Sunday Independent for a little over four years. He described the publication. He was asked when he first became aware of the plaintiff, and Mr English described a number of instances where the plaintiff or members of his family had come to his attention. He said that although he was aware of Mr Burke, he wasn't someone of significant renown until his dispute with the School came into the public domain.

89. As a weekly newspaper, he said, the Sunday Independent had not been the first to cover the story concerning Mr Burke's dispute with the school, but there was a "*fascination*" over the circumstances of that dispute and Mr Burke's suspension, especially given the subject matter of the dispute. He said that the Sunday Independent had covered the issue of gender identity extensively over that summer as it was a "*big talking point*".

90. He said that he sent the fifth defendant, one of the newspaper's senior journalists, to Mayo to test the waters and get a sense of what the local reaction was. This led to the article entitled *'They're not liked here'* referred to above, which he described as a "*very good journalistic job*". He said that by that stage Mr Burke had been imprisoned for refusing to comply with a court order to stay away from the School and that he was now a figure of major national interest and had been, since then, one of the most talked-about people in the country. Asked why he thought that was, he said that he thought there was a fascination with Mr Burke and that he thought (Transcript, Day 3, page 85, line 4):

> "*[A] lot of people find it difficult to understand why he remains in prison, difficult to understand why he chose to protest against the decision to exclude him from the school by standing outside the school for a sustained period of time and then the difficulty of*

understanding why he will not purge his contempt and secure his release from Mountjoy Prison."

91. He said that the situation was highly unusual and that he had never come across anything like it in his 35 years as a journalist. He outlined some details of his newspaper's coverage of Mr Burke, which included a story based on the letter from the Student Council of the School referred to above. He then described how the Article the subject of these proceedings came to be published.

92. He said that, as usual, the newspaper's staff had a news conference on both Tuesday and Wednesday morning of the week in which the Article was published, at which stories for possible inclusion in that Sunday's edition of the paper were discussed. He said that this story was not raised at either of those conferences, but was brought to his attention at the next news conference on Thursday afternoon at 3 pm. It was brought to his attention by the head of news. He was told that Ms Bracken had a potential story about how Mr Burke was getting on in prison and some difficulties he was having. He said that a story about Mr Burke's engagement with the justice system would have been of "*news value*" and "*of news interest and within the public interest*".

93. Decisions were then made on Friday about what stories would go where in the newspaper and how much space and prominence would be devoted to them. He described the process by which a story appears in the print and online editions of the newspaper. He said that it would have been filed by Ms Bracken and first reviewed by the news editor. It would also have been worked on by a sub-editor, who would, amongst other things, write the headline, designed to reflect the story but also capture the reader's attention. He said that there was a duty lawyer who reviewed all the content of the news section on Saturday and a legal department on hand in case any issues were raised. He said that there were no issues raised about this article. He said that he had final sign-off on all articles. He had no concerns with this article. He said that he had a huge amount of trust in Ms Bracken, whom he described as a "*reporter of long standing, a reporter of the utmost integrity"*.

94. He then described his engagement with Mrs Burke. He explained that he received her first email on Monday, 10 October 2022, his day off, and was considering whether to 'phone

her that day when he received her second email. He contacted his legal manager and they formulated a response which was sent that day.

95. He then described the commencement of the proceedings and, in very general terms, the investigation into the complaint about the Article. This took, he said, a number of weeks. He said it quickly became apparent that there were some inaccuracies in the Article, but he wanted to investigate further other aspects of it, in particular the claim that Mr Burke had been annoying other prisoners. Ultimately, they decided to publish an apology and correction on 1 January 2023. The apology was published on page 4 of the news section of the newspaper which he described as the first inside news page, as pages 2 and 3 are advertisements. It was also placed on the home page of the website and remained there for 24 hours and where it is still available.

96. Mr English also gave evidence of the newspaper's circulation figures. He said that the print circulation of the 9 October 2022 edition of the Sunday Independent was approximately 113,000, together with about 14,000 downloads of the e-paper edition of the newspaper. In respect of independent.ie, he said that the Article was one of the premium articles on the website, meaning the full article was only available to subscribers. Non-subscribers could see the headline and first two paragraphs of the Article, a so-called 'gate view'. There were approximately 120,000 views of the Article, of which about 100,000 were gate views.

97. He said that in deciding which articles were premium and which were not a balance had to be struck between generating traffic to the website and encouraging subscriptions. He said that the predominant reason for making an article premium, or restricting access to non-subscribers, was the hope that people would subscribe to see that article. He said that just four people had subscribed in order to see the Article. He said that the newspaper calculated its revenue from the Article, from free and subscriber access, to be €750.

98. He also explained the readership figures for the Sunday Independent and the advertising claim that it had almost 700,000 readers per issue. He distinguished between sales and readership, noting that polling data available to all publishers provided evidence of how many readers there were for each copy of the newspaper.

99. He confirmed that the first defendant was a member of the Press Council and that the Sunday Independent therefore abides by the Press Council's Code of Practice.

Cross-examination of Mr English

100. Mr English was challenged by Mr Burke on the figures he provided for the number of views of the Article on the website and the figure of 10 million users per month. He denied that there was any discrepancy and explained that 10 million users per month meant 10 million individual visits to the website, and that most visits involved a single article being viewed.

101. He was questioned about the 11 September 2022 article headlined '*They're not liked here*'. He rejected Mr Burke's descriptions of the article as "*gutter journalism*", "*a malicious vile attack on my family using anonymous sources we don't even know exist*", "*an insult to the people of Castlebar*", and "*an abuse of your media platform*".

102. He was then questioned about the Article and whether he accepted that it wasn't true. Mr English accepted that there were inaccuracies in the Article, specifically that Mr Burke was not moved for his own safety because he was annoying other prisoners. But in respect of whether Mr Burke was repeatedly expressing his religious beliefs and views to other prisoners, he merely said that he had "*no evidence that it is true*".

103. When asked was there any urgency about publishing the Article, Mr English said that they were not in the habit of sitting on stories since they might not survive "*in a news sense*" until the following week. He confirmed that the defendants had not sought to contact the plaintiff or his family prior to publishing the Article. He said that they were not in a position to contact Mr Burke because he was in prison. It was put to him that there was a delay in removing the Article from the website once it became clear that there were inaccuracies in it. Mr English said that it took some time to investigate matters. It was also suggested that there was a delay in publishing the correction and apology, which Mr English attributed to the fact that Mr Burke had instituted legal proceedings.

104. Mr Burke then put to Mr English that the apology was inadequate and left open the possibility that although Mr Burke hadn't been moved because he was annoying other

prisoners by expressing his religious views, he had, nonetheless, been annoying them in that way. Mr English denied that this was so.

Ali Bracken

105. Ms Bracken gave evidence that she had been a journalist for approximately 20 years and that she has been with the Sunday Independent for just under four years. She said that she first became aware of the plaintiff in September 2022 when he was suspended from the School and then imprisoned for breaching a court order to stay away from the School.

106. She said that she has written eight or nine articles about Mr Burke. She described the circumstances in which she wrote the first of them, the 11 September 2022 article. She said that it was decided with her editors that she would go to Castlebar and get a sense of how the community in Castlebar felt about Mr Burke. She said she went to his father's shop and spoke to his father, as reflected in that article. She rang his mother and left a voicemail, and called to the family home where she spoke briefly with his brother. She said that she tried to speak to local people and though most did not want to speak to her about the plaintiff or his family, two did speak to her, but not on the record. She described it as "*offensive*", and an "*affront*" to have that article described as "*tinkerish*" and "*trampish*".

107. She confirmed that she had written the story about the letter from the Student Council, having been provided with a copy of it by a confidential source.

108. In relation to the Article the subject of these proceedings, she said that she contacted a confidential source to find out how Mr Burke was getting on in prison. She said that when a high-profile figure is imprisoned, they remain of interest to the public and their behaviour behind bars is of interest to the public. She said that she then "*verified*" the information the first source had provided with a second source. She also checked with the Irish Prison Service but they didn't provide a comment. She explained that she didn't seek comment from Mr Burke because he was in prison and didn't contact his family because they wouldn't have been in a position to comment. She confirmed that the information in the Article accurately represented what she was told by her confidential sources. Her source subsequently confirmed to her that there were inaccuracies in what she had been told.

Cross-examination of Ms Bracken

109. Mr Burke questioned Ms Bracken about the 11 September 2022 article. She rejected his characterisation of the article as a "*hit job*".

110. In relation to the allegedly defamatory article, Ms Bracken accepted that the Article contained an error in relation to Mr Burke being moved, but did not accept that he had not been moved for his own safety or that he had not been annoying other prisoners by repeatedly expressing his religious views and beliefs to his fellow prisoners. She said that was the information which she had got from her confidential source which she accepted in good faith.

Arguments of the parties

111. Mr Burke argues that the Article, or at least the first seven paragraphs of it, were untrue in their entirety. He argues that the words used in their natural and ordinary meaning were defamatory and have damaged his reputation. He further argues that the defendants were reckless in publishing the Article and delayed addressing the inaccuracies in the Article and apologising for and correcting errors and he should therefore be entitled to punitive or aggravated damages.

112. He argues that the defendants are not entitled to rely on the defence of fair and reasonable publication provided for in section 26 of the 2009 Act, having regard to the non-exhaustive list of criteria in section 26(2)(a)-(h) and because this was not a 'public interest' story.

113. The defendants do not plead the truth of the Article and did not call any evidence in support of the truth of any of its contents. They argue, however, for a nesting series of propositions. First, they argue that the words used in the Article, in their natural and ordinary meaning are not capable of bearing a defamatory meaning. Second, they argue that even if they are capable of bearing a defamatory meaning, the Article does not defame the plaintiff, *i.e.* tend to injure his reputation in the eyes of reasonable members of society, because, in effect, the plaintiff had no reputation to protect, or at least no reputation which this article tended to injure. Third, they contend that they are entitled to rely on the defence of fair and

reasonable publication in section 26 of the 2009 Act. The defendants also pleaded the defence of qualified privilege, and their written submissions, dated 24 April 2024 included submissions in support of this plea. However, it was made clear on the last day of the trial that the defendants no longer sought to rely on that defence. Finally, the defendants contend that in the event that the court concluded that the plaintiff was defamed and that the defence of fair and reasonable publication was not available to them, the plaintiff could only be entitled to nominal damages.

Issues

114. In light of the evidence adduced and the submissions advanced, it seems to me that the following are the issues which need to be addressed:

i. What is the meaning of the words used in the Article?
ii. Is that meaning capable of being defamatory?
iii. If so, did the Article tend to injure the plaintiff's reputation? As part of that consideration, it is necessary to consider what the plaintiff's reputation was at the time the Article was published?
iv. If the Article did tend to injure the Plaintiff's reputation, is the defence of fair and reasonable publication available to the defendants?
v. If not, what is the appropriate level of damages which should be awarded to the plaintiff?

115. Before considering those issues, it is appropriate to set out my conclusions on the evidence necessary to address them.

Conclusions on evidence

116. In fact, as was apparent from the evidence heard over the four days of the trial, there was little dispute on the facts, rather the disputes between the parties were as to how those facts should be interpreted.

117. Although no evidence was called from the prison authorities to explain the reason that Mr Burke was moved, there is, in fact, no dispute between the parties but that he was moved

for operational reasons, whatever they may be, and that it did not relate to his having annoyed other prisoners.

118. Although the defendants' witnesses did not concede that Mr Burke had not been annoying other prisoners by repeatedly expressing his religious views, Mr Burke's unchallenged evidence was that this was not the case. I accept his evidence in this regard, and accept that he had a good relationship with other prisoners.

119. At the time that the Article was published, the story about Mr Burke's suspension from school and his imprisonment for failing to comply with a court order by continuing to attend at the School, notwithstanding his suspension and the court order, had gained widespread attention in the media and was of significant interest to the public.

120. The Article was published on 9 October 2022 in the paper edition and online at 2.30 am that morning. It was widely circulated and amongst the most read stories on independent.ie for in excess of 24 hours. I accept the readership figures for the Article provided by Mr English which are consistent with the newspaper's advertised readership.

121. I accept that a number of people commented online on the Article in a variety of fora. There was no evidence to indicate whether the number of comments of which there was evidence should be regarded as significant, though I note that Mr Burke referred to a "*Twitter storm*". In light of the readership figures provided by Mr English, I conclude that the Article was published widely and attracted a significant amount of online comment.

122. As I indicated during the trial, I permitted the plaintiff to introduce copies or screenshots of online commentary on the Article as evidence of the fact that those comments had been posted. Most of the screenshots submitted by the plaintiff were of tweets from the website formerly known as Twitter, and the plaintiff placed emphasis on the number of 'likes' a number of the tweets critical of or mocking him had received. In circumstances where no person who posted a comment was called to give evidence, the comments, as with the newspaper articles on which the defendants sought to rely, could never be evidence of the truth of their contents.

123. The Article was removed from the independent.ie website on 12 October 2022, as confirmed in an email from Mr English to Mrs Burke at 11.04 am that morning. I do not consider that the defendants delayed unduly in removing the Article. The defendants had published an article based on information provided to them by a previously reliable source. That information had been checked with a second source. In the circumstances, the newspaper was entitled to take a short period of time to check whether, and to what extent, there were inaccuracies. Although Mrs Burke's letters said that she had been told by a person in the Press Office of the Irish Prison Service that there were "*no issues with Mr Burke*", the email from the same person dated 11 October 2022 only said that there were no issues other than operational issues considered with respect to his move. The defendant's decision to remove the Article the following day on a without prejudice basis was not unduly delayed.

124. There is no evidence of malice or recklessness by the defendants in deciding to publish the Article. The publication of an article with the headline '*They're not liked around here*' on 11 September 2022 is not sufficient to establish malice on the part of the defendants, an allegation which both of the defendants' witnesses strenuously denied. I might pause to say that the decision to use a quote from an anonymous source which was disparaging of the Burke family as the headline of the article gave that anonymous voice a platform which was not merited on the basis of Ms Bracken's investigations in Castlebar. There was no basis for concluding from Ms Bracken's evidence that the opinion of the two anonymous sources who were prepared to speak to Ms Bracken should be taken as a fair representation of how the plaintiff's family was perceived in Castlebar.

125. I accept Ms Bracken's evidence that the source for her story had previously been wholly reliable and that she therefore accepted what the source told her in good faith. Notwithstanding her trust in the source, she sought to confirm the story with a second source. The story was reviewed by her line editor and the editor, Mr English. It was reviewed by the newspaper's duty lawyer, and no red flags were raised.

126. Ms Bracken also sought to confirm the story with the Irish Prison Service but received no comment. I accept her explanation as to why she didn't seek to check the story with Mr Burke or his family, but I have to say that I think that was a mistake. Although it might have been unlikely that Mr Burke's family would be in a position to confirm a story about how Mr Burke was managing in prison – a story which, if true, even Mr Burke might not have

been able to confirm – but they were never given an opportunity to do so, despite the fact that Ms Bracken had a mobile telephone number for Mrs Burke. However, this falls far short of establishing recklessness, still less malice on the part of the defendants.

127. Although I have concluded that the Article was removed from independent.ie in a timely manner, the apology and correction was unduly delayed in my view. It was not until 22 December 2022 that the defendants made clear that they accepted that there were errors in the Article and proposed wording of an apology and correction. No agreement was reached and the apology was published shortly thereafter. However, no adequate explanation has been provided as to why it took the defendants until late December to offer the apology for having published an article which they admitted contained errors. I do not accept that the fact that there were legal proceedings in being justified the delay of more than two months from the date the Article was published before the defendants made clear to Mr Burke that they admitted those errors and were prepared to offer an apology.

What is the meaning of the words used in the Article?

128. Although I propose addressing each of the issues I have identified in turn, I might observe that it is somewhat artificial to separate out the question of what words mean, whether they are capable of being defamatory and whether they do, in fact, tend to injure a person's reputation. The consideration of each of those issues are intertwined and all are underlain by the consideration of the words in context.

129. Mr Burke pleads that words used carry the following meanings in their natural and ordinary meaning:

a) *The plaintiff's normal pattern of life is to severely annoy others by the expression of his religious views and beliefs;*
b) *The plaintiff is unable to regulate his tendency to share his religious views and beliefs;*
c) *The plaintiff is oblivious to the impact his behaviour has on those around him;*
d) *The plaintiff habitually disregards the right of others to privacy;*
e) *The plaintiff has harassed people;*

f) The plaintiff is reckless and/or irresponsible as to his own safety and to the effect of his actions;

g) The plaintiff's relationship with his fellow prisoners in Mountjoy Prison is extremely poor;

h) The plaintiff is incapable of behaving in a professional manner;

i) The plaintiff is incapable of co-existing peaceably with others;

j) The plaintiff is someone who must be kept in a special environment for his own safety;

k) The plaintiff is responsible for his difficulties his employer;

l) The plaintiff is unfit and/or unsuitable to be employed as a teacher.

130. It is trite to observe that, in determining the meaning of words, context is everything. The context is set out in the Article itself, which concerned a person who was in prison for contempt of court. He was, therefore, necessarily, in a different category from most, if not all, of the other inmates. He was not, as was obvious, in his usual environment, or engaging in his usual activity, as a teacher in a secondary school.

131. Moreover, his imprisonment had followed a dispute with the School which, in his view, arose from the School's insistence that he comply with a direction that would violate his religious beliefs. The High Court had granted an injunction requiring him to stay away from the School while he remained on administrative leave, but he had continued attending at the School and because of this breach of a court order he had been jailed for contempt. All of this is set out in the portions of the Article which Mr Burke does not challenge and which he described as "*fluff*" in his evidence.

132. It was also stated in the Article that Mr Burke had said on a number of occasions that he would not purge his contempt by giving an undertaking to abide by the injunction and is quoted as having said in court that that would be "*giving in to something wrong*". Mr Burke makes no complaint about these portions of the Articles.

133. The approach that a court should take to determining the meaning of words is described in *McGarth v Independent Newspapers* [2004] 2 IR 425. The High Court (Gilligan J) was dealing with a preliminary application to determine whether the words used in a newspaper article were capable of bearing the defamatory meaning alleged (at p. 433):

"*At the trial it is for the judge to decide as a matter of law whether the words are capable of bearing a defamatory meaning on the principle that it is for the court to say whether the publication is fairly capable of a construction which would make it libellous and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over elaborate analysis of the article because the ordinary reader would not analyse the article in the same manner as a lawyer or accountant would analyse documents or accounts. In deciding the issue I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly, the court should not take a too literal approach to its task.*"

134. Mr Burke refers in his submissions to the Supreme Court decision in *Leech v Independent Newspapers* [2014] IESC 78; [2015] 2 IR 178 and the description by McKechnie J regarding what is encompassed by the ordinary and natural meaning of words (at p. 189):

"***[26]*** *Words generally are construed in their ordinary and natural meaning, that is, as understood by reasonable and fair-minded people possessed of ordinary general knowledge and experienced in worldly affairs. Gatley,* Libel and Slander *(10th ed., Sweet & Maxwell, 2007) states, at para. 3.15, that "[t]he natural and ordinary meaning may also include implications or interferences", and the author continues at para. 3.16:-*

> *"Ordinary meaning and implications.*
>
> *'What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of words. But that expression is rather misleading in that it conceals the fact that there are two elements in it.*

Sometimes it is not necessary to go beyond the words themselves, as where the claimant has been called a thief and a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.""

135. I have also regard to the principles identified by the Court of Appeal (Irvine J, as she then was) in *Gilchrist v Sunday Newspapers* [2017] IECA 191; [2017] 2 IR 714.

136. We turn then to the portions of the Article which the plaintiff says *do* have a defamatory meaning. In my view, the ordinary and natural meaning of the words is no more than the following: that Mr Burke repeatedly expressed his religious views to fellow prisoners and that the expression of his religious views was normal behaviour for him. Further that the effect of his expression of those views on 'typical' prisoners, *i.e.* those in the general population of the prison and who were not regarded as 'model' prisoners, was to annoy them to the point that they might threaten violence to him. Further again, that the prison authorities were aware of this and thought that placing him with model prisoners would avoid any risk to him.

137. In his evidence, Mr Burke suggested that it would be illogical to extrapolate from his prior disruptive behaviour in court that that is how he would behave in a day-to-day setting. While I accept that the courtroom can be a stressful environment at the best of times, one might have thought that it was an environment in which a person would want to make every effort to regulate their conduct. Certainly, as the Supreme Court made clear in *Walsh v Minister for Justice* [2019] IESC 15, on which Mr Burke relies, the stressful nature of court proceedings is not an excuse for misconduct. But Mr Burke's argument that what was "*normal conduct*" for him shouldn't be assessed by reference to his conduct in court because it is an exceptional environment, must apply with greater force to a suggestion that Mr Burke's "*normal pattern of life*" should be assessed by reference to how he conducted themselves in what, for him, must have been a wholly alien environment.

138. Therefore, Mr Burke's pleading that the words meant that his "*normal pattern of life is to severely annoy others by the expression of his religious views and beliefs"* is simply not borne out by the words in context. There was nothing normal about Mr Burke's pattern of

life the subject of the Article. Similarly, the words do not in any sense suggest that he is unsuitable to be employed as a teacher or was responsible for his difficulties with his employer, or that he was incapable of co-existing peaceably with others.

139. Other meanings that Mr Burke attributes to the words exaggerate the ordinary and natural meaning of those words. When being cross-examined, he characterised the Article thus (Transcript, Day 2, p. 42, line 25):

> *"[Y]ou come out say I was a lunatic, I was running around the prison, I was button-holing people, I was putting them up against the wall, I was acting like a maniac, and the prison authorities had to intervene to try and save my life and avoid me getting scars."*

140. The words used in the Article simply do not paint such a colourful picture in the mind's eye. Rather, the meaning conveyed is of a person expressing their religious beliefs in a prison setting in a manner which had the effect of annoying some prisoners sufficiently seriously that they might have been violent to Mr Burke, or that the prison authorities were concerned that this was so. On the other hand, the defendants characterise the words as meaning merely that Mr Burke was annoying, but I agree with Mr Burke, that the ordinary meaning of the words is not merely that he had been annoying but that he had been sufficiently annoying to prompt the prison authorities to be concerned that a prisoner or prisoners would be violent towards him.

141. The plaintiff pleads that the Article means that he was oblivious to the impact his behaviour had on those around him. He also says that it means he habitually disregarded the privacy of others or harassed them. Leaving aside that I do not see that the Article as being capable of being interpreted as suggesting how the plaintiff "*habitually*" behaves for the reasons stated above, it seems to me that the plaintiff is arguing for two different meanings from the same words. It is well settled that words alleged to be defamatory must, for the purpose of a defamation action, be regarded as having a single meaning, even though the same words may have been interpreted differently by different people. As stated in Gatley (at 3-016):

"*For the purpose of the law of defamation, when ascertaining the ordinary, reasonable reader's understanding, the words have only a single, "right" meaning. Where the relevant tribunal of fact was the jury, this did not mean that the jury had to ignore the undoubted fact in many cases it is likely (or even obvious) that different readers will have understood the publication in different ways, some defamatory, others not.*"

142. The purpose of the single meaning rule is explained by Hogan J in *Speedie v Sunday Newspapers Ltd* [2017] IECA 15 as follows (at para. 14):

"*The real object of the single meaning rule is, accordingly, to promote certainty so far as the parties are concerned by fixing on one, single objectively determined meaning to the relevant words of a particular article and thereby to avoid the possibility of inconsistent verdicts.*"

143. Of the two meanings suggested by Mr Burke, the plea regarding his being "oblivious" is much the more plausible, though overstated. The words used do carry the implication that the plaintiff may have failed to realise that the repeated expression of his religious views was annoying his other prisoners or that he gave no consideration to or did not care whether they were annoyed, but not that he was deliberately harassing them, or invading their privacy. There is nothing in the words used in the Article which suggests that Mr Burke was aware or made aware of the impact of his alleged behaviour. The plea that the words mean that he was someone who was someone who was "*reckless and/or irresponsible as to his own safety*" is also, therefore, not made out.

144. Insofar as he pleads that the words meant that he is unable to regulate his tendency to share his religious views, that is not suggested by the Article, although it clearly does suggest that he does *have* such a tendency.

145. The suggestions that the Article meant that Mr Burke had to be kept in a "*special environment for his own safety*" is wholly exaggerated. In his evidence, Mr Burke focussed on the suggestion that he was detained with "model prisoners", which he denied. But the ordinary meaning of the words were simply that he was detained in a particular part of the prison, suitable for someone like him, *i.e.* a person imprisoned for contempt of court. Indeed, the reference in the Article to "*other inmates who are considered model prisoners*" carries

the implication that Mr Burke was a model prisoner. The Article also says that where he had been moved to was safer for "*someone like Enoch Burke*" and that there was a different calibre of prisoner there. But the natural and ordinary meaning of "*someone like Enoch Burke*" in that context is simply that he was someone who was in prison for contempt of court and someone who was not, therefore, in the same position as other prisoners.

146. Of the various meanings pleaded by Mr Burke, the plea that the Article carried the meaning that his relationship with his fellow prisoners, or at least a cohort of them, was extremely poor is the only one that is actually conveyed by the words in the Article having regard to their natural and ordinary meaning of the Article.

147. Finally, complaint is made about the allegation that members of the plaintiff's family staged a protest outside Mountjoy Prison. There is no ambiguity about the meaning of that statement, but it is impossible to see how it could be regarded as defamatory of the plaintiff's family, still less of the plaintiff. It is incapable of bearing a defamatory meaning, and none is, in fact, asserted.

Is that capable of being a defamatory meaning?

148. If the foregoing describes the ordinary and natural meaning of the words used in the Article, the next issue which arises is whether words with that meaning could *ever* be defamatory. A defamatory statement is defined in section 2 of the 2009 Act as:

> "*... a statement that tends to injure a person's reputation in the eyes of reasonable members of society, and "defamatory" shall be construed accordingly.*"

149. The plaintiff references *Berkoff v Burchill and Anor* [1996] EWCA Civ. 564 in which Neill LJ considered the definition of "defamatory". Having considered a wide variety of sources he said that:

> "*It will be seen from this collection of definitions that words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade or business or professional activity, if they hold him up to contempt scorn or ridicule or tend to exclude him from society. On the other*

hand insults which do not diminish a man's standing among other people do not found an action for libel or slander. The exact borderline may often be difficult to define."

150. The threshold, per the 2009 Act, is the tendency of the statement to "injure". The first aspect of what is said about Mr Burke is that he was repeatedly expressing his religious views and beliefs. It is difficult to imagine how that could ever be regarded as tending to injure a reputation. Freedom of expression and freedom of religion are constitutionally protected rights, and to suggest, without more, that someone was expressing their religious views could never, in my view, be defamatory. It is conceivable that attributing views to a person which were inconsistent with their actual beliefs could, depending on context, be capable of being defamatory, though even in those circumstances, something out of the ordinary would be required (see, for instance, *Ecclestone v Telegraph Media Group* [2009] EWHC 2779, in which a statement that the plaintiff had no time for vegetarianism was determined not to be capable of being defamatory). That doesn't arise here.

151. Nor could a statement that a person expressed their religious views, notwithstanding that the expression of those views might not be welcome or might be annoying to those to whom they were communicated, ordinarily be capable of being defamatory. On one view, continuing to express your principles to an audience which may not be receptive and in an unfamiliar environment simply illustrates that one is true to those principles and could not be regarded as something capable of injuring a person's reputation.

152. At its height, the Article suggests that the plaintiff acted in an ill-advised, careless or thoughtless way in repeatedly expressing his religious beliefs when his doing so was becoming very annoying to some fellow prisoners. In this regard, it is the use of the word "*repeatedly*" which carries the sting of the Article. But the suggestion that a person is ill-advised or careless in where and when they expressed their religious views is not, without more, capable of injuring a person's reputation. This applies all the more so when one considers the group of persons whom it was alleged that the plaintiff had annoyed, that is, prisoners in the general population in Mountjoy Prison. That is not to disparage any of those prisoners, but to take into account the situation in which they live in prison. In my view, a reasonable member of society would consider that in any confined community and in particular in a community of people confined against their will for a variety of reasons, a person's behaviour would have to reach a much lower threshold of unsociability to

potentially provoke a hostile reaction than it would among people with ordinary freedoms. Further, a reasonable member of society would expect that a person unused to a prison environment, a person who, unusually, was imprisoned for civil contempt, might be more likely to encounter difficulties navigating the prison environment than others. Or, put otherwise, a reasonable member of society's opinion of such a person would not be diminished because it was said that that person had failed to adapt well to that environment. The fact that, according to his evidence, the plaintiff *had* adapted well to the environment does not render the words defamatory.

153. Mr Burke contends that the suggestion that he was detained with model prisoners is defamatory. This is difficult to understand. I fail to see how any person could consider his reputation injured by the fact that it was, incorrectly, stated that this was so. Similarly, the fact that he was stated to be in a safer environment for someone like him could not serve to damage his reputation.

154. I have considered the evidence advanced on Mr Burke's behalf – his own and his mother's – and in particular, his objection to the Article and his belief that it was defamatory. I have addressed above, the evidential status of the online commentary on which he sought to rely, but even if it were admissible as evidence of the truth of its contents, such online commentary could never be a proxy for the view of the reasonable member of society, the benchmark set by the 2009 Act, and could not serve to establish that the published Article tended to injure Mr Burke's reputation. In my view, the natural and ordinary meaning of the words were not capable of being defamatory.

155. Having so concluded, it is, strictly speaking, unnecessary for me to consider the other issues raised. However, for completeness, and lest I am wrong in my conclusions, for instance, that the words do not mean that Mr Burke harassed his fellow prisoners, or that accusing him of being unaware of or indifferent to the reaction of those to whom he chose to express his religious views is not capable of being defamatory, I propose to consider the question of whether the Article tended to injure Mr Burke's reputation and the defendants' reliance on the defence of fair and reasonable publication.

Did the Article tend to injure Mr Burke's reputation?

156. Even if I accepted that the Article had some of the exaggerated meanings contended for by Mr Burke, and that the meanings contended for were capable of being defamatory, in light of Mr Burke's reputation at the time that the Article was published, it is manifestly the case that the Article did not, and could not have, injured his reputation.

157. As stated in Cox and McCullough (para 11-160):

> "*The law is not prepared to compensate a person for a publication that would have injured an objectively good reputation in circumstances where that person does not or should not actually possess such a good reputation. As Lord Bingham said in* Grobbelaar v News Group Newspapers *([2002] 1 WLR 3024:*
>
> > *The tort of defamation protects those whose reputations have been unlawfully injured. It offers little or no protection to those who have, or deserve to have, no reputation deserving of legal protection.*"

158. What was the Plaintiff's reputation at the time that the Article was published? I am mindful of the rationale for the rule in *Scott v Sampson*, albeit that, as set out above, greater flexibility is provided for in section 31(6) of the 2009 Act. In assessing whether a person has a blemished reputation, only general evidence of a 'bad' reputation was admissible rather than evidence of specific misconduct. The rule avoids mini trials on disputed issues, which, in this case, might include matters such as the merits of his dispute with the School. As it happens, the School's entitlement to suspend the plaintiff has been the subject of a final determination of the High Court, which has not been appealed. But that judgment came after the Article was written. Although the School's entitlement to suspend Mr Burke was confirmed by the judgment, that was not yet determined at the time that the Article was published and therefore could not have affected his reputation at the time of publication, though it could be relevant to the assessment of damages.

159. In order to avoid any risk of having regard to matters which are not relevant to the question of whether the Article tended to injure his reputation, it is possible to have regard only to matters which a reasonable member of society would have known at the time that

the Article was published and which the plaintiff does not dispute. In fact, much of what is relevant is contained within the Article itself.

160. First, as stated in the Article, Mr Burke had clashed with the school authorities over an issue which Mr Burke claimed would violate his religious beliefs. Second, he was suspended by the School on full pay. Third, he continued to attend the School notwithstanding that suspension, with the result that the School applied for, and obtained, an interim injunction to restrain him from attending the School.

161. Pausing here, even if that were all that was known about Mr Burke, these matters would have had a significant bearing on a reasonable member of society's view of Mr Burke. Even if a reasonable member of society accepted the plaintiff's position that his suspension was unlawful and in breach of his constitutional rights, or accepted that there was a legitimate dispute about that, it couldn't have been doubted that Mr Burke had strongly held religious beliefs and was so determined in his expression and exercise of them that it had led to his suspension from school and the School considering it necessary to obtain a High Court injunction. It is difficult to credit Mr Burke's complaint that an article wrongly claiming that he had repeatedly expressed religious views to his fellow prisoners would have had any bearing on his reputation at all. The evidence at the trial, for instance regarding his attendance at the Mayo Pride March in 2018 or outside the Oireachtas in 2011, clearly established that Mr Burke was prepared to take steps to give public expression to his religious views.

162. But that is to ignore the most significant fact, well known to any reasonable member of society at the time of the Article and which, again, is not disputed by Mr Burke. This is that he did not comply with the High Court order to stay away from the School, had been imprisoned for contempt and had not purged his contempt. This wholly undermines any suggestion by Mr Burke that his reputation has been damaged by the Article. It must be the case that any person's reputation is diminished in the eyes of a reasonable member of society if they simply refuse to comply with a Court order. In a democratic state, operating in accordance with the rule of law, it is simply not open to anyone to decide with which orders of the court they will comply. If a person is the subject of a court order and considers that it was wrongly made, on any ground, then the remedy is to appeal that order, not to simply ignore it.

163. Moreover, as the Article correctly records, the injunction required Mr Burke to stay away from the School pending the determination of a disciplinary process. That disciplinary process, which has still not concluded, will afford Mr Burke an opportunity to make his case and to argue, as he contends, that the School violated his constitutional right to religious freedom by making the 'demand' of him that they did. But, as has been made clear in earlier decisions of this Court (see, for instance, *Board of Management of Wilson's Hospital v Burke* [2022] IEHC 717), the injunctions granted in favour of the School made no such demand of Mr Burke and did not require him to comply with the School's 'demand'. The fact that Mr Burke elides the distinction between his dispute with the School and his compliance with court orders does not mean that there was no such difference or that a reasonable member of society would not, in their consideration of Mr Burke's reputation, have had regard to such a distinction.

164. However, Mr Burke chose to interpret the court order as having a bearing on his religious beliefs which, in turn, he chose to treat as a justification for ignoring it. To put it at its most neutral, a reasonable member of society could not, considering those facts, have had a view of Mr Burke's reputation which was capable of being injured by an incorrect allegation that he had been speaking excessively about religion following his imprisonment, which he claimed was for refusing to compromise his religious beliefs. He had behaved and was continuing to behave in a way which significantly adversely affected his reputation. The suggestion that he severely annoyed his fellow prisoners by the repeated expression of his religious beliefs is, in those circumstances, a whisper in the hurricane of noise which his actions in September 2022 created.

165. For clarity, I do not suggest that, because Mr Burke had been found to be in contempt of court and committed to prison, nothing could be said about him that is defamatory. The case law is clear: even a blemished reputation can be injured (see *McDonagh v Sunday Newspapers* [2017] IESC 59; [2018] 2 IR 79). However, where the allegedly defamatory statement is not inconsistent with the person's actual reputation, indeed, is very much less serious than the matters which give rise to the plaintiff's actual reputation, then in my view, no injury to reputation has occurred.

166. Had I concluded that the Article was capable of being defamatory, it might have been necessary to consider whether my conclusions under this heading went to the question of damages only, or whether it meant that his claim had not been made out at all. Both would result in the same terminus, in that, if viewed as a question of mitigation of damages, I would have assessed the damages at zero.

167. Although the case law seems to suggest that a blemished reputation goes to the question of mitigation of damages only, it seems to me that where the conclusion is that no damage to reputation has occurred at all, then the appropriate conclusion is that there has been no defamation and to dismiss the claim unless some other form of relief was appropriate. In this case, the only relief sought other than damages is for a Correction Order pursuant to section 30. Since the defendants have already published an adequate correction and apology, the necessity for such an order doesn't arise and I would, therefore, have dismissed the action.

168. As noted above, it has not been necessary to consider events post-dating the publication of the Article for the purpose of determining whether Mr Burke had been defamed. It is clear, however, that Mr Burke's subsequent conduct in remaining in contempt of court, and in disrupting court proceedings has only served to further damage his reputation and thus further undermine any suggestion that his reputation has been injured by the Article.

Fair and reasonable publication

169. Section 26 of the 2009 Act provides a defence to a claim regarding defamatory publication, the defence of fair and reasonable publication:

> *(1) It shall be a defence (to be known, and in this section referred to, as the " defence of fair and reasonable publication ") to a defamation action for the defendant to prove that—*
>
> *(a) the statement in respect of which the action was brought was published—*
>
> *(i) in good faith, and*
> *(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,*

(b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and
(c) in all of the circumstances of the case, it was fair and reasonable to publish the statement.

170. Subsection (2) sets out a list of ten factors to which regard may be had in determining whether publication was "fair and reasonable".

171. The essential features of the defence are that the statement was in the course of or for the purpose of a discussion "*of public interest*", which discussion was "*for the public benefit*". Even if a statement is published in good faith and, having regard to the care taken to ensure its accuracy, it was fair and reasonable to publish, if the subject matter of the statement is not a matter of public interest and for the public benefit, the defence is not available. Neither "public interest" nor "public benefit" are defined in the Act. It is clear, however, that what is in the public interest and for the public benefit does not encompass any subject in which the public might be interested.

172. The purpose of section 26 was described by the High Court (Owens J) in *Desmond v Irish Times* [2024] IEHC . Noting that the statutory intervention arose out of a development in the law on the defence of qualified privilege giving rise to what is termed 'the *Reynolds* defence' (see *Reynolds v Times Newspapers* [2001] 2 AC 127), he stated (at para. 38):

"*The purpose of s.26 of the 2009 Act is to protect responsible journalism or other responsible discussion of matters in the public interest. As was stated by Lord Nicholls in* Bonnick v. Morris *[2003] 1 AC 300 ([2002] UKPC 31) at 309, para. 23: "Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved.*"

173. He describes what is involved in applying section 26(1)(a)(ii):

"*62. Section 26(1)(a)(ii) requires a trial judge to make a value judgment on content within context. In my view this is not a complicated task. It involves an assessment of*

the material published. Concepts such as enlightenment of public opinion or the value bringing prominent issues to public attention are easily understood.

63. It will often be obvious from the content of an article in a newspaper or a television programme that the subject matter has the necessary "public interest" characteristics. These characteristics are central to investigative journalism."

174. In my view, it is, as Owens J suggests, not a complicated task in this case to reject the contention that the Article constituted a statement about a matter of public interest or for the benefit of the public. Although Mr Burke was no doubt a public figure at the time that the Article was published and stories about him were newsworthy, it is difficult to discern any public interest discussion that this Article could be said to be furthering or any public benefit which the Article sought to deliver. The defendants' suggestion that the Article was in the public interest because it was about the Mr Burke's engagement with the prison authorities, or about his religious beliefs does not fairly reflect the content and tone of the Article. In the circumstances, had it arisen, I would have concluded that the statutory defence under section 26 was not open to the defendants.

Conclusions

175. The seven paragraphs of the Article about which the plaintiff complains are untrue. That is unfortunate, but the tort of defamation and the 2009 Act do not provide a remedy simply because an untrue statement is made about a person, even if the untrue statement causes that person upset. To obtain a remedy in tort, a plaintiff must establish that the untrue statement tended to injure their reputation.

176. For the reasons explained above, I have concluded that the words used in the Article, in their ordinary and natural meaning, were incapable of injuring the plaintiff's reputation. Even if they had been capable of injuring his reputation, having regard to the plaintiff's actual reputation at the time that the Article was published, the Article did not and could not have injured his reputation.

177. Had the Article been defamatory, the defence under section 26 of the 2009 Act would not have been available to the defendants. Although the public may have been interested in

stories about Mr Burke at the time that the Article was published, there was no "public interest" in the Article and therefore no basis for excusing what might otherwise have been defamatory.

Proposed Order

178. I will make an order dismissing the plaintiff's claim.

179. My provisional view on costs is that the defendants, having been entirely successful in their defence of the claim, are entitled to an award of costs in their favour, to be adjudicated in default of agreement. Should the plaintiff wish to contend for a different form of costs order than that proposed, he should deliver short written submissions within ten days of the date of this judgment. The defendants will have ten days thereafter to respond. A costs ruling will then issue (if required).