THE HIGH COURT

[2008 No.28 1A]

IN THE MATTER OF AN INTENDED PROSECUTION FOR CRIMINAL LIBEL

AND

IN THE MATTER OF SECTION 8 OF THE DEFAMATION ACT 1961

AND

IN THE MATTER OF THE APPLICATION OF

TONY DENNEHY AND IRENE POYNTON

APPLICANTS

AND

INDEPENDENT STAR LIMITED T/A THE IRISH DAILY STAR NEWSPAPER

RESPONDENT

JUDGMENT of Mr. Justice Gilligan delivered on the 28th day of May, 2009

1. This is an application, pursuant to s. 8 of the Defamation Act 1961 (hereafter 'the 1961 Act'), for leave to institute a prosecution for criminal libel. Section 8 provides:-

> "No criminal prosecution stall be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel

published therein without the order of a Judge of the High Court sitting in camera being first had and obtained, and every application for such order shall be made on notice to the person accused, who shall have an opportunity of being heard against the application."

2. This application was accordingly heard *in camera*. However, by consent of the parties this judgment is delivered in open court.

3. The applicants are, respectively, the brother and sister of Finbar Dennehy, deceased, and the application is brought by way of notice of motion and a grounding affidavit sworn by the first applicant. He avers that the respondent is the owner and publisher for the purposes of the 1961 Act of the newspaper "The Irish Daily Star", which is the subject matter of the within proceedings. He refers to the fact that his brother, Finbar Dennehy, died on the 26th September, 2007. The body of Finbar Dennehy was discovered in his apartment in Clontarf, in the City of Dublin on the 26th September, 2007. The Garda Press Office reported that he had died from a single stab wound.

4. On the 28th September, 2007, the front page of the respondent's newspaper the Irish Daily Star, carried an extremely prominent headline "Kinky Sex Horror" "Murder riddle as naked man is found tied up and choked". The accompanying article, stated to be written by Michael O'Toole, went on to identify the deceased Mr. Finbar Dennehy, as the victim and stated that "Gardaí were last night probing whether a man was murdered – or killed accidentally in a kinky sex game". The article stated that Mr. Dennehy "was found

naked with a plastic bag over his head, a noose around his neck and his hands tied behind his back". A further article on p. 6 also stated to be written by Michael O'Toole, carried the prominent headline of "Murder riddle of sex game victim", with a subheading of "Noose tied around neck in autoerotic romp". This article stated that "Gardaí still don't know if the man who was trussed up like a pig in a bizarre sex game was murdered – or died accidentally".

5. In a further article on the 29th September, 2007, the Irish Daily Star carried a prominent headline "Kinky gay sex man was stabbed".

6. The first named applicant avers that the allegation that the late Mr. Dennehy was involved in a bizarre sex game that went horribly wrong is wholly untrue and grossly defamatory of the late Mr. Dennehy. It is averred that the assertions are grossly destructive of the late Mr. Dennehy's good name and that as a result of these allegations the family of the late Mr. Dennehy have been left outraged and caused extreme distress and damage. Further it is averred that the terms in which the articles were written and presented show a manifest intent to vilify the deceased and to do so in terms which were such as to be likely to cause immense anger, pain and distress to members of the late Mr. Dennehy's family and his friends, that the articles by reason of their content and style have provoked anger and resentment among family members including in particular, the first named applicant and that he has found it difficult to restrain himself arising from the publication of the articles and the lack of any remorse on the part of the respondent. The first named applicant avers that the contents of the articles are scurrilous and

sensationalistic in presentation and denigratory of his late brother in the most provocative and inflammatory manner, and that the articles and their content have caused particular upset.

7. The respondent, having had the opportunity to do so, has declined to deliver any replying affidavit, preferring to rely on submissions to the court and accordingly, the first named applicant's averment that it is wholly untrue and grossly defamatory of the late Mr. Dennehy to have stated that he was involved in a kinky gay sex game that went horribly wrong remains unchallenged, as does the averment of the first named applicant that the contents of the articles are scurrilous and sensationalistic in presentation, and denigratory of the late Mr. Dennehy in the most provocative and inflammatory manner.

8. As a result of a garda investigation into the death of the late Mr. Finbar Dennehy, an individual was charged with and convicted of his murder and sentenced to life imprisonment.

9. Subsequent to the publication of the article the applicants' solicitors wrote to the editor of the Irish Daily Star indicating the anger and distress that the deceased's family had suffered as a result of the publication of the articles, and advising of their intention to institute a prosecution for criminal libel and to apply to the High Court for leave to do so pursuant to s. 8 of the 1961 Act. The applicants through their solicitors invited the editor of the Irish Daily Star to publish an apology and retraction of the statements contained in the articles. No reply was received to this initial letter and, subsequently, a further letter

of the 22nd January, 2008, noted that the editor had failed to reply to the earlier letter and repeated the warning that a s. 8 leave application would be made in the near future in the absence of a satisfactory reply. Subsequently, the solicitors for the respondent replied by way of a letter of the 15th February, 2008, indicating a denial of any conduct of a criminal nature, or any conduct approaching criminality and indicating that the application for leave pursuant to s. 8 would be contested.

10. The views as stated by the first named applicant in relation to the articles as referred to herein, which have not been contested, state all that is appropriate in relation to the articles themselves.

11. Two principal legal issues arise for consideration. The first concerns the relevant principles applicable by the court, in an application pursuant to s. 8 of the 1961 Act, for leave to commence a criminal prosecution for the publication of a libel and secondly, in the particular circumstances of this case, the fact that the applicants are the brother and sister respectively of the late Mr. Finbar Dennehy, who was deceased at the time of the relevant publication, having been murdered some few days beforehand.

12. The general principles applicable in the present application are those which were originally enunciated by Wien J. in *Goldsmith v. Pressdram* [1976] 3 W.L.R. 191.

13. In expressing those principles Wien J. stated at p. 196:-

"First before discretion can be exercised in favour of an applicant who wishes to institute criminal proceedings in respect of a libel, which he contends is criminal, there must be a clear *prima facie* case. What I mean by that is that there must be a case to go before a Criminal Court that is so clear at first sight that it is beyond argument that there is a case to answer. Secondly, the libel must be a serious one – so serious that it is proper for the criminal law to be invoked. It may be a relevant factor that it is unusually likely for the libel to provoke a breach of the peace, although that is not a necessary ingredient at all. Thirdly, the question of the public interest must be taken into account so that the judge has to ask himself the question 'does the public interest require the institution of criminal proceedings'? What is not appropriate in my judgment is the question whether damages might or might not afford an adequate remedy to a complainant. I consider that that question is irrelevant. Once one arrives at the conclusion that the criminal law ought to be invoked then it is not a private case between individuals; the State has an interest and the State has a part in it."

14. The principles as laid down by Wien J. in *Goldsmith* were endorsed by Finlay P. in *Gallagher v. Independent Newspapers* (Unreported, High Court, 3rd July, 1978) and by Gannon J. in *Hilliard v. Penfield Enterprises Ltd.* [1990] 1 I.R. 138. Gannon J. had the benefit of being furnished with a typed authentic copy of the judgment of Finlay P. In endorsing the principles, Finlay P. had one qualification which related to the constitutional guarantee of personal rights which are personal to a living person and accordingly not relevant in the present circumstances. In *Hilliard* the applicant was the

widow of a Church of Ireland rector. The respondents were the publisher, proprietor and editor of a magazine named "The Phoenix". Shortly after his death an article appeared in the magazine alleging, *inter alia*, that the applicant's husband had in the past been an "intelligence officer" for the I.R.A., that he had provided contacts for that organisation in connection with bank robberies carried out by it, and that he had set fire to cars and houses on its behalf. The applicant made a s. 8 application in the High Court for leave to commence a prosecution against the respondents for criminal libel. She claimed that, by reason of her relationship to a person so infamous as was depicted in the article, both she and her infant daughter would be deprived of benefits which would otherwise have accrued to them from persons of public importance who had held her late husband in high esteem. She claimed further that the manner in which the falsehoods contained in the article were expressed evidenced a manifest malicious intention not only to vilify her husband but also to cause personal pain to herself and her daughter and to hold them up to public odium and contempt. Gannon J. refused the application. In doing so he expressly declined to prescribe binding principles for future s. 8 applications so as to avoid fettering the discretion under that provision. However, he held, applying the principles laid down in *Gallagher*, that the applicant in a s. 8 application must establish a clear *prima facie* case, in the sense that there is a clear case to answer if the matter goes before a criminal court. He went on to hold that s. 8 places an onus on an applicant to prove that there is a public interest in the prosecution being commenced, which must be balanced against the public interest in the maintenance of the freedom of the press. With particular relevance to the present case, Gannon J. held that, in order for a publication which defames a dead person to amount to a criminal libel, it must be proven

to have been published with the malevolent purpose of vilifying his memory with the intention of injuring surviving members of his family. He refused the application on the ground that in the case before him the defamation of the applicant and her daughter, even if it could be proven at trial to have been malicious and intentional, lacked the gravity in law to require that it be the subject of a prosecution for criminal libel.

15. Counsel for both parties herein acknowledge the principles derived from *Goldsmith* as appropriate to the present application for leave pursuant to s. 8 of the Defamation Act 1961, which principles can be summarised as follows (*per* Finlay P in *Gallagher*):

> "(1) The applicant must establish a clear prima facie case in the sense that it is a case which is so clear at first sight that there is beyond argument a case to answer if the matter goes before a criminal court.
>
> (2) The libel must be a serious one, so serious that it is proper for the criminal law to be invoked.
>
> (3) Although it may be a relevant factor that the libel is unusually likely to provoke a breach of the peace, that is not a necessary ingredient.
>
> (4) The question of the public interest must be taken into account on the basis that the judge should ask himself the question: does the public interest *require* the institution of criminal proceedings?"

16. As regards the second issue, Mr. Callanan for the applicants submits that the articles have caused injury to the applicants, and that the respondent brought about that injury intentionally or with a reckless disregard for them, and that it is not necessary to establish that the words complained of are defamatory of the applicants themselves, accepting that the articles are not defamatory of the applicants in the strict sense of that term.

17. The authorities, however, cast some doubt on this proposition. At p. 147 of his judgment in *Hilliard*, Gannon J. declined the s. 8 application before him on the ground that:-

> "the *defamation of the widow and daughter of the deceased*, assuming it to be proved as intentional and malicious, does not have the gravity in law to require prosecution for a criminal offence" (emphasis added).

18. This passage appears to indicate that where, as in *Hilliard*, the article complained of refers to a deceased person, it must also defame a living person in order to warrant the grant of leave under s. 8. It is submitted on the applicants' behalf that this cannot be the import of *Hilliard* for a number of reasons. If it were, the crime of libel would in effect be abolished insofar as deceased persons are concerned, since some defamation of the surviving relatives would invariably be required. It is contended that the word 'defamation' in this passage was used to mean injury to reputation, and that the requisite injury to living persons can take a number of forms. It is submitted that this conclusion is

supported by reference to the nature of the applicant's complaint in *Hilliard*, which consisted of loss of benefits from persons who held positions in public life, together with exposure to public odium and contempt, rather than a complaint of libel against the applicant and her daughter in the normal sense. Mr. Callanan refers to *Gatley on Libel and Slander*, 11th ed., at p. 768, where the author suggests that some defamation of the relatives is required, but acknowledges that such defamation can arise "by reason of the vilification of the dead relative's memory." Mr. Callanan further submits that insofar as Gatley at p. 768 refers to the need for the statements to be defamatory of the surviving relatives of the deceased, this is inconsistent with the sense in which the word was used in *Hilliard* to connote the injury to the family. To construe the offence of libel in relation to deceased persons as requiring some defamation of surviving relatives would, it was said, be contrary to principle, remote from the nature of criminal libel and impossible to reconcile with the old authorities, including *De libellis famosis* (1605) 5 Co Rep 125a. Mr. Callanan submits that the respondent intended to injure the applicants or displayed reckless indifference as to whether they would suffer injury. It was difficult to see how such injury could not have been present to the mind of the author or that of the editor of the newspaper. The timing of the publication in particular was evidence from which an intention might be inferred. In addition, Gannon J. in *Hilliard* seemed prepared to assume that intention could be proved regarding the deceased's widow and daughter in that case even though the accusations contained in the article had been directed at the deceased. It is contended on the applicants' behalf that the application in *Hilliard* was refused on the basis that the injury to the applicant and her daughter was not sufficiently grave, not on the ground that the applicant had failed to show the other ingredients of the crime of libel.

The injury to the applicants in the present case consisted in part of the immense distress they were caused at a time when they were least in a position to deal with that distress. The articles were published immediately upon the death of the applicants' brother, before his burial and before the applicants had had an opportunity to mourn his passing. The psychological consequences remained with them and were ongoing. Clearly this far exceeded the 'mere offence' spoken of in Gatley. Allied with this was the injury to reputation they had sustained by association with a person about whom such comments had been made, particularly as the comments related to deviancy of sexual conduct. That injury, though perhaps irrational, was real.

In addition, it was submitted that the court enjoyed a very broad discretion in s. 8 applications, a discretion which Gannon J. in *Hilliard* had expressly refrained from fettering by prescribing binding principles to be applied in the future.

19. Mr. McCullough, for the respondent, submits that the requirement of some defamation of the surviving relatives themselves was clearly established by the judgments in *R v. Topham* (1791) 4 Term Rep. 126 and *R v. Ensor* (1887) 3 T.L.R. 366, cited and applied in *Hilliard.* He contends that this analysis of *Hilliard* is supported by Gatley (11th ed., p. 769). There the learned author also indicates at p. 768 that the statements must be defamatory of living persons, albeit due to the vilification of the deceased. In *Topham* Lord Kenyon, delivering the judgment of the court, stated at pp. 129-130:-

> "Now to say in general that the conduct of a dead person can at no time be canvassed, to hold that even after ages are past the conduct of bad men cannot be contrasted with the good would be to exclude the most useful part of history; and therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose to vilify the memory of the deceased and with a view to injure his posterity (as in *R. v. Critchley*), then it comes within the rule stated by Hawkins - then it is done with a design to break the peace, and then it becomes illegal."

20. The respondent suggested that "his posterity" in this context meant those who survived the deceased rather than the way in which he was remembered. This would appear to be correct having regard to the fact that Lord Kenyon referred earlier in the same sentence to the vilification of the memory of the deceased, implicitly indicating that he regarded the deceased's memory and posterity as separate concepts.

21. Stephen J. in *Ensor* quoted the above passage at pp. 366-367 and continued at p. 367:-

> "The judgment seems to me to show that a mere vilifying of the deceased is not enough. Judgment, indeed, was arrested in Topham's case because it was not enough. *There must be a vilifying of the deceased with a view to injure his posterity. The dead have no rights and can suffer no wrongs. The living alone can*

> *be the subject of legal protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt or ridicule.* This, no doubt, may be done in every variety of way. It is possible, under the mask of attacking a dead man, to attack a living one. There are in our own and other languages well-known coarse terms of abuse which, taken literally, reflect only on the character of a man's mother, but which if applied to a living man in writing would certainly be libellous, whether his mother was living or dead, because they are known to attribute to the son the qualities which such a mother might be supposed to transmit; and if the mother were mentioned and vice were imputed to her in order to bring disgrace upon the son, it seems to me that though the son was not expressly mentioned the law would be the same." (Emphasis added).

22. He noted the view that a man must be held to intend the natural and probable consequences of his actions, and that because the natural and probable consequence of impugning a deceased person would be to incite his relatives to a breach of the peace, such a libel on the deceased should be punishable as a crime. Stephen J. observed that, in the case before him, Wills J. had seemed to express that view in charging the grand jury. However, Stephen J. could not fully agree, noting at p. 367:-

> "In that case [*Topham*] judgment was arrested because no intention to injure the family was alleged. *This shows that the intent to injure the family was a fact requiring proof and necessary to be found by the jury, and not an inference by*

> *which they were bound from the terms of the writing reflecting on the dead man.* I wish to add that I regard the silence of the authorities and the general practice of the profession as more weighty authority on this point than the isolated statements of Lord Coke and the few unsatisfactory cases referred to in *R. v. Topham*. I am reluctant in the highest degree to extend the criminal law. To speak broadly, to libel the dead is not an offence known to our law. If an extension of it is required it is for parliament and not for the judges to extend it. I think it is a fatal objection to several of the counts of the indictment that they aver only a tendency and not an intention to injure and to excite a breach of the peace. To define the crime of libel with reference to the tendency of the matters written, and not by the intention of the writer, might or might not be an improvement of the law; but if it is, it must be effected by the legislature and not by the judges." (Emphasis added)

23. It is further contended on the respondent's behalf that these passages make clear that an intention to injure living persons is necessary to establish a criminal libel consequent on a defamation of the deceased. While that may entail a departure from the earlier authorities and traditional principles, it is entirely consistent with *Topham* and *Ensor*, and with the ground on which leave was refused in *Hilliard*.

24. Mr. McCullough submits that the necessity for the libel complained of to be defamatory of living persons is borne out by the observations of Gannon J. in *Hilliard*, where the leave application was refused on the ground that the defamation of the widow

and daughter of the deceased did not have the requisite gravity, although Gannon J. considered that the defamation of the deceased himself was very grave, stating at p. 141:

> "I do not find it necessary, nor do I propose, to quote the article nor any extract from it. I have read the article and consider it to be so scurrilous and contrived in its presentation of dissociated persons and events as to arouse feelings of revulsion towards the author as well as vilifying the subject, namely the applicant's deceased husband. It is difficult to believe that either of the two individual respondents could stoop so low as to present or adopt such a mean, spiteful and wounding attack upon a deceased under the guise of a commentary on his funeral. In my opinion there is nothing in the article or in the apparent circumstances of its publication which could in any, or any colourable, way be for the public benefit. It would be impossible to describe a libel which accuses a person of having been twenty years ago an intelligence officer for the I.R.A. and of providing contacts to lead to massive bank robberies, or of setting fire to houses and cars on behalf of the I.R.A. as being of a trivial character. A libel of the nature which this article is can only be described as most serious in the nature of the defamation. I would entertain some doubt as to whether the punishments provided in ss. 10, 11, or 12 of the Defamation Act, 1961, would indicate adequately the seriousness of such a libel in the event of prosecution to conviction."

The application was nevertheless refused on the ground that the defamation of the applicant and her daughter lacked the necessary gravity.

25. This lends further support to the proposition that what concerns the court is the defamation of living persons, albeit through statements about the deceased. The judgment of Gannon J. in *Hilliard* appears consistent with no other conclusion. The picture which emerges from *Topham*, *Ensor* and *Hilliard* is that there must be some defamation of living persons and that the material published must have been published with the malevolent purpose of vilifying the deceased with a view to injuring such persons.

26. I do not overlook the fact that Gannon J. intended not to lay down principles in *Hilliard* for the guidance of other judges. However, in applying *Topham* and *Ensor* he was clearly satisfied that the principles as therein set out represent Irish law, notwithstanding that, as noted by Stephen J. in *Ensor*, they were inconsistent with earlier authorities, regarded by the latter as "unsatisfactory". I see no reason to depart from the understanding of the law enunciated in *Hilliard*. For leave to be granted it is necessary to establish a *prima facie* case that the statements complained of are defamatory of living persons. This defamation may be accomplished either by, as it was put in *Ensor*, "holding them up individually to hatred, contempt or ridicule", or in some other way, albeit through the statements about the deceased.

27. The following passage from *Gatley on Libel and Slander* (11th ed.) at p. 768 reflects substantially the same propositions;

> "it is said to be a criminal offence to defame a deceased person. However, the better view would seem to be that no extension of the actus reus of the crime is recognised in this sense, and so the publication has to be defamatory of living members of the deceased's family albeit by reason of the vilification of the dead relative's memory."

In this connection Gatley quotes in part the passage from the judgment of Stephen J. in *Ensor* cited at para. 21 herein. Gatley suggests that this passage may leave open the possibility that forms of injury other than a libel can constitute the *actus reus* of the offence. However, with respect to the learned author, the passage from the judgment in *Ensor* does not appear to leave open this possibility. Reading the passage as a whole, it recognises that the relatives may be exposed to hatred, contempt or ridicule "in every variety of way": it does not suggest that every variety of injury will suffice. The references in the authorities to an intention to injure are more general. Accordingly it may be that an intention to bring about some form of injury is sufficient as to the *mens rea* of the offence. As to the *actus reus* however, it would seem that the injury actually effected must take the form of defamation of living persons. It appears to follow from the authorities considered above that other varieties of injury will not suffice.

28. While I accept that the court enjoys a wide discretion in an application under s. 8, discretion is not a byword for arbitrariness: it must be exercised in accordance with the principles prescribed by law, including those as stated in *Topham* and *Ensor*.

29. The judgment in *Ensor* makes it clear that the surviving relatives need not be expressly named, and there is no indication in *Hilliard* that the article complained of cast specific imputations on the widow and daughter of the deceased. However, again the article which defames the deceased must also, albeit by reason of the statements about him, defame his relatives or other living persons, that is to say it must expose them to hatred, contempt or ridicule, or tend to cause others to shun or avoid them, or tend to lower them in the estimation of right thinking members of society generally, if they are to succeed in a prosecution for criminal libel.

The allegations in the present case relate to matters of a very personal nature to the deceased. It could not reasonably be assumed by anyone that the applicants herein, being the deceased's brother and sister, were aware of or connected with such activities as were ascribed to him. They have, as averred to, undoubtedly been left outraged and caused extreme distress and upset. However, they have suffered these consequences by reason of the libel against their late brother. In my view it is necessary as a prerequisite to a grant of leave pursuant to s. 8 that the article the subject matter of the application must be defamatory of living persons, or more precisely in the instant case a *prima facie* case of defamation must be made out on behalf of the applicants, and that case can include defamation of living members of the deceased's family, albeit by reason of the dead relative's memory, but subject to proof of an intent to injure living persons, in this instance the brother and sister of the deceased. As noted above, it is submitted on behalf of the applicants that this intention may be present. Mr. McCullough contended that there was no evidence of an intention to injure the family. He cited the judgment in *Ensor* to the effect that the intent to injure the family was a fact requiring proof and necessary to

be found by the jury rather than something the jury were bound to infer from the statements reflecting on the deceased. Mr. Callanan submitted that such an intention could be inferred, *inter alia* on the basis of the timing of the publication and on the ground that injury to the applicants was the natural and probable consequence of the publication of the articles complained of. He submitted that a person should be presumed to intend the natural and probable consequences of his actions. Noting the statement in *Ensor* that the jury are not bound to infer such an intention, he submitted that such an inference might nevertheless be drawn by a jury in an appropriate case.

In my view there is no evidence, and neither can it be inferred in the present case, that the respondent intended to injure the applicants. Furthermore I am of the view that in the circumstances the applicants have not been defamed. Accordingly, no *prima facie* case is made out and leave must be refused.

30. Mr. Callanan raises interesting arguments grounded on the European Convention on Human Rights Act, 2003. He refers to *Von Hannover v. Germany* [2004] E.M.L.R. 21, a decision of the European Court of Human Rights ('ECtHR') concerning the publication of photographs of a Princess of Monaco in various magazines. The German courts took the view that the publication of some of the photographs was lawful. The ECtHR held that domestic law infringed her right to privacy in failing to offer protection against such abuses. The Court referred at para. 57 to the positive obligation of the State to protect private life, and went on to say at para. 63:-

> "The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" (see Observer *and* Guardian, loc. cit.), it does not do so in the latter case."

This distinction was foremost among the reasons underlying the finding that the applicant's rights under Article 8 had been violated (see paras. 76-77 of the judgment). In this regard Mr. Callanan notes that the deceased was not a public figure. Reliance is also placed on *Pfeifer v. Austria* (2009) 48 E.H.R.R. 8. In that case the ECtHR held that the applicant's rights under Article 8 had been violated due to the failure of his defamation claim in respect of a magazine article alleging that he had caused the suicide of a far right wing commentator. The Court held that the allegation went beyond expression protected by Article 10.

Mr. McCullough refers to the decision of the ECtHR in *Dalban v. Romania* (Judgment of 28th September 1999), wherein the Court observes at para. 49:

> "Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of

> confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its rightful role of "public watchdog" in imparting information of serious public concern."

Mr. McCullough also relies on the decision of the Supreme Court in *Mahon v. Post Publications* [2007] 3 I.R. 338. In *Mahon* Fennelly J (with whose judgment Murray CJ and Denham J agreed) said at para. 87:

> "The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works."

The authorities relied upon by the applicant appear difficult to reconcile with the decision of the Supreme Court in *Mahon*. Even apart from that difficulty however, in the circumstances that arise in the present case the submissions advanced on behalf of the applicants on this point cannot assist them. This is because the court is bound to apply the law as it is. Section 2 of the 2003 Act requires that statutory provisions and rules of law must be interpreted and applied "in so far as is possible, subject to the rules relating to such interpretation and application" in a manner consistent with the Convention. It is not

possible, under the guise of interpretation, to construe the law in such a way as to bring about a departure from the clear requirements laid down in the authorities relevant to the determination of this application. Those authorities are clear in requiring that there should be some defamation of living persons, albeit by reason of statements concerning the deceased, to constitute a criminal libel. The court has already observed that the applicants' claim cannot surmount this hurdle. The Convention cannot alter the interpretation of the law to an extent beyond that which is provided for in s. 2.

31. Accordingly for the reasons as set out leave to institute a prosecution for criminal libel pursuant to s. 8 of the Defamation Act 1961 is refused.