

## THE LAW RELATING TO AGGRAVATED DAMAGES

*Abstract: This article provides a comprehensive overview of the law relating to aggravated damages in Irish law, with a particular emphasis on aggravated damages in Irish Tort law. It traces the development and extension of aggravated damages in Ireland from its origins in Conway v Irish National Teachers Organisation and conducts a detailed analysis of the case law post-Conway. The article also reviews more recent decisions and considers the current stance adopted by the courts when faced with a decision whether to award aggravated damages under the three different strands of the Conway criteria. The methodology of assessment together with the compensatory and punitive elements underlying the philosophy of aggravated damages are also examined.*

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### Introduction

Almost thirty years later, *Conway v Irish National Teachers Organisation* remains the seminal ‘go to’ authority on aggravated damages in Irish law.<sup>1</sup> It was through this judgment that aggravated damages were developed past a theoretical concept and into a genuine bona fide category of compensatory damages which Irish judges have regard to when assessing claims.<sup>2</sup> Judicial development of the law on aggravated damages post-*Conway* was initially quite restrained. However, after the Supreme Court decision in *Philp v Ryan* confirmed that such damages could be awarded within negligence claims, the application of aggravated damages has been confirmed in many different areas of tort law.<sup>3</sup> Over the past fifteen years, the courts have shown an increased willingness to consider awarding aggravated damages.

### What are aggravated damages?

Aggravated damages are essentially a sub-category of compensatory damages that ‘occupy a murky middle ground between normal compensatory and exemplary damages’,<sup>4</sup> partly to compensate a plaintiff for any additional hurt or insult caused to them by a defendant’s actions and partly to recognise a defendant’s cavalier attitude.

It is important to differentiate aggravated damages from exemplary damages. Exemplary damages are not compensatory damages. The aim of exemplary damages is predominantly to act as a deterrent and to show a wrongdoer that ‘tort does not pay’.<sup>5</sup> They can be distinguished from aggravated damages on the basis that they are assessed by a court predominantly as a means of making an example or punishing a wrongdoer for their

<sup>1</sup> [1991] 2 IR 305.

<sup>2</sup> For examples of matters in which aggravated damages were awarded previous to their refinement in *Casey*, see, for example, *Whelan v Madigan* [1978] ILRM 136, *Kennedy v Ireland* [1987] IR 587 and *Kennedy v Hearne* [1988] IR 481. There is further commentary on *Whelan v Madigan* at (n 112), *Kennedy v Ireland* at (n 117) and *Kennedy v Hearne* at (n 87) and (n 110).

<sup>3</sup> [2005] 4 IR 241.

<sup>4</sup> Cees Van Dam, *European Tort Law* (2nd edn, Oxford University Press 2013) 358.

<sup>5</sup> *Rookes v Barnard* [1964] 1 All ER 367, [411].

behaviour in the commission of a wrong and for their disregard for a plaintiff's rights.<sup>6</sup> Exemplary damages have been awarded very sparingly and essentially are retained for use to show a court's disapproval of egregious wrongdoing.<sup>7</sup>

### **Conway v Irish National Teachers Organisation<sup>8</sup>**

*Conway* essentially was the catalyst from which the idea of aggravated damages developed past conceptualisation and developed teeth. In *Conway*, a dispute arose between the Board of Management of Drimoleague National School and the defendant, which resulted in strike action by the teachers. The defendant also issued a directive to the other schools in the area that they were not to accept the children of Drimoleague National School. As a result of the industrial action and the subsequent directive, the children of Drimoleague National School were deprived of an education for ten months. The claim against the defendant was therefore for interference with the constitutional right of the children to an education. Barron J in the High Court awarded IR£11,500 compensatory damages, together with IR£1,500 exemplary damages to the plaintiff and all of the seventy children affected by the actions of the defendant. The defendant appealed against the decision to award exemplary damages to the Supreme Court but was unsuccessful. On appeal, Finlay CJ addressed the question of damages:

In respect of damages in tort or for breach of a constitutional right, three headings of damages in Irish law are, in my view, potentially relevant to any particular case. These are:

1. Ordinary compensatory damages being sums calculated to recompense a wrong to a plaintiff for physical injury, mental distress, anxiety, deprivation or inconvenience, or other harmful effects of a wrongful act, and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.
2. Aggravated damages, being compensatory damages, increased by reason of:
  - (a) the manner in which the wrong is committed involving such elements as oppressiveness, arrogance or outrage, or

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<sup>6</sup> The Law Reform Commission, 'Consultation Paper on Aggravated, Exemplary and Restitutionary Damages' (LRC CP 12-1998), at [1.07] and [7.29] emphasises that while the predominant purpose of punitive damages is to punish a wrongdoer, they also serve a function in vindicating a plaintiff's rights and strengthening the law. Further, Murray CJ in *Shortt v An Garda Síochána* [2007] IESC 9, also views exemplary damages as serving a role in vindicating the rights of a plaintiff.

<sup>7</sup> Awards of exemplary damages are largely restrained to egregious breaches of constitutional rights, such as occurred in *Conway* (n 1); or in matters involving malicious prosecutions, see *McIntyre v Lewis* [1991] 1 IR 121 and *Shortt* (n 6). They have also been awarded for breaching the plaintiff's constitutional right to privacy, see *Herrity v Associated Newspapers [Ireland] Ltd* [2008] IEHC 249. They have been utilised in several high profile matters involving serious defamations of character, see, for example, *Crofter Properties Limited v Genport Limited* [2005] IESC 20 and *Nolan v Sunday Newspapers Limited t/a The Sunday World* [2019] IECA 141. They have also been incorporated into statute as a head of damage by s 32 of the Defamation Act 2009.

<sup>8</sup> *Conway* (n 1).

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff up to and including the trial of the action.

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must in many instances be in part recognition of the added hurt or insult to a plaintiff who has been wronged and in part also a recognition of the cavalier or outrageous conduct of the Defendant.

3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the Court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation where it may exist in the same case to compensate the plaintiff for the damage which he or she has suffered, I purposely used the above phrase 'punitive' or 'exemplary' damages because I am forced to the conclusion that notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element.<sup>9</sup>

To this day *Conway* is quoted as the central authority in counsels' submissions and judges' decisions when the question of aggravated damages arises in a matter, despite the fact that aggravated damages were not actually awarded in the case. The second 'head of damages' referred to by Finlay CJ above highlights the concept of assessing aggravated damages as a compensatory damage by reference to three different sub-categories, which will be referred to hereunder as '*Conway* Categories 2(a), 2(b) and 2(c)'.

### **Conway Category 2(a): the manner in which the wrong was committed involving such elements as oppressiveness, arrogance or outrage**

The courts have made several awards of aggravated damages under this heading for deliberate wrongdoing of a serious nature.

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<sup>9</sup> *ibid* 317.

## Deliberate wrongdoing

In *Todd v Cincelli*,<sup>10</sup> damage was caused to the plaintiffs' property by demolition works carried out by the defendants to an adjoining premises. The demolition of the adjoining property had been carried out by the defendants without warning and in the face of prior representations by the defendants that there would be no such demolition. Further, the defendants had no legal entitlement to carry out the demolition and the defendants were aware of this before works commenced. Kelly J awarded damages of IR£154,300.<sup>11</sup> He also held that the plaintiffs were 'entitled to a modest sum by way of aggravated damages in recognition of the added hurt or insult to them as a result of the conduct of the defendants', and awarded an additional IR£7,500 in aggravated damages.

In *Shortt v Commissioner of an Garda Síochána*,<sup>12</sup> Hardiman J noted that the commission of the wrong and the subsequent conduct of the defendants 'ticked all the boxes' of the *Conway* criteria.<sup>13</sup> In this case, members of the Garda Síochána deliberately concocted false evidence to secure a conviction against the plaintiff. The plaintiff was imprisoned for three years, which caused him significant reputational and financial damage. His health also suffered as a result. To compound his hardships, he had been offered temporary release if he were to admit his guilt. He was awarded total damages of €1,923,871, to include an award of €50,000 in exemplary damages by Finnegan J in the High Court.<sup>14</sup> However, he was not awarded aggravated damages as Finnegan J was concerned about affording double compensation. He appealed on the grounds that the awards made under each head of damage were inadequate and on the basis that he should have been awarded aggravated damages. On appeal, the Supreme Court awarded a total of €4,623,871.00 in damages comprised of €2,250,000.00 general and aggravated damages, €1,000,000 exemplary damages and €1,373,871.00 in special and other damages. The Supreme Court decided to make a global award in respect of general and aggravated damages because it was unable to untangle the aggravating factors from the substantive wrongs. Hardiman J noted that: 'Not only is this a case where aggravated damages, in addition to ordinary compensatory damages are available; I believe it is a case where it is imperatively necessary in justice that they be awarded'.<sup>15</sup> In *Herrity v Associated Newspapers [Ireland] Ltd*,<sup>16</sup> the defendant published a number of articles about the plaintiff engaging in a relationship with a priest. The information and details of the relationship were obtained from illegally taped telephone conversations of the plaintiff and other individuals. The plaintiff claimed damages for several breaches of her constitutional rights. Dunne J awarded €60,000 as a global figure for compensatory and aggravated damages and concluded that: 'The behaviour of the defendant in making use of such material is, in my view, nothing short of outrageous'.<sup>17</sup>

In particular, *Conway* Category 2(a) will be to the fore of a judge's mind in civil claims emanating from the sexual, physical and psychological abuse of minors. Such egregious

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<sup>10</sup> [1999] IEHC 124.

<sup>11</sup> These damages were comprised of IR£25,000 in respect of the cost of repairs, IR£800 in miscellaneous expenses, IR£500 in respect of the planning appeal fees incurred, IR£2,500 in respect of the rental accommodation costs incurred, IR£11,000 for professional fees, IR£5,000 in contingency fees, IR£65,000 for the diminution in the value of the plaintiffs' property, IR£10,000 damages to Mr Todd for inconvenience, stress and general upset, IR£12,000 to Mr Todd for inconvenience, stress and general upset and IR£22,500 to Mrs Todd for personal injuries.

<sup>12</sup> *Shortt* (n 6).

<sup>13</sup> *ibid* [97].

<sup>14</sup> See *Shortt v Commissioner of An Garda Síochána* [2005] IEHC 311.

<sup>15</sup> *ibid* [98].

<sup>16</sup> *Herrity* (n 7).

<sup>17</sup> *ibid* [55].

actions against minors, where the wrongdoer involved is a family member, family friend or fiduciary are entirely the type of actions that should be classified as outrageous, oppressive and arrogant. In *Connellan v Saint Joseph's Kilkenny*,<sup>18</sup> the plaintiff had been the victim of abhorrent abuse. During the course of his detention at an orphanage in Kilkenny, he was repeatedly sexually assaulted. He was also physically and racially abused by employees of the defendant. One employee had taunted him making him sing the song 'I'm Nobody's Child', and instilled in him that he was totally under her control. She also had taunted him in the presence of other residents. O'Donovan J awarded him €250,000 in general damages, plus an additional €50,000 by way of aggravated damages noting that: 'If that is not arrogance and outrage deserving of aggravated damages, I do not know what is'.<sup>19</sup> In *Walsh v Byrne*,<sup>20</sup> the plaintiff claimed that he had been sexually assaulted by the defendant between the ages of 11 and 17. The plaintiff sought compensation for personal injuries, loss, damage, inconvenience and expense including aggravated damages for sexual assault and battery and trespass to the person. He also sought various reliefs including a declaration that the entire relationship created by the defendant with the plaintiff had been a continuum of oppression of the plaintiff involving manipulation, psychological domination and acts of assault and battery, and that this continuum of oppression was tortious. White J concluded that the plaintiff was essentially 'groomed' and entitled to damages, including aggravated damages and awarded a global sum of €200,000.

The courts have more recently made awards under *Conway* Category 2(a) in cases involving incorporated entities. In *Camiveo Ltd v Dunnes Stores*,<sup>21</sup> Barrett J found that the actions of Dunnes Stores contravened all three categories of the *Conway* criteria. In that matter, the plaintiff, the owner of Edward Square Shopping Centre, had to sue the defendant to recover rent due and owing. The High Court ordered the defendant to pay over €1 million euro in rent due to the plaintiff. The defendant appealed, but the Supreme Court also found in favour of the plaintiff. The defendant continued to procrastinate on paying the sum awarded by the court, and copies of the court orders were served on the defendant with penal endorsements thereon. In response, the defendant closed one of the main doors in its store, which was also one of the main entrances into the plaintiff's shopping centre. This caused a significant fire safety issue and financially affected other tenants in the shopping centre. The defendant eventually paid the balance of the rent owing, but only when the plaintiff had pursued a motion to transfer the matter to the Commercial List of the High Court. The plaintiff then issued fresh High Court proceedings and maintained that the closure of the doors was in breach of several covenants of the defendant's lease. The plaintiff also sought orders requiring the defendant to keep the main doors open and orders directing the defendant to make payments due under the lease as they fell due. They also asked the Court to award aggravated and exemplary damages and submitted that the closure of the doors was done with the intention of reducing the value of the plaintiff's investment in the Edward Square Shopping Centre, thus causing harm to its economic interests. The defendant argued that the doors had been closed for 'operational' reasons. However, the court found that internal emails sent by the defendant, which came to light in discovery, suggested that the doors had been deliberately closed as a retaliatory measure to the service on the defendant of the court orders with the penal endorsements thereon. Barrett J awarded damages for breach of contract and for the commission of the tort of causing loss by unlawful means. He also directed that the doors were to remain open. In addition, he described the defendant's action

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<sup>18</sup> [2006] IEHC 119.

<sup>19</sup> *ibid* [55].

<sup>20</sup> [2015] IEHC 414.

<sup>21</sup> [2017] IEHC 147.

as 'high-handed and cavalier' and awarded €53,860.50 in compensatory damage to the plaintiff.<sup>22</sup> He also made an additional award of €45,000 in aggravated damages. The defendant appealed both the award of compensatory and aggravated damages. The Court of Appeal overturned the ruling regarding the tort of causing loss by unlawful means and reduced the award of compensatory damages to €45,000.<sup>23</sup> However, Costello J upheld the award of €45,000 in aggravated damages. He held:

that the trial judge was entitled to hold that the respondent ought to be compensated for the wrongs inflicted by Dunnes by an award of aggravated damages based on the manner in which the wrong was committed, the conduct of Dunnes after the commission of the wrong, and the conduct of Dunnes in the defence of the claim up to and including the trial of the action.<sup>24</sup>

### Recklessness

Intention is largely absent in most torts, especially in claims grounded on negligence. The courts were therefore initially reluctant to make awards of aggravated damages for reckless actions. This could be the reason why the application of aggravated damages was originally constrained in the early years post-*Conway*.

In *Swaine v Commissioners of Public Works in Ireland*,<sup>25</sup> the plaintiff plumber, an employee of the defendant, had been exposed to asbestos dust for a prolonged period of time without the provision of any protective clothing. As a result of becoming aware of the risk of potentially developing mesothelioma, the plaintiff had developed what was described as a chronic reactive anxiety neurosis. The defendant was initially not aware of the risk posed by asbestos dust, but they subsequently became aware, yet failed to take any measures to warn or protect the plaintiff from the risk. The High Court awarded him €45,000 by way of general damages and an additional €15,000 in aggravated damages, but the award of aggravated damages was overturned by Keane CJ in the Supreme Court. However, perhaps the defendant was fortunate that the award of aggravated damages was overturned. The factual evidence suggests that the defendant behaved in a grossly negligent manner over a prolonged period of time. Keane CJ's apparent reluctance appears to have been underpinned, at least on the facts of the case in front of him, by a concern not to unduly extend the concept of aggravated damages to actions in negligence, even to claims involving gross negligence. He stated, at the second last paragraph of his judgment, that:

it would not be appropriate for the court, in my view, to hold that there are no circumstances in which, in actions for negligence or nuisance, aggravated damages may be awarded. That question can be left for a case in which it is fully argued. In the present case, however, I am satisfied that, while the defendants were unquestionably guilty of what the trial judge described as 'the grossest negligence', that factor, of itself, is not sufficient to entitle the plaintiff to aggravated damages in the absence of circumstances such as those referred to in the judgment of Finlay CJ in *Conway v Irish National Teachers Organisation* or factors of a similar nature.<sup>26</sup>

<sup>22</sup> *ibid* [147].

<sup>23</sup> *Camiveo Ltd v Dunnes Stores* [2019] IECA 138.

<sup>24</sup> *ibid* [131].

<sup>25</sup> [2003] IESC 30.

<sup>26</sup> *ibid*.

More recently however, the courts have shown that they are willing to consider making awards of aggravated damages where a defendant has acted with a high degree of recklessness. In *Sweeney v Ballinteer Community School*,<sup>27</sup> the plaintiff claimed she was overlooked for promotion and having unsuccessfully appealed against the decision, the relationship between herself and the principal deteriorated further. The plaintiff subsequently ended up taking sick leave on grounds of stress. While on sick leave, she was followed in February 2008 by a private detective hired by the principal. The plaintiff called the Gardaí as she noted that she was being followed. She suffered from depression and retired from her post on health grounds later in 2008. She subsequently sued the defendant for personal injuries, claiming that it was vicariously liable for the actions of the principal. Herbert J found that the actions of the principal had been ‘oppressive and arrogant’.<sup>28</sup> He noted that for the principal to have so acted ‘whether deliberately or with reckless indifference even though he was or ought to have been aware that mental harm to the plaintiff might result from his actions amounted in my judgment to malicious targeting and harassment of the plaintiff’.<sup>29</sup> He awarded the plaintiff €88,625 in damages, which comprised of €5,000 in aggravated damages. This judgment highlights that the courts can consider awards of aggravated damages against a defendant, who has caused injury either deliberately or with a high degree of recklessness. The decision needs to be approached with a certain degree of caution as it could also be interpreted as being an outlier. However, if the decision is endorsed in the future by the superior courts, it could lead to significant growth in the application of aggravated damages under this *Conway* Category 2(a) in matters involving a high degree of reckless behaviour, or more particularly, matters involving reckless behaviour which has been repeated or has persisted over a prolonged period of time.

### **Conway Category 2(B): The conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong**

The courts have also considered *Conway* Category 2(b) in a number of cases. The judgments therein suggest that there is no obligation to apologise, nor will a failure to apologise on its own result in an award of aggravated damages. Instead, decisions have more frequently focused on the refusal to ameliorate the harm done or on the making of threats to repeat the wrong.

#### **Refusal to apologise**

While apologies are relevant in certain types of claims regarding the mitigation of damages, such as defamation claims, the courts have previously found that the lack of an apology should not form the basis of a claim for aggravated damages.<sup>30</sup> In *Kessopersadh v Keating*,<sup>31</sup> the plaintiffs in this matter sued the Gardaí for trespass for unlawfully entering their house, without their consent and without a warrant. O’Malley J found that the entry was not lawful and awarded damages. However, she declined to make an award of aggravated damages,

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<sup>27</sup> [2011] IEHC 131.

<sup>28</sup> *ibid* [66].

<sup>29</sup> *ibid* [42].

<sup>30</sup> See s 24 of the Defamation Act 2009, which enshrines an apology as a mitigating factor in a defamation claim. See also s 32 of the Defamation Act 2009, which enshrines the concept of aggravated damages on a statutory footing in defamation claims in respect of the conduct of the defence.

<sup>31</sup> [2013] IEHC 317.

noting that, there ‘has been a failure to apologise, but I do not think that that on its own can entitle a plaintiff to aggravated damages’.<sup>32</sup>

### Failure to ameliorate the harm

In *Eustace v The Lord Mayor, Aldermen and Burgesses of Drogheda Borough Council*,<sup>33</sup> Drogheda Borough Council trespassed on the plaintiff’s land in 2001. However, despite being advised by the plaintiff on numerous occasions that they were trespassing and the plaintiff proving this by subsequently sending their title deeds to the defendants, the defendants continued to trespass on the land until 2010. Ní Raifeartaigh J awarded compensatory damages of €65,000 together with an award of €12,000 in aggravated damages against Drogheda Borough Council for the 9 year trespass. She characterised the acts of the council ‘as gross negligence and its attitude to acknowledging its mistake as grudging and gradual’.<sup>34</sup>

### Threat to Repeat the Wrong

In the aforementioned *Shortt v Commissioner of an Garda Síochána*,<sup>35</sup> aggravated damages were also assessed with reference to Category 2(b) of the *Conway* judgment. Hardiman J stated that: ‘the offer to get him early release if he withdrew his appeal, thereby acknowledging his guilt, clearly and necessarily implied that if he did not do so he would be left to rot in jail which is clearly in my view a ‘threat to repeat the wrong’, or at least to continue it’.<sup>36</sup> In the aforementioned *Camiveo Ltd v Dunnes Stores*,<sup>37</sup> the defendant eventually paid its rent, but only after they had closed the main door of the premises. Barrett J also assessed aggravated damages under *Conway* Category 2(b) for the defendant’s retaliatory actions of shutting the door after service of a court order upon them; a measure which he described as having been taken to inflict further economic injury upon the plaintiff.<sup>38</sup>

In *Tolan v An Bord Pleanála*,<sup>39</sup> a defamatory letter was sent to the defendant about the plaintiff. Subsequently the author of the letter acknowledged that he had made a mistake as to the identity of the person about whom the letter was written about and apologised to the plaintiff. However, despite repeated demands the defendant refused to remove the letter from the planning file, unless they were directed to do so by a High Court order. The impugned letter was retained in an envelope and was marked ‘Withdrawn’ in prominent red writing and retained on the defendant’s planning file. It was therefore available for inspection by the general public. Moreover, despite Hedigan J commenting on the ‘administrative indifference shown to the plaintiff in this case’ in the final paragraph of his judgment, he decided not to award aggravated damages to the plaintiff because the defendant was not the origin of the defamation in question.<sup>40</sup> Arguably, the defendant was fortunate in this matter to avoid aggravated damages. Although it was not the origin of the wrongdoing, its attitude was cavalier in nature. It forced the plaintiff into initiating costly legal action, against a party with deeper pockets, in an effort to force the removal of a letter that it knew was false and highly defamatory. Further, the defendant never sought legal advice about the removal of

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<sup>32</sup> *ibid* [106].

<sup>33</sup> [2019] IEHC 455.

<sup>34</sup> *ibid* [88(i)].

<sup>35</sup> *Shortt* (n 6).

<sup>36</sup> *ibid* [96].

<sup>37</sup> *Camiveo* (n 21) [109].

<sup>38</sup> *ibid* [147]. The Court of Appeal also confirmed that it was correct of Barrett J to have regard to the conduct of the defendant after the commission of the wrong when assessing aggravated damages, see *Camiveo* (n 23).

<sup>39</sup> [2008] IEHC 275.

<sup>40</sup> *ibid*.

the letter before maintaining a blanket refusal to remove the letter without a court order. It perpetuated a wrong that it was fully aware of.

### **Conway Category 2(C): The conduct of the wrongdoer or his representatives in defending the claim up to and including the trial of the action**

Litigation, by its very nature is adversarial as it arises from a perceived wrong committed by one party upon another. Both sides in the litigation process have a significant amount at stake financially, and possibly personally or professionally. Frequently, passions run high and common-sense and the ability to be reasonable can depart the entrenched parties. It is not always possible to elicit the facts of the case or truth of a statement by making polite enquiries during cross-examination. Litigation sometimes has to be robust and the truth has to be extracted by taking a prolonged and vigorous line of questioning. While ultimately there might be nothing of relevance discovered by the cross-examination, a plaintiff has to accept that their evidence is going to be challenged on every aspect of their claim. It is a matter for a plaintiff to prove their claim and a defendant has the right to challenge them on any aspect of the claim being pleaded.

In her judgment in *Kinsella v Kenmare Resources plc*,<sup>41</sup> Irvine J succinctly summarised the effects of a cross-examination. She noted that: ‘there are few witnesses who leave a witness box unchallenged as to the truth of their evidence or who do not feel somewhat bruised and upset as a result of the oftentimes hard-hitting consequences of an adversarial system of litigation’.<sup>42</sup> Hence, during the course of litigation and cross-examinations, matters can become heated and pleas and questioning might descend into the rougher side of robust. A judge therefore has a very difficult role to balance the competing rights of the plaintiff, who believes they have been wronged, against those of the defendant, who has the right to make the plaintiff prove their claim and the right to challenge the plaintiff’s evidence. Judges are also tasked to ensure that the pleas and lines of cross-examination pursued validly challenge the plaintiff’s evidence, in a manner that is reasonably justified to achieve the aim of finding out the most likely version of the truth. ‘Reasonableness’ is paramount and the case law suggests that some latitude will be afforded to a defendant where there is an objective evidential basis to make such a challenge. On the converse, if the challenge is speculative, opportunistic and not evidentially supported, a defendant may be punished with an award of aggravated damages being ultimately made against it.

*Conway* Category 2(c) is responsible for a substantial amount of applications for and awards of aggravated damages. It encompasses a significant divergence of scenarios in which the courts have found that a defendant has conducted its defence in a cavalier manner. Courts have made awards in matters involving unsubstantiated pleas, causing unnecessary delays in the progress of proceedings, relying on evidence that a defendant knew was incorrect, failed allegations of fraud and unsuccessful applications under s 26 of the Civil Liability and Courts Act 2004. The courts have also made several awards under this heading in respect of defamation claims and also in respect of overly zealous cross-examinations of plaintiffs and witnesses.

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<sup>41</sup> [2019] IECA 54.

<sup>42</sup> *ibid* [236].

## Relying on false evidence

In *Philp v Ryan*,<sup>43</sup> it came to light at trial that the first defendant doctor had altered his medical records to conceal a mistake about advising the plaintiff to undergo a PSA test six weeks after an earlier examination. The plaintiff developed cancer. The issue of the alteration of the records only came to light during cross-examination of the first defendant. It was also clear from the cross-examination of the first defendant that his legal team found out about a week before the trial had commenced that he had altered his records.<sup>44</sup> However, they did not inform the plaintiff or the court of the alterations. They presented evidence in such a manner that they were careful not to cross-examine the plaintiff's experts on these notes. Peart J awarded damages of €45,000, but he did not award aggravated damages. The defendant appealed the level of the award and the plaintiff cross-appealed on the basis that damages were inadequate. The plaintiff also argued that he was entitled to aggravated damages. In the Supreme Court, McCracken J found these actions to be 'truly appalling' and 'incomprehensible'.<sup>45</sup> The award of compensatory damages was increased to €100,000, to include aggravated damages of €50,000. Similarly in the aforementioned case of *Shortt v Commissioner of an Garda Síochána*,<sup>46</sup> during the course of Mr Shortt's proceedings to have his conviction declared a miscarriage of justice, vital evidence relating to a Garda's admission of perjury was withheld from the plaintiff and state counsel. When this evidence came to light, nothing had been done to inform the plaintiff of the issue. Hardiman J, addressing the plaintiff's entitlement to aggravated damages, noted that the plaintiff's 'attempt to obtain the redress of having his conviction declared a miscarriage of justice was met with deliberate cynical and continuous perjury during the long hearing in the Court of Criminal Appeal'.<sup>47</sup> Also, in the aforementioned case of *Camiveo Ltd v Dunnes Stores*,<sup>48</sup> aggravated damages were also assessed with regard to Conway Category 2(c). The defendant tried to maintain a defence that the doors were closed for operational reasons, despite internal emails sent by the defendant which had come to light in discovery. The court concluded that the only logical interpretation of the emails was that the doors had been deliberately closed by the defendant as a retaliatory measure to the service of the court orders bearing the penal endorsements upon them.

## Fraud and s 26 applications

S 26 of the Civil Liability Act 2004 provides a mechanism whereby a defendant can apply for the dismissal of a plaintiff's claim on the basis that the plaintiff has knowingly adduced or provided false or misleading evidence. S 26 was partially enacted to prevent a plaintiff putting forward a fraudulent or exaggerated claim. It can be a very powerful deterrent because a plaintiff's entire claim can be dismissed if they have not been truthful or if they misled the court on any single material element of their claim. In particular, a number of applications for aggravated damages have been considered by the courts on foot of unsuccessful defences which have pleaded, or implied, that a claim was fraudulent or on foot of an unsuccessful s 26 application by a defendant.

In *Stokes v South Dublin County Council*, the defendant pleaded that the plaintiff had injured his knuckle while pursuing his sport of boxing, rather than as a result of tripping in a pothole as had been alleged by the plaintiff.<sup>49</sup> However, the defendant was not able to convince Barr J

<sup>43</sup> [2004] IEHC 77.

<sup>44</sup> *ibid* [13].

<sup>45</sup> *ibid* [21].

<sup>46</sup> *Shortt* (n 6).

<sup>47</sup> *ibid* [96].

<sup>48</sup> *Camiveo* (n 21).

<sup>49</sup> [2017] IEHC 229.

of this hypothesis. Barr J found such an allegation was tantamount to an allegation of fraud.<sup>50</sup> He also found that the plaintiff was entitled to be compensated for the upset caused to him by virtue of the nature of the unsuccessful defence which had been put forward and awarded the plaintiff €55,000 in compensatory damages, together with an additional €5,000 in aggravated damages.

In *Daly v Mulhern*, the first defendant apologised to the plaintiff at the scene of the accident and assured her that they would sort matters out between them and that there was no need to call the Gardaí.<sup>51</sup> The first defendant subsequently attended the plaintiff's house and reiterated the promise. Ultimately, he failed to make good on the promise. The plaintiff subsequently issued proceedings against him for personal injuries sustained in the accident. The first defendant defended the proceedings on the basis that the plaintiff had fabricated the accident. He denied the occurrence of the accident and maintained that he was a stranger to the allegations in the plaintiff's statement of claim. The plaintiff suffered stress, upset and hurt when her solicitor made her aware of the contents of the defendant's letter denying the occurrence of the accident and alleging drunkenness against the plaintiff. O'Sullivan J found that the plaintiff suffered additional hurt in respect of the manner in which the first defendant had reneged on his promise to make matters good after the accident and also for the manner in which his defence had been conducted. He awarded the plaintiff compensatory damages of €36,808.29, together with an award of €10,000 in aggravated damages. Arguably, aggravated damages could also have been assessed with reference to *Conway* Category 2(b), as the conduct of the first defendant did not ameliorate the harm done, despite his early assurance to the contrary.

In *Saleh v Moyvalley Meats (Ireland) Ltd*,<sup>52</sup> the defence essentially suggested that the plaintiff was malingering. An application under s 26 of the Civil Liability and Courts 2004 Act was not specifically pursued by the defence, but it was clear from the nature of the cross-examination that the plaintiff was being accused of malingering. Cross J examined whether the defendant was justified in making such allegations. He noted that the allegations were based on the opinion of the defendant's consultant neurosurgeon. He concluded that 'the defendant's attitude was not necessarily unreasonable', but he went on to warn that if the allegation had been unsupported by expert evidence, then he would have awarded aggravated damages to the plaintiff.<sup>53</sup> In *Lackey v Kavanagh*,<sup>54</sup> aggravated damages were sought by a successful plaintiff on the basis of a minimal impact plea in the defendant's defence and also on the basis of the cross-examination of the plaintiff's medical advisor. It had been specifically pleaded in the defence that: 'The collision and impact between the two vehicles was so minor and slight that the plaintiff did not nor could not have suffered the alleged or any personal injury loss or damage.' The issue of minimal impact was maintained on the basis of CCTV evidence which showed very little movement of the plaintiff's body by the force of the collision. Cross J examined the reasonableness of the defendant's approach to the plea. He concluded that the CCTV provided reasonable justification to maintain such a plea and declined to make an award of aggravated damages.

However, in *Keating v Mulligan*,<sup>55</sup> the defendant's conduct at trial was not deemed to be reasonable and drew the ire of Cross J. In June 2016, the plaintiff was a passenger on a Luas

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<sup>50</sup> *ibid* [96].

<sup>51</sup> [2005] IEHC 140.

<sup>52</sup> [2015] IEHC 762.

<sup>53</sup> *ibid* [70].

<sup>54</sup> [2013] IEHC 341.

<sup>55</sup> [2020] IEHC 47.

tram when it was struck by the defendant's vehicle. The plaintiff claimed to have sustained soft tissue injuries in the accident and that the accident had also triggered a major depressive disorder. The plaintiff was involved in a subsequent accident also on a Luas tram in August 2017. The plaintiff did not reveal this subsequent accident in her replies to notice for particulars. She verified these replies with a sworn affidavit of verification. The plaintiff submitted a medical report to the defendants on 17<sup>th</sup> June 2019, the fourth day of the trial and after the initial cross-examination had taken place. This medical report was dated 12<sup>th</sup> June 2019 and it made reference to the plaintiff's later, August 2017 accident. The defendant applied under s 26 of the Civil Liability and Courts Act 2004 for a dismissal of the claim, on the basis that the plaintiff had misled the court. However, the defendant went further in its submissions and suggested that the plaintiff had either instructed her solicitors to suppress the report, or that her solicitors suppressed it in order to disguise the later 2017 accident. Cross J indicated that he would have allowed reasonable latitude, had the application under s 26 been grounded solely on the issues of the alleged non-disclosure of the subsequent accident. He further commented that: "This Court in a number of cases has referred to an award of an aggravated damages as being the only real deterrent to a defendant to make unmeritorious applications in this regard".<sup>56</sup> He awarded €70,000 in respect of damages, together with an additional €10,000 in aggravated damages on the basis that there was no evidential basis to support the defendant's submission that the plaintiff and her solicitors had engaged in a fraud to conceal the subsequent 2017 accident.

Conversely Simons J, in *Doyle v Donovan*,<sup>57</sup> while dealing with an appeal from the Circuit Court, declined to award aggravated damages in another matter involving allegations of fraud against the plaintiff. In this matter, the plaintiff issued proceedings for injuries sustained by the defendant's vehicle colliding with the rear of his vehicle. The defendant had denied liability and specifically pleaded, in a defence, that the plaintiff deliberately caused the collision by violently braking. This plea, according to the plaintiff, implied that he fraudulently manufactured the accident. However, even though the plea was never actually withdrawn, it was not relied upon in the original Circuit Court hearing. In refusing the plaintiff's application for aggravated damages, Simons J stated that:

weight has to be attached to the overall conduct of the proceedings. In the present case, the allegation that the accident had been deliberately caused was not pursued at the hearing before the Circuit Court. It was not put to the plaintiff in cross-examination. The defendant declined to stand over the allegation when she herself was under cross-examination. Moreover, by the time the case came on for hearing on appeal before the High Court, the defendant had conceded liability.<sup>58</sup>

Simons J appears to have approached the matter from a different viewpoint to Cross J in the above matters. He believed that the provisions of the Civil Liability and Courts Act 2004, as regards swearing false affidavits and providing false or misleading evidence, applied equally to plaintiffs and defendants. He also believed that there was asymmetry between plaintiffs and defendants because aggravated damages can only be awarded against a defendant. He opined that the proper measure for a court to mark its disapproval of the conduct of such

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<sup>56</sup> *ibid* [30].

<sup>57</sup> [2020] IEHC 11.

<sup>58</sup> *ibid* [45].

litigation would be to punish a defendant on costs and he was willing to hear later submissions on that point.<sup>59</sup>

### Defamation cases

In *Kinsella v Kenmare Resources plc*,<sup>60</sup> a High Court jury found that the plaintiff had been defamed by the defendant and awarded €9,000,000 in compensatory damages and a further €1,000,000 in aggravated damages. The decision to award aggravated damages was reversed by the Court of Appeal and general damages were reduced to €250,000.<sup>61</sup> While it is important to note that aggravated damages for defamation claims are assessed with reference to s 32 of the Defamation Act 2009, the decision of the Court of Appeal is useful to examine. The award of aggravated damages was grounded on the manner in which the plaintiff had been challenged on his evidence during cross-examination. The defence counsel suggested to the plaintiff that his evidence was a 'complete fabrication' and that he would be calling a Ms. Corcoran as a witness to prove this. It subsequently transpired that Ms. Corcoran was not called to counter the plaintiff's evidence. De Valera J then advised the jury that it was open to them to consider awarding aggravated damages on that issue. The Court of Appeal set aside the award of aggravated damages. Irvine J noted that:

the questioning of Mr. Kinsella regarding the aforementioned conversation and the failure of the appellants to call Ms. Corcoran to challenge his evidence provided no reasonable basis for an award of aggravated damages and the trial judge should have directed the jury to that effect. The situation might have been different had the questioning upon which Mr. Kinsella relied as objectionable been part of an overly prolonged or hostile cross-examination.<sup>62</sup>

However, despite the adversarial and robust nature of cross-examinations, the above decision suggests that an overly rough or prolonged cross-examination based on matters put to the plaintiff, about which 'promised' evidence subsequently ends up not being called, could result in an award of aggravated damages.

In *Nolan v Sunday Newspapers Ltd (trading as Sunday World)*,<sup>63</sup> a number of articles published by the Sunday World Newspaper in 2012 and 2013 about the plaintiff were found to have traduced his good name, reputation and character. The articles suggested that the plaintiff, a former Kildare County Footballer, was the organiser of swingers parties and involved in the provision of sexual services for financial gain. The articles were supported by photographs, obtained from the plaintiff's former partner, of the plaintiff attending these swingers events. The plaintiff did not deny attending the parties as alleged, but he maintained that he was brought to these parties by a previous partner and attended these events to try and maintain his relationship with her. The plaintiff maintained that he found the parties distasteful. O'Connor J accepted the plaintiff's evidence in this regard. He also found that there was 'not a shred of evidence to support a suggestion or innuendo that the plaintiff was involved in prostitution, pimping or any such type of illegal activity'.<sup>64</sup> The publication of the articles had a profound effect on the plaintiff's life. He was shunned by his friends and also by his former wife and children and developed depression and suicidal ideations. There were a

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<sup>59</sup> *ibid* [43] – [55].

<sup>60</sup> [2019] IECA 54.

<sup>61</sup> *ibid* [236].

<sup>62</sup> *ibid* [236].

<sup>63</sup> [2017] IEHC 367.

<sup>64</sup> *ibid* [21].

substantial number of aggravating factors involved in this matter, amongst them was the manner in which the defendant conducted its defence. O'Connor J noted the main aggravating factors were:

The failure of the defendant to exclude harmful inaccuracies, the refusal to heed the warning about the effect on the plaintiff's relationship with his children and the gratuitous mention of the plaintiff's public figure brother are all factors which exacerbated the defamation already identified. In addition, the questions posed during the cross-examination of the plaintiff concerning the assassination in 2002 mentioned in the 2012 article which is totally irrelevant to the plaintiff and the public position of the plaintiff's brother in the 2013 article are factors which this Court can take into account together with the unnecessary reference to the plaintiff's alleged friendship with a former Government Minister in the 2012 article. The decision of the defendant to ignore the letter from the plaintiff's solicitor dated 6th March, 2013, along with the refusal to make an offer of amends constitute particularly offensive conduct.<sup>65</sup>

He awarded the plaintiff a sum of €250,000 in respect of the defamation contained in the articles together with an additional €30,000 in aggravated damages and €30,000 in punitive damages. The defendant appealed the award of damages to the Court of Appeal.<sup>66</sup> It also appealed against the findings that the plaintiff had been defamed by the articles. The plaintiff cross-appealed on the basis that the trial judge erred in not finding that he was entitled to a separate award of damages for the contravention of his right to privacy together with a declaration that his constitutional right to privacy had been contravened by the defendants actions of publishing private photographs obtained from his former partner. Peart J dismissed the defendant's appeal and allowed the plaintiff's cross-appeal. He did not alter the overall award of €310,000, rather he recalibrated the awards of damages. He awarded €200,000 in respect of general damages for defamation and €50,000 in respect of breaches of his constitutional right to privacy. He also upheld the awards of €30,000 in respect of the award for aggravated damages and the award of €30,000 in punitive damages.

In *McNamara v Dunnes Stores (Parkway) Limited*,<sup>67</sup> the plaintiff claimed damages for defamation and false imprisonment on the basis that she was allegedly wrongly accused of theft by the defendant's security guard. The defendant, on one hand denied the claim in its defence, but then on the other hand, pleaded qualified privilege in their defence. In short, one cannot claim qualified privilege over a statement that is denied was made at all. Murphy J, was critical of the conduct of the defence noting that:

the defence chose to put forward one witness and one witness only, whose evidence in effect was that the plaintiff is a thief and that she had stolen items from Dunnes Stores. The initial injury to the reputation of the plaintiff has in the Court's view been considerably aggravated by the conduct of the defence which rather cynically gave evidence of justification while masquerading as a defence of qualified privilege.<sup>68</sup>

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<sup>65</sup> *ibid* [39].

<sup>66</sup> *Nolan v Sunday Newspapers Ltd (trading as Sunday World)* [2019] IECA 141.

<sup>67</sup> [2017] IEHC 172.

<sup>68</sup> *ibid* [115].

She awarded the plaintiff €7,500 by way of damages for defamation together with an additional €2,500 in aggravated damages.

The decision in *Kennedy v Hearne*, pre-dated the enactment of s 32 of the Defamation Act 2009, nevertheless aggravated damages were awarded for the manner in which the defendants' conducted the defence of the matter.<sup>69</sup> The plaintiff, a practising solicitor, issued proceedings for libel and breach of constitutional rights against the defendants, on foot of allegations and publications that he had not paid the full amount of tax due and owing by him. During the trial, the plaintiff and two of his employees were subjected to a rigorous cross-examination. When Murphy J sought to establish the reasoning behind the reaching cross-examination, he was advised by the defendants' counsel that the objective of the cross-examination was to demonstrate that the plaintiff had attempted to evade tax and that he was 'a cheat' and a person who had not got any reputation in respect of which he was entitled to recover damages. Ultimately, Murphy J found that the plaintiff had been libelled and awarded IR£500 damages. He also awarded an additional sum of IR£2,000 in aggravated damages. The plaintiff appealed the order to the Supreme Court on several different grounds, one of which concerned the adequacy of the award of compensatory and aggravated damages. The defendants also initially appealed to vary the level of damages but withdrew this at the hearing of the appeal. Finlay CJ in the Supreme Court, emphasising the seriousness of the defendants' conduct at the trial, increased the aggravated damages award to IR£10,000. He noted that the attack upon the plaintiff's character made during cross-examination and in open court had led to far greater harm being caused to the plaintiff's character and professional reputation as a solicitor, than the harm caused by the initial libel, which had not been as serious. Further, the original libel had not been widely published.

### **Attacking the plaintiff during cross-examination**

As mentioned above, 'reasonableness' and 'justification' are key concepts that judges consider when determining if a cross-examination has strayed too far and into the territory of aggravated damages. The defendants' cross-examination of the plaintiff in the above-mentioned *Kennedy v Hearne*, exhibited none of these attributes. However, in *Zhang v Farrell*,<sup>70</sup> Barr J found that the defendant's line of questioning was both reasonable and justified on the facts presented, despite the apparent rough nature of the cross-examination of the plaintiff. In this matter, the plaintiff was asked during cross-examination if she would be better off if she returned to China. The defendant also enquired how she spent her social welfare payments. The plaintiff's legal team objected as they perceived this line of questioning to be abusive and offensive to the plaintiff. Barr J disagreed. He found both lines of questioning to be reasonable. The questioning about her relocation to China arose from the reports of the two psychiatrists, both of whom had postulated that the plaintiff may fare better in her home environment in China, where she would have the care of her mother. Regarding the issue of how she spent her social welfare payments, one of the causes of stress asserted by the plaintiff to the psychiatrists was her lack of income and the defence counsel was deemed to be reasonable in exploring that issue.

### **Attacking a witness**

Cross J in *O'Sullivan v Depuy International Limited* noted that it was open to the court to award aggravated damages for making 'reckless allegations against a plaintiff or a witness'.<sup>71</sup> The independence of one of the plaintiff's expert witnesses was scrutinised because this expert

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<sup>69</sup> *Kennedy* (n 2).

<sup>70</sup> [2018] IEHC 441.

<sup>71</sup> [2016] IEHC 684 [12.5].

was involved in Qui Tam litigation in the United States against the same defendant. A concern or perception that he might have a conflicting or vested financial interest in the outcome of the proceedings was scrutinised by the defendants during cross-examination. Cross J stated:

I previously indicated that the issue of aggravated damages may have a roll [sic] in cases which the conduct of the defendants is such as (for example, the swearing of an affidavit verifying a defence when there is no real defence to the matter, or the making of any basis or reckless allegations against the plaintiff or a witness) in circumstances in which there is no real other deterrent to a defendant. An award of aggravated damages against a defendant who acts in bad faith, may well be the only deterrent to balance the draconian statutory penalties against a plaintiff who acts in bad faith.<sup>72</sup>

However, on this occasion, he found that it was reasonable for the defendant to assail the credibility of the expert and to have the issue of his Qui Tam litigation adjudicated upon. Further, in previously mentioned *Lackey v Kavanagh*,<sup>73</sup> Cross J found the cross-examination of the medical expert in that matter also to be reasonable. The attack in question centred upon a certain surgical technique of manipulation under anaesthetic deployed by the plaintiff's treating orthopaedic surgeon, Mr Bough. It was submitted by the defendant that Mr Bough was virtually the only orthopaedic surgeon who practiced that particular technique and that he was essentially carrying out the procedure for his own financial gain. Cross J, while finding that the attack on Mr. Bough was a significant one, found that the court must look at the nature of this, both in the light of the not unreasonable view that the defendant took as to the nature of the plaintiff's injuries and also the fact that Mr. Bough did not seem at all affected by the attack on him. Declining to award aggravated damages, he stated that:

In relation to the attack upon Mr. Bough, the plaintiff's medical adviser, it is clear to say that the attack on him might certainly to a sensitive soul, appear to be on the rough side of robust when dealing with a professional witness.

I observed Mr. Bough and, this is no reflection on him, he did not appear to be a sensitive soul. Undoubtedly he gave as good as he got.<sup>74</sup>

Arguably, it would be difficult to reconcile an award of aggravated damages solely based on an attack upon a witness, particularly if the attack on the witness centred around matters unconnected to the plaintiff's claim. This is because it could be difficult to quantify how such an attack could cause any additional harm or distress to the plaintiff personally. Therefore if the attack is unconnected to the plaintiff in some manner, then it would appear to be inconsistent with the compensatory nature of the damages generally to make an award of aggravated damages.

### **Aggravation by defence experts**

Defence expert witnesses should also be careful as to how they engage with a plaintiff. If an expert strays further than is necessary in interactions, a defendant could be made to pay for any such indiscretions with an award of aggravated damages against them. Such an

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<sup>72</sup> *ibid* 12.5].

<sup>73</sup> *Lackey* (n 54).

<sup>74</sup> *ibid* [53-54].

indiscretion occurred in *FW v British Broadcasting Corporation*.<sup>75</sup> In this case, the plaintiff's name was broadcast in a programme concerning child sexual abuse by the defendant, despite undertakings that his identity would be preserved. The plaintiff sued for negligence and breach of undertaking. During the course of an examination conducted by a psychiatrist engaged by the defendant, the plaintiff was put through unnecessary questioning regarding the childhood sexual abuse that he had suffered. The psychiatrist also told the plaintiff that he would also have to recount an equally detailed version of events at trial. He applied for aggravated damages for the additional trauma that the psychiatrist's comments inflicted upon him. The court awarded him IR£80,000 in compensatory damages, together with an additional IR£15,000 in aggravated damages for the additional suffering caused by the 'gross professional negligence and incompetence' displayed by the psychiatrist in question.<sup>76</sup>

### Denying liability

The courts have affirmed in several matters that maintaining a denial of liability is not a sufficient ground to entitle a plaintiff to an award of damages under this category.

Kelly J stated in *O'Donnell v O'Donnell*, that:

the maintenance of a denial of liability is not an abuse of the process of the court. A defendant is entitled to require a plaintiff to prove his case. The denial of liability was not maintained up to trial as I have already recorded. That was a concession which the defendant was not obliged to make.<sup>77</sup>

Therefore, while the maintenance of a denial of liability will not entitle a plaintiff to aggravated damages, this does not mean that the defendant has free reign to launch a counter-attack. The courts have awarded aggravated damages for threatening groundless cross-pleadings, but mainly in the context of claims emanating from sexual abuse. In the above-mentioned case of *O'Donnell v O'Donnell*,<sup>78</sup> the plaintiff sued for damages including aggravated damages, intentional infliction of emotional suffering, and for violation of his right to bodily integrity. The defendant's solicitor replied to the initial letter of claim threatening proceedings for defamation and requesting the immediate withdrawal of the allegations, together with an apology. He also sought confirmation as to whether the plaintiff's solicitor had authority to accept the service of proceedings. Although Kelly J opined that the threats were ultimately 'bluster', he concluded that they were made with the intention of deterring the plaintiff from pursuing his suit.<sup>79</sup> He awarded €85,000 for pain and suffering to date, together with an additional €3,000 in aggravated damages.

Further, in the context of claims emanating from sexual abuse, the courts have concluded that they can take the behaviour of a defendant at a preceding criminal trial into account when assessing aggravated damages in a subsequent civil case. In *O'K v L.H.*,<sup>80</sup> de Valera J stated that he was entitled to take into consideration the first defendant's lack of participation in the proceedings and his conduct at the earlier criminal trial, which was a 'trigger' for the

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<sup>75</sup> [1999] IEHC 145.

<sup>76</sup> *ibid.*

<sup>77</sup> [2005] IEHC 216 [66]. Kelly J also quoted the cases of *Noctor v Ireland* [2005] IEHC 50 at [66] and *Cooper v O'Connell* [Supreme Court, 5th June, 1997] at [68] as authority to support the position that the denial of liability by a defendant is not an abuse of court process.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid* [72].

<sup>80</sup> [2006] IEHC 393.

plaintiff initiating the civil proceedings.<sup>81</sup> He awarded damages of €305,104, to include €50,000 in aggravated damages.<sup>82</sup>

### Causing unnecessary delays in progressing proceedings

In *Retail Systems Technology Limited v McGuire*,<sup>83</sup> the plaintiffs had to issue numerous applications to the court to obtain relevant information from the defendants. The judgment is unclear as to how many applications were required. However, this conduct met with the condemnation of Kelly J, who stated that:

there is no doubt but that their behaviour throughout this litigation has been less than satisfactory. They procrastinated and delayed on many occasions. Information was obtained, both by discovery and particulars, only after numerous applications to court. In my view an award of aggravated damages demonstrating the courts disapproval of this behaviour and the general way in which they conducted themselves is appropriate. I award a further €10,000 damages for aggravated damages.<sup>84</sup>

### Behaviour of the plaintiff

There are also other factors that the courts must consider before making or declining to make awards of aggravated damages, such as the behaviour and conduct of the plaintiff themselves throughout the course of the litigation or at trial. A plaintiff who has not provided credible evidence or who has contributed to the very issue that aggravated damages were sought in respect of, might not succeed in an application for aggravated damages.

*Hollybrook (Brighton Road) Management Company Limited v All First Property Management Company Limited* involved a seventeen day trial in the High Court between the plaintiff company, controlled by Sean Dunne, and the defendant company, controlled by a former acquaintance, Gina Farrell.<sup>85</sup> The plaintiff sued the defendant for various reliefs, including the return of its books of record and for damages for breach of contract. On the twelfth day of trial, the defendant director, Gina Farrell, admitted that she had falsified cleaning records. The plaintiff applied for aggravated damages. Laffoy J, noted the history of litigation between Sean Dunne and Gina Farrell and found that these falsifications had no impact on the broader members of the plaintiff company. She noted that Sean Dunne had been described as the person pushing the litigation and he had underwritten the payment of €150,000 in security for costs. She questioned the 'ulterior motive' behind the litigation in question and described what had ensued at trial as 'a waste of the time and the resources of the High Court and the public monies which fund the High Court, for which both sides share responsibility'.<sup>86</sup> In light of the above, the application for aggravated damages was found to be 'wholly untenable'.<sup>87</sup> In *G.E. v The Commissioner of An Garda Síochána*,<sup>88</sup> the plaintiff claimed damages for false imprisonment. He also sought aggravated damages in respect of the

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<sup>81</sup> *ibid* [11].

<sup>82</sup> *Shortt* (n 6) [96]. Hardiman J also took the defendants' behaviour in the Court of Appeal into account when assessing aggravated damages. He held that the plaintiff's 'attempt to obtain the redress of having his conviction declared a miscarriage of justice was met with deliberate cynical and continuous perjury during the long hearing in the Court of Criminal Appeal'.

<sup>83</sup> [2007] IEHC 13.

<sup>84</sup> *ibid* [92].

<sup>85</sup> [2011] IEHC 375.

<sup>86</sup> *ibid* [1.11].

<sup>87</sup> *ibid* [11.4].

<sup>88</sup> [2018] IEHC 293.

contention by the defence during cross-examination that he had lied about his nationality. Faherty J was ‘satisfied that as regards his nationality, the plaintiff was less than forthcoming in his responses to the questions put to him’.<sup>89</sup> She also found the line of questioning adopted by the defendant’s counsel to be fair, and despite awarding damages for false imprisonment, she declined to award aggravated damages.

In *Keating v Keating*,<sup>90</sup> the plaintiff sought to have a transfer of his farm and other farm assets to the defendants set aside on the basis that his consent had been procured by undue influence. He also sought damages for personal injuries for assault and trespass as a result of the second defendant kicking his door in and throwing a spare tyre through one of his windows, which he claimed also caused him to suffer from PTSD. During the course of the proceedings, the plaintiff alleged that the second defendant had carried out several physical assaults on him. This was the first time that these physical assaults had been raised in the proceedings and they were unsupported by any credible evidence. The plaintiff succeeded in having the impugned transactions set aside. He also received an award of €12,500 in respect of personal injuries sustained as a result of the trespass. However, he failed in his application for aggravated damages. Laffoy J stated in the third last paragraph of her judgment that: ‘I do not think that this is an appropriate case in which to award aggravated damages, particularly as I have found that the plaintiff in his testimony made allegations against the second named defendant which I have found to be untrue’.<sup>91</sup>

In *Smith v Gilbert*,<sup>92</sup> a plaintiff’s claim for loss of earnings was partly comprised of ‘a mass of half illegible invoices of dubious accuracy’.<sup>93</sup> The poorly vouched claim for loss of earnings had caused considerable frustration, not only to the defence, but also to the court. The plaintiff applied for aggravated damages partly on foot of the manner in which this element of the claim had been challenged. However, Budd J did not accede to the application noting that: ‘He who lives in a glasshouse, should not throw stones’.<sup>94</sup>

The above matters illustrate that a judge takes a holistic view when determining the issue of aggravated damages, including the conduct of the plaintiff from the time of the initial wrong and throughout the entire course of the proceedings.

## Who can be awarded aggravated damages?

Aggravated damages can be awarded to both natural persons and to incorporated entities. In *Camiveo Ltd v Dunnes Stores*,<sup>95</sup> the defendant submitted that a limited company is incapable of suffering additional hurt or insult. The Court of Appeal rejected this argument noting that there was nothing in *Conway* which would justify such a distinction.<sup>96</sup> It is therefore possible that a body corporate can be awarded aggravated damages. In fact, eight years previously, Kelly J had approved an award of aggravated damages to a limited company in *Retail Systems Technology Limited v McGuire*.<sup>97</sup>

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<sup>89</sup> *ibid* [94].

<sup>90</sup> [2009] IEHC 405.

<sup>91</sup> *ibid*.

<sup>92</sup> [2005] IEHC 275.

<sup>93</sup> *ibid* [86].

<sup>94</sup> *ibid* [87].

<sup>95</sup> *Camiveo* (n 23).

<sup>96</sup> *ibid* [132].

<sup>97</sup> *Retail Systems Technology Limited* (n 83).

## Pleading an entitlement to aggravated damages

Finlay CJ in *Conway v Irish National Teachers Organisation*,<sup>98</sup> considered this issue and concluded that, if the entitlement arises before trial, it would be prudent to specifically plead the entitlement to such damages. He stated:

First principles would appear to suggest that the general purpose of pleading, as far as the plaintiff is concerned, is the giving of fair notice to the defendant of the issues which are to be tried and the allegations which are to be made against him and this would make it desirable that any claim being made for damages over and above ordinary compensatory damages should be notified, and the facts upon which reliance might be placed in support of it, should be indicated to the defendant. To such a general principle there would, of course, be exceptions: for example, in relation to aggravated damages in respect of matters which might only arise at the trial or at a stage of the preliminary proceedings subsequent to the filing of the statement of claim, but in general there would appear to be no sound principle for excluding from the general proposition that the claim should fairly make known to the defendant the question of a reliance or proposed reliance upon a right to exemplary damages.<sup>99</sup>

The conduct of a defendant at trial would therefore fall into the exceptions outlined by Finlay CJ above. Thus, it is not possible to plead an entitlement to aggravated damages and such damages can be applied for at trial if the entitlement arises during the trial. Cross J confirmed this point in the context of dealing with an application for aggravated damages in *Saleh v Moyvalley Meats (Ireland) Ltd.*<sup>100</sup> He stated that in such a scenario ‘a plaintiff need not plead aggravated or exemplary damages in order to be awarded them if the entitlement arises due to the conduct of the case by the defendant’.<sup>101</sup> Similarly, in *Hollybrook (Brighton Road) Management Company Limited v All First Property Management Company Limited*,<sup>102</sup> it only came to light on the twelfth day of trial that plaintiff had falsified cleaning logs. Laffoy J stated: ‘I do not think it is unfair to Ms. Farrell to consider the claim for aggravated damages, although it is not pleaded’.<sup>103</sup> However, even if the entitlement to aggravated damages is not pleaded or applied for at trial, it appears that it is still within a judge’s discretion to award them. In the aforementioned *Stokes v South Dublin County Council*,<sup>104</sup> aggravated damages were awarded to the plaintiff in a situation where the judgment makes no reference to the entitlement being pleaded, nor does the judgment make any reference to any submissions or requests being made by the plaintiff’s legal team for aggravated damages at the trial of the action. As noted earlier, an evidentially unsubstantiated theory of how the plaintiff fractured his knuckle was both pleaded in the defence and reiterated at trial. Therefore, even though the entitlement could have been pleaded before trial, it did not disentitle the judge from using his discretion to make an award of aggravated damages.

## Assessment of the level of aggravated damages

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<sup>98</sup> *Conway* (n 1).

<sup>99</sup> *ibid* [321].

<sup>100</sup> *Saleh* (n 52) [60].

<sup>101</sup> *ibid* [61].

<sup>102</sup> *Hollybrook (Brighton Road) Management Company Limited* (n 85).

<sup>103</sup> *ibid* [11.3].

<sup>104</sup> [2017] IEHC 229.

Assessments of the awards of aggravated damages have varied widely according to the seriousness of the tort underpinning the initial wrong and the gravity of the aggravating feature. The awards referred to above suggest that the more serious the original wrong is, and the greater the degree of the aggravating features, the higher the award of aggravated damages will tend to be. The question of whether aggravated damages can be awarded in the absence of an award of compensatory damages was recently considered in the Court of Appeal by Ryan P in *Slattery v Friends First*.<sup>105</sup> He concluded that ‘The Court finds [it] is unnecessary to reach a conclusion as to whether it is possible to have an award for aggravated damages where the plaintiff has failed to prove a loss that would justify compensatory damages’.<sup>106</sup> This comment appears to confirm that an award of aggravated damages is therefore contingent upon some level of compensatory, or at the very least, some level of nominal damages being awarded.

Arguably, as aggravated damages by their very definition appear to be contingent on the award of compensatory or nominal damages, one might assume that they should not exceed the other heads of compensatory damages awarded. However, there is precedent previous to *Comway* that suggests that if the aggravating features are more serious than the original wrongdoing, then the award of aggravated damages can exceed the award of compensatory damages. In the afore-mentioned *Kennedy v Hearne*,<sup>107</sup> the final award of aggravated damages was twenty-fold the award of compensatory damages. In that matter the original defamation was found not to have caused significant damage to the plaintiff’s reputation as it was not widely published. However, Finlay CJ found that the allegations put forward during cross-examination that the plaintiff was a ‘cheat’, exceeded the seriousness of the original defamation. He increased the High Court award from IR£2,000 to IR£10,000 and held that:

Having regard to what I would consider the very large difference between the seriousness of the original defamation and the much greater seriousness of the harm to the plaintiff’s character and reputation as a solicitor arising from the conduct of the proceedings in the High Court, I conclude that the sum of £2,000 as aggravated damages was significantly inadequate to compensate a solicitor for being publicly accused in the city in which he practices, of being a cheat and having no reputation.<sup>108</sup>

In *Whelan v Madigan*,<sup>109</sup> the wrong caused by the aggravation, namely a campaign of intimidation carried out by the defendant landlord against his four tenants, exceeded the original wrongdoing of trespassing. In this matter, the defendant landlord was found to have committed acts of trespass against the plaintiff tenants by damaging their doors and letterboxes. Subsequently he carried out a campaign of intimidation by ringing some of the tenants and instead of speaking, he would breath down the phone. He also would turn up with workmen to the plaintiffs’ apartments to make right the works that he claimed were not authorised by the terms of their lease agreements. Kenny J found that the defendant’s ‘conduct was disgraceful and caused considerable anxiety and nervous shock’ to the plaintiffs. He awarded injunctions to all of the plaintiffs to restrain the defendant from continuing his campaign of trespass and intimidation. He also awarded damages of IR£22, IR£48 and IR£88 to three of the plaintiffs, together with awards of IR£300 in aggravated damages each.

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<sup>105</sup> [2015] IECA 149.

<sup>106</sup> *ibid* [94].

<sup>107</sup> *Kennedy* (n 2).

<sup>108</sup> *ibid* 541.

<sup>109</sup> [1978] ILRM 136.

Hence, this matter also illustrates that where the aggravating feature is considered to be worse than the substantive wrong, an award for aggravated damages can exceed, by many multiples, the award for compensatory damages.

The vast majority of the case law highlighted suggests that judges tend to make separate awards of aggravated damages on top of the usual heads of compensatory damages, particularly in situations where it is possible to untangle and quantify the aggravating feature from the original wrongdoing. However, in other situations, where such an exercise is not possible, judges will prefer to make global awards of compensatory and aggravated damages. Hence, Murray CJ, in his judgment in *Shortt v Commissioner of an Garda Síochána*,<sup>110</sup> stated that: a ‘global figure for compensatory damages may well be appropriate where the circumstances of the case indicate that the factors giving rise to aggravated damages are relatively marginal to the substantive wrongs which entitle a plaintiff to ordinary compensatory damages’.<sup>111</sup> This judgment suggests that it is therefore prudent for judges to award global damages in situations where the aggravating features and substantive wrongs are closely interwoven and incapable of being separately identified and quantified.<sup>112</sup>

### Compensation or punishment?

In 2000, the Law Reform Commission (‘LRC’) compiled an extensive report on aggravated, exemplary and restitutionary damages.<sup>113</sup> The LRC considered the ‘inevitable ambiguity’ that exists between aggravated and exemplary damages, as both categories are grounded by the misconduct of a defendant, a distinction of which one should apply can be difficult to decipher.<sup>114</sup> The LRC recommended that aggravated damages should be defined as follows:

Aggravated damages are damages to compensate a plaintiff for the additional hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff’s claim, or by the defendant’s conduct subsequent to the wrong, including the conduct of the legal proceedings.<sup>115</sup>

Essentially, the LRC wanted to place an emphasis on the compensatory nature of damages, so as to ensure that they would be awarded to compensate the original and additional suffering caused to the plaintiff by the defendant’s actions. The rationale is that a plaintiff should not be compensated for anything apart from the entire suffering caused by the actions of a defendant.

Twenty years later, the distinction as to whether aggravated damages are awarded to compensate the plaintiff for the original and additional suffering caused, to punish the defendant for a cavalier attitude thereto or to achieve a combination of both of the foregoing objectives, remains difficult to decipher. Some awards appear to have been focused on the

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<sup>110</sup> *Shortt* (n 6).

<sup>111</sup> *ibid*.

<sup>112</sup> See also *Herrity* (n 7) and *Walsh* (n 20), where global awards of compensatory and aggravated damages were also awarded.

<sup>113</sup> Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60–2000).

<sup>114</sup> *ibid* para 5.11. See also the decision in *Kennedy v Ireland* [1987] IR 587, which pre-dated the decision in *Conway*. The plaintiffs, who were political journalists had their phone deliberately ‘tapped’ on the instructions of the then Minister for Justice. The ‘tapping’ was carried out without lawful justification. They were awarded damages for the distress suffered as a result of the breaches of their constitutional rights. Hamilton P noted that they were entitled to be awarded significant damages and found that it was ‘irrelevant whether they should be described as aggravated or exemplary’.

<sup>115</sup> *ibid* para 5.26.

compensatory element and the additional upset caused to the plaintiff by the defendant's conduct. In the aforementioned *Stokes v South Dublin County Council*,<sup>116</sup> Barr J appears to have considered the effect that the aggravation had on the plaintiff and awarded €5,000 'for the upset caused to him by virtue of the nature of the unsuccessful defence put forward by the defendant'.<sup>117</sup> Similarly, in *Herrity v Associated Newspapers [Ireland] Ltd*,<sup>118</sup> Dunne J, also appeared to make the award based on the additional harm that the aggravating act had upon the plaintiff. She assessed ordinary and aggravated compensatory damages in the sum of €60,000 'for the conscious and deliberate and unjustified breach of the plaintiff's right to privacy and the undoubted and significant distress caused to the plaintiff as a result of that breach'.<sup>119</sup> However, the majority of the case law suggests that that aggravated damages are being deployed in a more punitive fashion to punish the defendant's wrongdoing. In *Shortt v Commissioner of an Garda Síochána*,<sup>120</sup> Hardiman J, whilst noting that such damages are compensatory in nature, appeared to have accepted that that they are to be made in addition to compensating for the distress suffered by the behaviour of the defendant. He stated that:

aggravated damages are compensatory damages increased by the presence or absence of the factors mentioned by Finlay C.J. or others. It is, therefore wrong in principle to say that an award of compensatory damages which takes account of the plaintiff's emotional distress (here, an extremely important factor: the man was driven to despair) exhausts the capacity for an award of aggravated damages.<sup>121</sup>

In particular in situations where *Conway* Category 2(c) is being considered, the courts appear to be placing an emphasis on a punitive role for aggravated damages. In *O'Sullivan v Depuy International Limited*,<sup>122</sup> Cross J's obiter comments suggest that the role of aggravated damages is to create equilibrium on the battle field of litigation. He stated that: 'An award of aggravated damages against a defendant who acts in bad faith, may well be the only deterrent to balance the draconian statutory penalties against a plaintiff who acts in bad faith'.<sup>123</sup> Similarly, in *Dineen v Depuy International Limited*,<sup>124</sup> Cross J reiterated, obiter, that: 'The only way in which any fairness or balance in the arena can be ensured is if courts are prepared to award aggravated damages in suitable cases'.<sup>125</sup> In *Camiveo Ltd v Dunnes Stores*,<sup>126</sup> Barrett J noted that defendants 'may act in a manner that is so objectionable as to merit severer sanction, here in the form of aggravated damages, imposed by the court with some regret that they should require to be ordered but with the conviction that such requirement presents'.<sup>127</sup> He awarded €45,000 aggravated damages in addition to damages for breaches of contract and wrongful interference with economic rights.<sup>128</sup> In *Retail Systems Technology Limited v McGuire*,<sup>129</sup> Kelly J awarded €10,000 in aggravated damages to demonstrate the court's

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<sup>116</sup> [2017] IEHC 229.

<sup>117</sup> *ibid* [35].

<sup>118</sup> *Herrity* (n 7).

<sup>119</sup> *ibid*, [83].

<sup>120</sup> *Shortt* (n 6).

<sup>121</sup> *ibid* [97].

<sup>122</sup> [2016] IEHC 684.

<sup>123</sup> *ibid* [12.5].

<sup>124</sup> [2017] IEHC 723.

<sup>125</sup> *ibid* [9.12].

<sup>126</sup> *Camiveo* (n 21).

<sup>127</sup> *ibid* [147].

<sup>128</sup> The Court of Appeal did not uphold the findings of Barrett J regarding the award for interfering with economic rights, but it did uphold the award of €45,000 in aggravated damages.

<sup>129</sup> *Retail Systems Technology Limited* (n 83).

disapproval of the procrastinating behaviour of the defendants and the general way in which the defendants conducted themselves. There is no actual evaluation as to how this procrastination caused any additional suffering to plaintiff, though it is relatively easy to infer.

## Conclusion

Aggravated damages, after a constrained start post-*Conway* are now well established in Irish law. In particular, their development gathered significant pace, particularly in tort law in the last fifteen years after the Supreme Court decision in *Philp v Ryan*.<sup>130</sup> They are now a bona fide sub-category of compensatory damages that judges can have regard to when assessing claims. While aggravated damages are still sparingly awarded, it is envisaged that *Conway* Category 2(c), with regard to the conduct of the defence, will continue to be the category that attracts the most amount of applications for and awards of aggravated damages. Reasonableness and justification of the allegations advanced by the defence are key concepts that a court will consider when assessing an entitlement to aggravated damages. These concepts are balanced against a holistic view of the behaviour of all parties from the initiation of the wrong and throughout the course of the proceedings.

There remains significant scope for their further development, particularly with regard to *Conway* Category 2(a) – the manner in which the wrong was committed – with regard to wrongdoing involving a high degree of reckless indifference and more particularly where the reckless behaviour has persisted over a period of time.

There appears to be differing and opposing viewpoints among the judiciary on the role of aggravated damages. These viewpoints are most marked in matters surrounding the conduct of the defence. This situation was bound to occur because the very definition of the role of aggravated damages in *Conway* is partly to compensate a plaintiff for the added hurt or insult and partly to punish a defendant's cavalier attitude. Therefore different judges will have different views on which of these elements takes precedence or which part of the test they focus on. Some judges, as stated above, appear to make awards of aggravated damages with a focus on punishing or deterring poor litigation conduct, and some award aggravated damages with an intention of compensating a plaintiff for the harm arising from the defendant's conduct. The case law would however suggest that there is more of a punitive rather than a compensatory element underpinning the more recent decisions to award aggravated damages, though in many of the cases the objectionable behaviour of the defendant has an impact on the plaintiff, in addition to vexing the presiding judge.

It has essentially been thirty years since any substantive examination of aggravated damages has been undertaken by the superior courts. Such a thorough examination needs to be undertaken when the next appropriate case presents itself, particularly since the application of such damages has increased substantially in the absence of any significant contemporaneous detailed consideration of principal. Such an exercise should include an examination of the role, scope and methodology of assessing aggravated damages. It will be interesting to see if the superior courts will seek to endorse, refine or constrain any further development of the law relating to aggravated damages and the seminal principles which were set out in the *Conway* judgment, now of almost thirty years vintage.

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<sup>130</sup> *Philp* (n 3).