



THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Record Number: 2017/82

Neutral Citation: [2022] IECA 185

Noonan J.

Faherty J.

Binchy J.

BETWEEN/

OLIVER CULLY

PLAINTIFF/

APPELLANT

- AND -

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DIRECTOR OF
PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS/

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 2nd day of August 2022

1. The events giving rise to these proceedings occurred in the early hours of 24 April 2004. At approximately 3.35 a.m. on that date, at Camden Street, Dublin, the plaintiff, who is the appellant in this appeal, had engaged the services of a taxi. Almost immediately, he had a verbal disagreement with the taxi driver about the fare. The taxi driver drove a short distance to where two Gardaí were standing. The Gardaí asked the appellant to get out of the taxi and he did so. There followed a scuffle as between the appellant and the two Gardaí.

During the scuffle, the appellant was brought to the ground by the Gardaí and thereafter was arrested and detained and brought to Harcourt Terrace Garda Station. He was released at approximately 6.50 a.m.

2. Later that day, which was a Sunday, a decision was taken by Chief Superintendent Bill Donoghue to prosecute the appellant with offences contrary to ss. 4, 6 and 19 of the Criminal Justice (Public Order) Act, 1994 (the “Act of 1994”). The reason that the decision to prosecute routine public order offences was taken by such a senior officer of An Garda Síochána was because the appellant himself was at the time an off duty Garda (he informed the Court during the hearing of this appeal that he had recently retired). On 27 April 2004, the appellant contacted a Superintendent Tom Conway and made a complaint to Superintendent Conway about his treatment by the Gardaí on 24 April. It is understood that by this complaint, the appellant claimed, *inter alia*, that he had been arrested without cause and assaulted by the Gardaí.

3. In due course, summonses charging the appellant with offences contrary to ss. 4, 6 and 19 of the Act 1994 issued. An investigation into a possible breach of the Garda code of discipline by the appellant was also initiated. Inspector Mary Murray of B District was appointed to conduct this investigation. She was appointed to do this by Chief Superintendent Donoghue. B District was also the District to which the Gardaí who arrested and detained the appellant were attached, a fact upon which the appellant places much emphasis.

4. The criminal charges were dismissed following a full hearing in the District Court on 7 September 2005. The disciplinary investigation was subsequently discontinued, although not for about another five months.

5. On 27 March 2007, the appellant issued these proceedings by way of plenary summons claiming damages for unlawful arrest, false imprisonment, malicious prosecution, assault

including trespass to the person in the form of intentional infliction of emotional and physical harm, harassment, intimidation and oppressive behaviour. A Statement of Claim was delivered on 26 September 2008 and a Defence was delivered on 25 May 2009. Notices for Particulars were raised and replied to by each of the parties during 2009 and 2010.

6. Notice of Trial was served on 19 March 2014 and a reply to the Defence was delivered on 22 May 2014.

The case as pleaded

7. I have already summarised above the content of the Plenary Summons. The Statement of Claim delivered on 26 September 2018 is a detailed and lengthy document. The appellant claims that at approximately 3.35 a.m. on 24 April 2004, he engaged the services of a taxi, driven by a Mr. Michael Keenan. He told Mr. Keenan that he wanted to go to Lucan and was informed that the fare would be €35. However, the appellant informed Mr. Keenan that the fare should be in the region of €18, and that in any case he would pay whatever was on the meter. It is stated that Mr. Keenan then drove a short distance to where two Gardaí were standing and Mr. Keenan got out of his car and spoke to the Gardaí. It is claimed that the Gardaí then ordered the appellant to get out of the car, and when he did so he was pulled roughly by two Gardaí, a Garda Keogan and a Garda Lowney from the footpath to the street. The appellant claims he was verbally abused by the Gardaí and he started to walk away. The appellant claims that he told the Gardaí that he would report them, and the taxi driver, and that they should “mind their jobs”. The appellant claims that he was then “rugby tackled” to the ground and assaulted by several Gardaí, sustaining injuries in the process. He was pinned face down to the ground and handcuffed. An Inspector King arrived at the scene and spoke to the appellant. He was arrested and taken to Harcourt Terrace Garda Station.

8. The appellant claims that while in the station, he was asked if he wanted to go home, and he was told that that would “be the end of it”. He was also warned that he could be summonsed. He claims that he warned a Garda at the station that this was “compounding the wrong” and that “the clock is ticking on this”. The appellant was eventually released at 6.50 a.m.

9. The appellant claims that three days later, on 27 April 2004, he telephoned a Superintendent Conway (at Pearse Street Station) and made a complaint about his treatment to him. He claims that he was assured by Superintendent Conway that an officer would be appointed to investigate his complaints. The appellant made written complaints by letters dated 27 April 2004 and 7 May 2004 and sought an independent investigation. The Statement of Claim states that he received three letters in early May of 2004 in which he was informed that Inspector Mary Murray of B District had been appointed to investigate his complaints. The Statement of Claim goes on to say that the appointment of Inspector Murray had the appearance of bias because B District was the same District to which the Gardaí against whom the appellant had made complaints were attached.

10. The appellant claims that Inspector Murray invited him to attend Pearse Street Garda Station for the purpose of advancing his complaint, but when he attended there he was served, by Inspector Murray, with a notice dated 27 May 2004 of Garda disciplinary proceedings against him. He claims that the first named respondent has failed to carry out any investigation of his complaints, and it is claimed that in the circumstances the second named respondent owed a duty to the appellant to ensure that he was not maliciously prosecuted.

11. The Statement of Claim goes on to describe how the appellant was subsequently summonsed before the District Court and charged with offences contrary to ss. 4, 6 and 19 of the Act of 1994. These summonses were applied for by Garda Keogan on 19 May 2004

and were taken in the name of the Director of Public Prosecutions (“DPP”). They were prosecuted by the Chief Prosecution Solicitor of the Office of the DPP. It is claimed that the prosecution was at all times unfounded and malicious. It is claimed that the failure to carry out any independent investigation, which would have revealed the innocence of the appellant, and the commencement of Garda disciplinary proceedings against the appellant constituted malicious prosecution, harassment and intentional infliction of emotional harm.

12. At para. 7 of the Statement of Claim, it is stated that the appellant was subjected to unlawful arrest, assault, false imprisonment, malicious prosecution, intentional infliction of emotional and physical harm, trespass to the person in the form of harassment, intimidation, oppressive behaviour, breach of the appellant’s constitutional rights, failure to vindicate his constitutional rights and wilful disregard of his constitutional rights.

13. There then follows 32 sub-paragraphs of detailed particulars. Some of these particulars repeat allegations set forth above, but there are also particulars alleging a failure on the part of the respondents to seek out and preserve CCTV footage, and allegations that Garda Keogan and a Garda Kelly fabricated statements relating to the CCTV footage.

14. Particulars of the injuries suffered by the appellant, physical and mental, are provided. These include a laceration of his lower lip, abrasions over the dorsum of his right hand, contusions over the right and left biceps, back pain, and psychological trauma which kept the appellant out of work for an extended period.

15. The Defence delivered in the proceedings on behalf of the respondents amounts to a complete traverse of the Statement of Claim. In the reply to the Defence, the appellant generally joins issue with the Defence, and by way of special reply it is denied that the appellant was lawfully arrested for breaches of ss. 4, 6 and 19 of the Act of 1994, and it is further denied that the appellant was lawfully investigated and prosecuted in relation to those

offences. It is also denied that the disciplinary proceedings were lawfully taken, and that they were taken without malice.

The trial in the High Court and the jury award

16. The proceedings came on for hearing before Mac Eochaidh J. and a jury over a period of 14 days, between 10 February 2016 and 29 February 2016. During the course of the trial, the judge made a number of important rulings, some of which are the subject of appeals to this Court. For the purpose of this judgment, the most significant of these rulings are, firstly, a ruling of the trial judge on the fifth day of the trial, relating to the admissibility of evidence concerning the decision of the judge of the District Court to strike out or dismiss (it is unclear which) the charges brought against the appellant. Having heard arguments from the parties, Mac Eochaidh J. concluded that evidence as to the reason(s) for the striking out/dismissal of the charges would be more prejudicial than probative, and that the case being advanced by the appellant in respect of the motivation and decision making process of the first named respondent to bring proceedings against the appellant could be fully made without reference to the conclusions of the District Court judge which were unrelated, in the view of the trial judge, to the decision to prosecute the appellant. Accordingly, the trial judge ruled that nothing said by the judge of the District Court in the proceedings in that court could be referred to in the trial of these proceedings, other than the fact that the proceedings were struck out or dismissed. That ruling of the trial judge is one of the rulings now appealed by the appellant to this Court.

17. Another important ruling of the trial judge appealed to this Court was a ruling made by the trial judge on the penultimate day (Day 13) of the proceedings in the High Court pursuant to an application brought by the respondents. That is a ruling withdrawing the appellant's claim for malicious prosecution from the jury.

18. Relatedly, the trial judge also directed that a claim for unlawful prosecution of disciplinary proceedings should not go forward to the jury. That ruling was also appealed by the appellant, but no submissions or arguments were advanced by him under this heading, and I consider it to have been effectively abandoned as a ground of appeal.

19. Accordingly, those elements of the appellant's claim that went to the jury for determination were the claims for damages for unlawful arrest, false imprisonment and assault, including trespass to the person in the form of intentional infliction of emotional and physical harm. I should mention that as regards the last element of this claim, that relating to intentional infliction of emotional and physical harm, the trial judge rejected an application to withhold that claim from the jury. That ruling is the subject of a cross appeal by the respondents.

20. In the course of his charge to the jury, the trial judge informed the jurors that, if the appellant was successful in his claims, in the ordinary course he would recover his costs from the respondents. Subsequently, in responding to a question from the jury about the difference between damages and costs, he told the jury not to be concerned about costs, that they were matters for him, and not the jury. These instructions to the jury have given rise to another of the appellant's grounds of appeal, which I will come to later.

21. The jury then returned their verdict. I set out below the questions asked of the jury, and their answers:

“1. Was the plaintiff falsely imprisoned by the members of the Gardaí?

Answer: Yes.

If the answer to 1 is 'Yes' assess damages.

The amount of damages is €23,000.

2. Was the plaintiff assaulted by members of the Gardaí?

Answer: Yes.

If the answer to 2 is 'Yes' then assess damages.

The amount of damages assessed is €9,000.

3. Did the Gardaí intentionally or recklessly inflict emotional suffering on the plaintiff on 24 April 2004?

Answer: Yes.

If the answer to 3 is 'Yes' then assess damages.

Damages are assessed in the amount of €14,000.

4. Is the plaintiff entitled to aggravated damages?

Answer: Yes.

If the answer to 4 is 'Yes' assess damages.

Damages are assessed in the amount of €49,000.

5. Is the plaintiff entitled to punitive damages?

Answer: No.

If the answer to 5 is 'Yes' assess damages. That is not applicable."

22. Accordingly, the total amount of damages marked on the issue paper by the jury was in the sum of €95,000. Special damages were agreed in the sum of €31,439.00.

Decision of trial judge on costs

23. The decision of the jury was handed down on 29 February 2016. On 8 April 2016, there was a hearing before Mac Eochaidh J. as regards the costs orders that should flow from the decision of the jury, as well as such orders as to costs as were considered appropriate in the light of certain of the rulings made by the trial judge during the course of the trial.

24. In light of his success in the proceedings, the appellant sought an order that all costs that he had incurred in connection with the proceedings should be paid by the respondents. For their part the respondents, citing the decision of Clarke J. (as he then was) in the High

Court in *Veolia Water U.K. plc v. Fingal County Council* [2006] IEHC 240, submitted that there was more than one “event” in the case for costs purposes. The respondents submitted that, while the appellant had succeeded in establishing that he was falsely imprisoned and assaulted, he had failed to establish his claim for malicious prosecution, as well as a claim for malicious maintenance of disciplinary proceedings. It was submitted that these issues had taken up more than 50% of the trial. The pursuit of these claims had required the respondents to call witnesses who would not otherwise have been required if the proceedings had been confined to the issues on which the appellant had succeeded, i.e. false imprisonment and assault. In short, it was submitted that the appellant should be entitled to recover only those costs incurred in connection with the issues in which he was successful.

25. On behalf of the appellant, however, it was submitted that he should not only receive all of his costs, but that he should receive them on a solicitor and client basis. It was argued that unless the appellant received an order for payment of his costs on a solicitor and client basis, that he would not recover all of his costs. Emphasis was placed on his experiences in the District Court and related matters in support of this submission.

26. As to the application of the *Veolia* principles, it was submitted that the appellant had succeeded in establishing that he had been assaulted and falsely imprisoned, and also that he had suffered, at the hands of the respondents, the intentional infliction of emotional suffering. If the *Veolia* principles were applied in such circumstances, this would be a discouragement to *bona fide* litigants in the future. In the words of his counsel, the appellant was “blackguarded” by the way the authorities handled his reasonable complaints, following his assault, and the jury saw fit to award him aggravated damages. It was submitted that the *Veolia* principles have no place in such circumstances, and to apply those principles would, in effect, be inconsistent with the verdict of the jury.

27. Alternatively, it was submitted that if the court saw fit to apply the *Veolia* principles, and not to make an order in favour of the appellant for payment of all of his costs by the respondents, it should not make any award for payment of costs by the appellant to the respondents, as a reflection of the way in which the appellant was treated by the respondents.

28. In his ruling on costs, the trial judge noted that the allegation of malicious prosecution had been maintained vigorously against both senior and junior officers of An Garda Síochána, and that after a very careful review of all of the evidence he concluded that the allegation was wholly without foundation and that it should never have been made. He described it as a “preposterous conspiracy theory vigorously and unfairly pursued”. Accordingly, the trial judge concluded that this is a case in which it would be appropriate to make a special order as to costs because it would not be fair to award the appellant costs in respect of matters in which he did not succeed having regard to the vigour with which those matters were pursued, and the extraordinarily serious nature of the allegations made against Gardaí of almost every rank. The trial judge concluded that there was, for the purposes of assessing costs, more than one event in the case and that the claim of malicious prosecution was an event in respect of which the appellant had been unsuccessful. This element of the proceedings took up a very significant part of the case, and the trial judge was of the view that the case would have been very significantly shorter and less complex had that issue not been pursued.

29. He said that if the case had been confined to one of simple assault, it would probably have taken no more than four or five days. For these reasons he held that the respondents were entitled to an award of their costs in respect of the defence of the tort of malicious prosecution and the “non tort” of tortious maintenance of disciplinary proceedings.

30. However, he considered that if he was to make an award to the respondents for 50% of their costs, as was contended for by the respondents, this would result in an injustice to

the appellant, because it would have the effect of wiping out the costs that the appellant would be entitled to receive which in turn would have a deleterious effect on his success in the proceedings. He felt it would be unfair for the court to make an order which had the effect of requiring the appellant to pay all of his own costs.

31. The trial judge also expressed the view that it would not be appropriate, in applying the *Veolia* principles, to do so on the basis of days spent in court, because the real costs of an action constitute much more than days spent in court. Having considered all of these matters the trial judge made an order that the appellant should recover the costs of the proceedings, but the respondents should recover “35% of the action in respect of the matters in in which [they had] succeeded”, and that there should be a set off accordingly.

32. Following the costs hearing, in the usual way, there was correspondence as between the registrar and the solicitors for the parties as regards the terms of the order, with a view to perfecting the order. Initially, the registrar prepared an order which provided that the appellant should recover from the respondents his costs of the proceedings on a party and party basis, and that the respondents should recover from the appellant 35% of their costs of the issues in which they had been successful in the proceedings. The respondents did not consider that this draft order properly reflected the order for costs actually made by the trial judge. They claimed that the trial judge had ordered that the respondents should recover from the appellant 35% of *all* of their costs of the action, and they submitted a revised draft of the order to the solicitors for the appellant. Ultimately it was not possible to reach agreement and the matter came back before the trial judge for clarification on 17 January 2017. Having heard the parties, the trial judge stated that he had intended his order to reflect the time wasted by reason of the unfounded allegations of malicious prosecution and related claims, and he had intended, in order to reflect his conclusions on that issue, that the appellant would receive 65% of his taxed costs only, on a party and party basis. He said that

while he could have done this by giving the appellant 100% of his costs, and by giving the respondents 35% of their costs, he had decided instead to express it as an award to the appellant of 65% of his taxed costs, to be paid by the respondents. The trial judge said that in formulating his order thus, he had deliberately adopted what he considered to be a more generous approach to his formulation of the costs order, in view of the fact that the appellant had succeeded in proving that he had been assaulted by members of the Gardaí. Accordingly, the order made by the trial judge, as perfected on 1 February 2017, was for payment of 65% of the appellant's costs, by the respondents, to be taxed in default of agreement. There was, therefore, no order requiring the appellant to pay any of the respondent's costs. The appellant's lack of success in a significant part of the case was reflected in the reduction of 35% of the costs that he would otherwise have received if he was entirely successful.

33. At this juncture it is necessary to say that at some stage in the course of the exchanges between the registrar and the solicitors for the parties about the order made by the trial judge on 8 April 2016, the appellant became concerned that some effort was been made to interfere with the order of the court made on that date. He clearly felt excluded from what was a normal process underway between the registrar of the court and the solicitors for the parties, so much so that he felt that even his own solicitors were acting against his best interests. This is in spite of the fact that they sent him a very detailed letter, which he included in the papers as part of this appeal, dated 22 July 2016, whereby they describe in great detail (the letter runs to eight pages) the nature of the correspondence entered into between the legal advisors to the parties, and the registrar, after the original costs hearing of 8 April 2016. They also address a series of specific questions put to them by the appellant. Regrettably, it appears that the appellant (who subsequently discharged his solicitors) remains convinced that something untoward was afoot in the correspondence that was exchanged between 8

April 2016 and 8 January 2017, but it is clear that nothing could be further from the truth. All that happened was that the parties could not agree on what precisely what the trial judge meant, or how he had expressed what he meant, on the 8 April 2016 and ultimately that gave rise to the convening of a further hearing before the trial judge in order to get the clarity required. The appellant engaged new legal advisors for the costs hearing in January 2017. They too were discharged subsequently, and the appellant appeared on his own behalf as a litigant in person before this Court.

34. In any case, the relevance of all of this is that the appellant also appeals the order for costs made by the trial judge and seeks instead an order for payment of all of his costs incurred in the proceedings by the respondents. Indeed, it is apparent that it is the reduction of 35% of his costs that has motivated the appellant to bring this appeal, and he confirmed as much at the hearing of this appeal. The impact of that reduction is such that, after payment of the balance of his legal costs not recovered from the respondents, the appellant would, he informed the Court, receive just €28,500 of the total of €95,000 general damages awarded to him by the jury.

The rulings of the trial judge under appeal

35. Before proceeding further, it is necessary to provide a more detailed summary of those rulings of the trial judge that are under appeal, and which now fall for determination.

Ruling re. evidence of proceedings in the District Court

36. On the fifth day of the trial, when the appellant's case had in all other respects concluded (save for one witness from Dublin City Council who gave brief evidence about the regulatory framework relating to calculation of taxi fares), the trial judge gave a ruling, having heard submissions from the parties, that no evidence could be given in relation to "what happened at the trial" of the appellant in the District Court, or the reason(s) why the

District Court judge dismissed the charges against the appellant. In the view of the trial judge, such evidence would be more prejudicial than probative. Obviously, this ruling did not prohibit the appellant from presenting evidence as to the fact that the proceedings were dismissed, this being an essential proof in an action for malicious prosecution. Furthermore, the trial judge ruled as admissible certain evidence that counsel for the appellant had expressly referred to in the argument on the issue, that being evidence relating to a letter written by the appellant's solicitor to the Chief Prosecution Solicitor, in advance of the trial in the District Court, saying that the case should not proceed in light of an inaccuracy in the statements of two of the Gardaí concerning CCTV footage, and also evidence concerning the alleged fabrication of these statements.

37. More generally the trial judge made it clear that the appellant was entitled to present evidence as to what happened on the day in question and the mindset of those who "sought to prosecute". In the view of the trial judge however, it was both unnecessary and impermissible for the appellant to advance any evidence as to the reasons of the District Court judge for the dismissal of the proceedings, or the credibility of the one witness - Mr. Keenan, the taxi driver - who gave evidence before the District Court judge dismissed the charges. None of this was necessary for the appellant to prove his case, the trial judge concluded.

Decision of trial judge to withhold issue of malicious prosecution from the jury

38. The trial judge's ruling on this issue was handed down on the penultimate day of the hearing, the 13th day, following an application made by the respondents the day before. It is a clear and comprehensive ruling, running to approximately 25 pages.

39. At the outset of his ruling, the trial judge observed that if the appellant failed to establish the absence of reasonable and probable cause to prosecute, then the matter of

malicious prosecution cannot go to the jury. Furthermore, he noted that it is a matter for the judge to determine whether or not there was an absence of reasonable and probable cause to prosecute, unless there is a disputed issue as to fact underlying the question. In this case, the trial judge was of the view that in this case there was no disputed fact underlying the question. The trial judge went on to state that where there is no evidence of malice in a claim for malicious prosecution, the matter cannot go to the jury.

40. Having made his preliminary observations, the trial judge went on to quote from the 5th Edition of Halsbury's *Laws of England* (Vol. 97), para. 728:

“A claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact indicating that the defendant was actuated either by spite or ill-will against the claimant, or by an indirect or improper motives. However, there is not malice merely because the claimant's conviction was a necessary step towards the defendant's fulfilment of some ulterior motive.

The claimant has the burden of proving malice. In a jury trial the question of malice or no malice is for the jury not for the judge, and if there is any evidence on which the jury can find malice, the judge must leave the question to it. A claimant who proves malice but not want of reasonable and probable cause still fails. Malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause is not to be inferred from malice.”

41. The trial judge then proceeds to quote from para. 730 of the same text as follows:

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position

of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

42. These principles do not appear to have been in dispute in the High Court, and nor were they the subject of any contention in this Court. Rather, the dispute centred around certain matters of fact, and the application of these principles to the facts.

43. The trial judge went on to observe that he thought that counsel for the appellant was correct when he submitted that Chief Superintendent Donoghue had a very firm view based upon the papers that he had in front of him (at the time that he made the decision to prosecute) that the appellant was guilty of the offences with which he was subsequently charged. This is borne out from a reading of the transcript, from which it is apparent that not only did the Chief Superintendent believe in the appellant’s guilt at the time, but he still did so when giving evidence in the High Court. So, for example, on day 11 of the trial Chief Superintendent Donoghue said:

“No, I believed it. I doubt if all the guards that gave evidence got together and decided that this is what we are going to do, or this is what we are going to say. We heard the evidence individually from the members and what they – what they said. The way he abused them, and the names that he called them, and what he said to them at the scene. I do believe it.” (page 88 of the transcript, lines 4-10)

It is clear from the transcript that this was the view of the Chief Superintendent from the time he first read the papers available on 24 April 2004.

44. This conclusion was of some importance because, as the trial judge went on to observe, if the person taking the decision to prosecute does not believe that the accused person is guilty of the relevant offences at the time the decision is made, then there is an absence of reasonable and probable cause.

45. The trial judge then went on to consider what he described as the second part of the test relating to the absence of reasonable and probable cause, that being whether or not the belief of the person making the decision to prosecute was reasonable. He again referred to Halsbury's *Laws of England*, this time para. 731:

“In establishing whether a prosecution was malicious, the presence of a reasonable and probable cause for a prosecution does not depend on the actual existence, but upon a reasonable belief held in good faith in the existence, of such facts as would justify a prosecution. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution. The belief in the existence of such facts as would justify a prosecution, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor, if he has always found his memory trustworthy, or out of information furnished to him by others and accepted by him as true.”

46. In this case, the trial judge observed, the last sentence had particular significance because Chief Superintendent Donoghue was relying upon information furnished to him by others, and specifically the report of Garda Keogan prepared immediately after the arrest of the appellant, the PULSE record of the event and the custody record, the latter of which the Chief Superintendent stated in evidence was read over to him on the telephone by the keeper of that record (as the Chief Superintendent was at the time in Pearse Street Garda Station and the keeper of the record was in Harcourt Street).

47. The trial judge then went on to quote from para. 732 of Halsbury's, which was also of particular significance for arguments advanced by the appellant:

“The existence of reasonable and probable cause for a prosecution is not sufficient unless the facts which constituted it were known to the prosecutor at the time of the

prosecution, but, if he did know those facts, the benefit of such knowledge is not necessarily displaced by the subsequent communication of some other fact, which, although it might affect the mind of a reasonable man and may affect the prosecutor's conviction of the guilt of the accused, does not alter the facts already known to him. However, if in the course of the prosecution something comes to light which shows it to be groundless, there is, it seems, no reasonable or probable cause for continuing the prosecution.”

48. The trial judge then went on to consider the basis upon which the Chief Superintendent made the decision to prosecute, based as it was on the documents mentioned above. He accepted the evidence of the Chief Superintendent that he believed the appellant was probably guilty of the charges and the trial judge further concluded that a reasonable, cautious and prudent person would, based on the same information, have come to a conclusion that it was proper to prosecute the appellant.

49. The trial judge noted that it was not necessary for the prosecutor to be certain as to the outcome; it is sufficient for the prosecutor to ask the question whether it is reasonable to believe that the accused was probably guilty of the offences and that there was enough information available to support that contention.

50. The trial judge then proceeded to consider (and reject) arguments advanced by the appellant that even if the prosecutor had reasonable and probable cause to prosecute, subsequent events should have caused the Chief Superintendent to review the decision to prosecute and to discontinue the prosecution. These arguments were also advanced by the appellant in this appeal.

51. Firstly, the appellant asserted that the first named respondent should not have relied upon the evidence of Mr. Keenan, the taxi driver, because he had previously been convicted of manslaughter. The trial judge, however, accepted the argument that the fact of Mr.

Keenan's previous conviction did not mean that he was not telling the truth in his evidence, and it was a matter for the District Court judge to accept or reject that testimony. The fact that evidence was to be given by Mr. Keenan was not an indicator of absence of reasonable and probable cause or malice.

52. Secondly, the appellant argued that the prosecution should have been discontinued when it became apparent that Garda Keogan and Garda Kelly had given false information as regards the identity of the person who had provided them with CCTV footage prior to the proceedings in the District Court. The trial judge rejected this argument because, firstly, the CCTV footage transpired to be irrelevant because it stopped 20 minutes before the events giving rise to the proceedings, and secondly, the trial judge accepted the evidence of Garda Kelly and Garda Keogan that it was a simple error of recollection on their part as to who provided the CCTV footage. An error of this kind would not require the discontinuance of the prosecution, the trial judge concluded.

53. Thirdly, the appellant relied on the letters that he wrote after the events of 24 April 2004, complaining of his treatment. It was submitted by the appellant that these letters placed a duty on the first named respondent to review the decision to prosecute the appellant. The trial judge rejected this argument; he observed that in every defended criminal proceeding the defendant maintains his or her innocence, and if the appellant's argument were accepted, it would mean that just about every criminal prosecution in the country would have to be halted simply because the accused asserted a defence.

54. The trial judge also rejected an argument that the Chief Superintendent should not have taken a decision to prosecute the appellant on three sections under the Act of 1994 (ss. 4, 6 and 19), because the appellant had not been arrested in connection with an offence under s. 19 of that Act, and this was a fundamental error in the decision to prosecute it. The trial judge concluded however that even if it was an error, the Chief Superintendent was not aware

of that error at the time, and there was enough evidence before the Chief Superintendent to ground a prosecution in respect of a s. 19 offence.

55. The trial judge also rejected an argument that the speed of the decision to prosecute the appellant – being a decision taken by the Chief Superintendent within a matter of hours from the time of the events concerned – in some way constituted evidence of an absence of reasonable and probable cause and/or malice. The trial judge noted that the criminal proceedings involved allegations of straightforward offences under the Public Order Act, which are tried summarily.

56. Having considered (and rejected) all of these arguments, the trial judge concluded that there was no basis to the appellant's claim that there was an absence of reasonable and probable cause in the decision taken to prosecute the appellant. The trial judge noted that on that basis alone, the claim in respect of malicious prosecution should not go to the jury, but in case he was wrong about that, the trial judge went on to consider the question as to whether or not there was any evidence of malice in the prosecution of the appellant.

57. The trial judge stated that the allegation of malice in the case was based on the proposition that, when the appellant stated at the time of his arrest that he would be making a complaint, the whole of B District conspired to prosecute the appellant, doing whatever was necessary to sustain the prosecution, for example, by making false statements and using unreliable witnesses. The trial judge said that there was no evidence at all to support such a theory. In the first instance, there was no evidence that Chief Superintendent Donoghue knew anything of the appellant's complaints at the time he took the decision to prosecute. The trial judge observed that the appellant's written complaints to Superintendent Conway were not made for another two days (it was actually three days) after the decision made by Chief Superintendent Donoghue to prosecute the appellant. Insofar as the appellant relied upon matters such as the evidence to be given by Mr. Keenan, and the inaccuracies in the

evidence of Garda Keogan and Garda Kelly in relation to CCTV footage, the trial judge was of the view that these were not matters from which malice could be inferred.

58. The trial judge also considered arguments relating to the appointment of Inspector Murray both to investigate the complaints made by the appellant himself and also to carry out an investigation into a suspected breach of disciplinary rules on the part of the appellant. The appellant had argued that the appointment of Inspector Murray to undertake both tasks, as well as her role in the prosecution of the appellant (which he said he discovered for the first time during the trial in the High Court), was indicative of bias, because she was at the time appointed to B District, the very same District of the Gardaí in which Garda Keogan and Garda Kelly, and other gardaí involved in the incident, were also stationed at the time. The trial judge had difficulty understanding how this complaint could be in any way related to the allegation of malicious prosecution. Even if there was a deficiency in the appointment of Inspector Murray, and even if the appellant's complaint was not properly investigated, in the view of the trial judge, these were not matters that were related to the decision to prosecute the appellant, and to continue with that prosecution.

59. For all of the foregoing reasons, the trial judge held that the claim as to malicious prosecution should not go to the jury.

Decision of trial judge to allow claim of intentional or reckless infliction of emotional harm to go to the jury

60. The trial judge noted that while there is a dearth of Irish authority on the topic, the tort of intentional or reckless infliction of emotional harm has been recognised in this jurisdiction in a Circuit Court case of *Cronin v. Kostal* [2005] 12 JIC 0103 (a decision of His Honour Judge Haugh, 1 December 2005). While in this case there were two completely different and competing stories as to what took place between the appellant and the Gardaí, if the

appellant were to be believed, the trial judge considered that there was sufficient evidence to support the theory that the behaviour of the Gardaí on the occasion in question was of a kind that would support a finding in favour of the appellant in respect of the tort and therefore he refused the application of the respondents to withdraw this element of the appellant's claim from the jury. In doing so, he rejected an argument put forward by the respondents that, insofar as the tort is recognised in this jurisdiction, it is in the nature of a residual tort to address a lacuna in circumstances where a person has suffered a recognised psychiatric injury at the hands of another, but where no other recognised tort has been occasioned to the injured party.

Notice of Appeal

61. A Notice of Appeal was delivered on behalf of the appellant on 28 February 2017.

The appellant identified sixteen grounds of appeal. These may be summarised as follows:

1. The trial judge erred in refusing to permit the appellant to adduce evidence as to the proceedings taken against him in the District Court;
2. The trial judge erred in fact and/or in law in finding that the tort of malicious prosecution of a disciplinary investigation is unknown to law, and in striking out that claim as a result, or in refusing to allow it to be considered by the jury;
3. The trial judge erred in fact and/or in law in discontinuing or striking out the claim of the appellant insofar as it consisted of an action for malicious prosecution, and/or in refusing to allow that cause of action to be considered by the jury;
4. The trial judge erred in fact and/or in law in refusing to allow the appellant to adduce evidence of the criminal convictions of Mr. Michael Keenan, taxi driver;

5. The trial judge erred in fact and/or in law in finding that there was no, or no adequate evidence of malice in the prosecution of the appellant;
 6. The trial judge erred in fact and/or in law in finding that there was no evidence of the absence of reasonable or probable cause to prosecute the appellant;
 7. The trial judge erred in fact and/or in law in finding that the decision to prosecute the appellant was made on the basis of a belief (or a reasonable belief) that he was guilty of the relevant offences;
 8. The trial judge erred in fact and/or in law in placing restrictions on the cross examination of a Garda Joe Lowney in regard to previous misconduct on the part of the said Garda Lowney;
 9. The trial judge erred in fact and/or in law in finding that those elements of the appellant's case which were withdrawn from the jury had materially or substantially increased the costs of the proceedings, and in awarding the appellants only 65% of his costs as a result;
- 62.** The appellant seeks the following orders, if the appeal is successful:
- (a) An order directing a retrial before a judge sitting with a jury of the question as to whether the appellant was subjected to malicious prosecution;
 - (b) An order directing the retrial before a judge sitting with a jury of the question as to whether the appellant was subjected to malicious prosecution of a disciplinary investigation;
 - (c) An order that the appellant recover 100% of his costs of the trial of the within proceedings;
 - (d) An order directing the payment out to the appellant of all or part of the damages awarded to him in the trial of the within proceedings;
 - (e) An order for the appellant's costs of this appeal.

Respondents' Notice

63. By their respondents' Notice delivered on 21 March 2017, the respondents oppose the appeal in its entirety. The respondents also cross appeal against the decision of the trial judge to allow the tort of intentional infliction of emotional suffering to go to the jury. They plead that the basis of this tort in this case comprised the same facts that gave rise to the alleged assault and as a result this led to double counting in the award of the jury. Accordingly, the amount awarded under this heading should be disallowed.

64. The-respondents also argue that the amount awarded to the appellant was excessive. In particular the amount of damages for false imprisonment (€23,000) and aggravated damages (€49,000) was excessive and disproportionate.

65. The respondents seek orders dismissing the appeal of the appellant, reducing the damages awarded to the appellant, disallowing the damages for intentional infliction of emotional suffering and aggravated damages, as well as an order for the costs of this appeal.

Submissions

Submissions of appellant

(a) Refusal of trial judge to allow evidence as regards the proceedings in the District Court

66. The appellant submits that the trial judge erred by disallowing evidence as regards the conduct of the proceedings in the District Court, as this evidence would have corroborated the malicious nature of the prosecution. It prevented the appellant from adducing evidence that would have demonstrated inconsistencies in the evidence given by Garda Shaun Keogan and Garda Alan Kelly in relation to their efforts to obtain CCTV footage from the Palace bar (which was adjacent to where the incident occurred) and their interactions with a Ms. Andrea Hyland, the catering manager of that establishment at the time. The jury was also denied

evidence that Ms. Hyland gave to the District Court that the Gardaí had fabricated statements concerning what she had told them.

67. The refusal of the trial judge to allow evidence relating to the proceedings in the District Court also denied the jury evidence concerning the credibility of the taxi driver, Mr. Keenan. It was submitted that Mr. Keenan was found in the District Court not to be a credible witness. The appellant also submitted that reliance by the first and second named respondents in the prosecution of the appellant on the evidence of a witness who had a previous conviction of manslaughter, may have led to an inference in the eyes of the jury that the prosecution was malicious.

68. The trial judge erred, in his charge to the jury, in suggesting that the appellant may not have been acquitted of the charges against him in the District Court, or that he got away on a technicality.

69. The appellant relies upon the decision of the Supreme Court in *McIntyre v. Lewis* [1991] 1 IR 121 from which authority it is clear that evidence as to what had happened in the course of the unsuccessful prosecution of the plaintiff in that case was adduced before the jury in the subsequent civil proceedings for malicious prosecution. It is submitted that, on this authority, the appellant should have been allowed to adduce evidence that the proceedings against him were dismissed on the merits following the hearing of the evidence rather than pursuant to any technical objection or for any other reason that did not go to the merits of the case made against him.

(b) Inadequate evidence of malicious prosecution

70. The appellant submits that the trial judge misunderstood the point being made about the evidence of Garda Keogan and Garda Kelly in relation to CCTV. He submits that the key point was that the Gardaí had failed to seek out and obtain the CCTV footage from the

Palace bar in a timely fashion, and that this was demonstrated and amplified by the contradictions in the evidence of Garda Keogan and Garda Kelly in their evidence to the District Court on the one hand, and the High Court on the other. He submits that the trial judge failed to give due consideration to the fact that Garda Keogan had admitted in evidence that he had previously dealt with a Ms. O'Flaherty as manager of the Palace bar and another nearby bar, namely Flannerys, and yet he wrongly named Andrea Hyland as the manager who gave him the CCTV. He submitted that the two Gardaí had changed their story in the High Court because they would not have been believed if they had disputed the evidence given by Ms. Hyland to the effect that she had nothing to do with the CCTV in the premises concerned.

71. The appellant submits that the trial judge further erred in withdrawing the issue of malicious prosecution from the jury, by failing to take into account the evidence that he had suffered cuts and extensive bruising at the time of his arrest, and that there was medical evidence to substantiate this which was not disputed at the trial.

72. Furthermore, the trial judge failed to take account of the fact that the appellant had been detained without charge for offences under the Act of 1994, for which there was no power of detention under the said Act. While that Act provides for powers of arrest, it does not provide for powers of detention, it is submitted. The appellant submits that this “left the Garda authorities in a vulnerable position and may have been a motivating factor in the prosecution.”

73. The appellant further submits that he was prosecuted without reasonable and proper cause and for improper motives, namely, to keep the Gardaí involved at “*all levels* in the clear” (my emphasis).

74. The appellant refers to a passage quoted by the trial judge in his decision on this issue, being a passage from the 5th Edition of Halsbury's *Laws of England*, in which it is stated:

“In a jury trial the question of malice or no malice is for the jury and not for the judge, and if there is any evidence on which the jury could find malice, the judge must leave the question to it.” (see para. 39 above for a more complete extract of this paragraph from Halsbury’s)

75. The appellant submits that the trial judge erred in not letting the matter go to the jury for determination, in circumstances where the decision to prosecute was taken by Chief Superintendent Donoghue within a matter of hours, without witness statements, and having had no communications with anybody at the scene of the incident. He submits that there was no evidence before the Chief Superintendent that he, the appellant, was inebriated at the time of his arrest. Furthermore, the Chief Superintendent failed to send the file to the DPP which would have afforded the appellant the protection of an independent assessment by the DPP.

76. Referring again to the same edition of Halsbury, the appellant submits that where information comes to light in the course of a prosecution that demonstrates that there is no reasonable and probable cause for continuing with the prosecution, then there is an obligation on the prosecutor to discontinue the proceedings. In this case, it is submitted that it would have become apparent sometime after the issue of the proceedings that the appellant had suffered extensive cuts and bruises during the incident, that Mr. Keenan had admitted to a criminal offence of overcharging the appellant and that a State witness (Ms. Hyland) was claiming that the Gardaí had fabricated statements in relation to the CCTV. It is submitted that these matters undermined any initial basis for reasonable and probable cause to issue the proceedings and support the appellant’s contention that the respondents should then have discontinued the proceedings.

77. The appellant claims that the appointment of Inspector Murray to three different conflicting roles in the investigation is further evidence of malicious prosecution. Inspector Murray was in charge of the prosecution of the appellant. She was also appointed to

investigate the appellant's complaints against the Gardaí, and she was put in charge of the investigation of possible breaches of the Garda code of discipline on the part of the appellant.

78. The appellant relies on *McIntyre v. Lewis* which, the appellant submits, establishes that having found that the appellant was the victim of an assault by the Gardaí, the jury would have been obliged to find that his prosecution was malicious. Although *McIntyre v. Lewis* was referred to in the High Court, this was not an argument advanced in that court, a fact upon which the respondents rely.

79. Finally, it is submitted that even if the Chief Superintendent formed a *bona fide* view as to reasonable or probable cause for prosecution, he "acted as an instrument of the malice of those Gardaí who assaulted the appellant."

(c) Absence of reasonable or probable cause

80. The appellant submits that the trial judge also erred in his decision to determine the issue of absence of reasonable and probable cause himself, and not to allow that issue to go to the jury. He submits that the trial judge erred in holding that there was no dispute as to fact as regards the reasons for the decision of the Chief Superintendent to prosecute the appellant. As a result of that conclusion, the trial judge held that he, and not the jury, could determine the issue as to whether there was an absence of reasonable and probable cause to prosecute the appellant. However, the appellant argues, there was a dispute between the parties surrounding the issue, i.e. whether the appellant had been assaulted by the Gardaí or was the aggressor, and so the issue of absence of reasonable or probable cause should have been determined by the jury, and not the judge.

(d) Exclusion of evidence relating to criminal record of Mr. Keenan

81. The appellant submits that the ruling of the trial judge to disallow evidence relating to the criminal record of Mr. Keenan was erroneous. He submitted that this evidence would have been relevant to the credibility of Mr. Keenan. Furthermore, the very fact that the Gardaí would rely upon a witness with such a background is itself indicative of malicious prosecution.

(e) The trial judge erred in his determinations relating to costs

82. There are several headings of appeal relating to the determination of the trial judge as regards costs. Firstly, the appellant submits that the trial judge erred in holding that issues related to malicious prosecution took up approximately 50% of the trial. He submits that no more than 10% of the trial was taken up with evidence relating to these matters. Accordingly, his reduction of 35% in costs to address the appellant's failure on these issues was excessive.

83. Furthermore, even though the trial judge concluded that the issue of malicious prosecution should not go to the jury, it is submitted that the trial judge should, in his discretion, not have penalised the appellant by reducing the costs recoverable by him from the respondents, because the appellant had a legitimate basis to advance a claim for malicious prosecution.

84. Moreover, the trial judge informed the jury that if the appellant was successful in his proceedings, then the respondents would have to discharge his costs, and accordingly the jury were misled.

85. It is further submitted that the trial judge by his order of January 2017, unfairly altered the costs order that he had made on 8 April 2016.

Submissions of the respondents

(a) Refusal of trial judge to permit appellant to adduce evidence of District Court trial

86. The respondents submit that the trial judge was correct in concluding that the tort of malicious prosecution does not require an examination of how the judge presiding over the prosecution of the plaintiff viewed the case against him. It was made clear to the jury that the prosecution in the District Court had not succeeded, and the appellant was permitted to give evidence in relation to his letters to the respondents complaining about the conduct of the District Court proceedings, as well as evidence given in the District Court in relation to the CCTV footage. It is submitted that the trial judge was correct in his conclusion that all of the evidence of “badness” that the appellant required to lead could be led without saying what happened at the trial in the District Court or referring to the comments made by the District Court judge.

(b) Withdrawal of issue of malicious prosecution from the jury

87. The respondents submit that initially at least, the appellant made the case that the prosecution was brought against him because of the complaints that he had made as regards the conduct of the Gardaí. However, the trial judge correctly (in the submission of the respondents) observed that this could not have been so because Chief Superintendent Donoghue knew nothing about any complaints of the appellant at the time that he took the decision to prosecute. The appellant’s complaints were made for the first time three days after the decision to prosecute was taken.

88. As regards the allegation that the Chief Superintendent failed to investigate the appellant’s complaints, it is submitted that claim of malicious prosecution is effectively one of a “top to bottom conspiracy” within B District to maliciously prosecute the appellant. The respondents agree with the trial judge in his determination of the issue when he stated that

this was nothing but a theory without a shred of evidence, and for that reason should not be sent to the jury for decision.

89. While the appellant now relies on *McIntyre v. Lewis*, he did not do so in the High Court. Had he done so, the trial would have been much shorter as there would have been no requirements for the respondents to call witnesses to deal with allegations of a conspiracy. The respondents were required to call evidence of three senior Gardaí to address these allegations.

90. It is submitted that the arguments made by the appellant regarding the identity of the person who gave the CCTV footage to Garda Keogan and Garda Kelly is irrelevant, and the trial judge was correct to describe it as such. The two Gardaí had made an error as to who had given them the CCTV footage, and they had accepted in their evidence that it was a mistake on their part. It is submitted that it is especially difficult to see the relevance of this matter given that it was not disputed that the footage provided emanated from the relevant premises, and that it did not capture the incident.

91. The respondents submit that the fact that Chief Superintendent Donoghue took the decision to prosecute the appellant quickly did not mean that it was unreasonable, particularly since this was a straightforward public order matter to be tried summarily. Furthermore, the fact that the appellant subsequently asserted (by way of correspondence through his solicitors, and not by way of statement) that he had a defence did not require the respondents to discontinue the prosecution. If it did, this would apply in very many prosecutions. The trial judge was correct to conclude that no new information relevant to the decision to prosecute came to light afterwards such as to establish an absence of reasonable and probable cause for the prosecution.

92. As regards the complaints made in relation to the roles assigned to Inspector Murray, they submitted that no evidence was led to indicate that she had carried out her roles in anything other than an exemplary manner.

(c) Evidence of Mr. Keenan

93. The respondents submit that the trial judge was correct to conclude that evidence concerning the previous convictions of Mr. Keenan should not be adduced to the jury. The fact that he had such convictions did not preclude the prosecution from calling him as a witness. Moreover, the basis of the prosecution against the appellant was not in relation to his interactions with Mr. Keenan, but in relation to his interactions with Gardaí.

(d) The decision of the trial judge on costs

94. The respondents submit that there are a number of matters about which they have no knowledge in relation to the submissions of the appellant as to costs. These include a document from a cost accountant retained by the former solicitors for the appellant, negotiations between the State and the appellant's legal team and letters that the appellant refers to as having been sent to him by the trial judge. Any contact that the respondents had in relation to the issue of costs, after the trial, were through the court registrar.

95. There was no change of the court order in relation to costs. All that happened was that, prior to the perfection of the order, the trial judge clarified his original order, after a full hearing during the course of which he heard submissions from the parties.

96. The respondents submit that the trial judge was best placed to determine the award of costs. The award made by the trial judge was stated by him to be a reflection of his view as to the manner in which the proceedings were conducted by the appellant. The appellant did not produce any evidence to support his allegations of conspiracy to prosecute him

maliciously and the order of the trial judge reflects what he considered to be fair by way of reduction having regard to the time spent on these issues, in respect of which the appellant was unsuccessful. Moreover, the trial judge, having concluded that up to half of the case had been consumed with matters on which the appellant had not been successful, reduced the costs awarded to the appellant by 35% only, so as not to eliminate the benefit of the jury award to the appellant. This was a decision properly made within the discretion of the trial judge, and in accordance with the principles set out in *Veolia Water U.K. plc v. Fingal County Council*.

Cross appeal

97. The respondents submit that the trial judge fell into error in allowing the issue of intentional or reckless infliction of emotional suffering to go to the jury. While the respondents accept that the tort has been recognised in this jurisdiction, specifically in the Circuit Court case of *Cronin v. Kostal Ireland*, that decision in turn recognised the parameters of the tort as set forth in *Wilkinson v. Downton* [1897] 2 QB 57. The tort was recognised in that case because the action did not fit readily into any of the established categories of tort. The facts in *Wilkinson* were that the defendant had informed the plaintiff, as a practical joke, that her husband had been injured in a road traffic accident, that he was lying on the road with both legs broken and that she should go to help him. The plaintiff suffered a violent shock resulting in injuries. The story, which she had been told deliberately by the defendant, was false. The plaintiff succeeded with her claim.

98. The respondents refer to the commentary on this case in McMahon & Binchy, *Law of Torts* (4th edn, Bloomsbury 2013), at para. 22.28, where it is stated:

“Where a person intentionally or recklessly inflicts emotional suffering on another he or she may be guilty of a tort. The precise status and scope of the tort are somewhat

uncertain, raising important questions about the proper basis of tortious liability and its relationship to the need to vindicate constitutional rights.”

99. While the court in *Cronin v. Kostal Ireland* recognised the existence of the cause of action, the plaintiff was unsuccessful.

100. In these proceedings, the respondents submit that the trial judge failed to recognise that circumstances of this case *do* fit easily into another recognised category of tort, i.e. false imprisonment and assault. In these circumstances, there was no necessity for the trial judge to allow this element of the appellant’s claim go forward to the jury for decision. The respondents rely upon a recent decision of the Supreme Court, *Ruffley v. the Board of Management of St. Anne’s School* [2017] IESC 33, a case involving a claim of workplace bullying, in which O’Donnell J., while having referred to *Wilkinson*, stated at para. 58:

“It is sufficient for present purposes to observe, that in dealing with claims that an individual who claims to suffer a mental or psychiatric injury as a result of the wrongful act of another, the common law has proceeded cautiously.”

101. The respondents submit that the jury appears to have felt obliged to award damages under each heading of damages (having found for the appellant on the key issues of false imprisonment and assault), and awarded the appellant €23,000 for false imprisonment, €9,000 for assault and €14,000 for the intentional or reckless infliction of emotional suffering. This appears to involve a significant element of double counting on the part of the jury, which may have been under the misapprehension that it had an obligation to award a separate amount to the appellant under this heading.

The damages awarded were disproportionate

102. The respondents submit that the award of damages is disproportionate, and in particular the award of €49,000 in aggravated damages. They note that the jury specifically found that an award of punitive damages was not merited.

103. The respondents rely upon *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305, which established that aggravated damages are compensatory damages increased by reason of the manner by which the wrong was committed. They are to be distinguished from punitive damages which are designed to punish the offender.

104. In *McIntyre v. Lewis*, O’Flaherty J., at p.140 stated:

“While aggravated damages are distinct they are still meant to ‘compensate’ the plaintiff. So, more accurately, they should be regarded – when they are awarded – as a sub head of the compensatory damages awarded to the plaintiff. On the other hand, exemplary damages are a separate category. They are not compensatory at all.”

105. It follows from all of this, it is submitted, that it is unusual for an award of aggravated damages to exceed the general damages awarded in a case. The respondents then refer to a number of proceedings in which aggravated damages were awarded but represented a fraction only of the amount of general damages. These cases include: *OK v. H* [2006] IEHC 393, *Connellan v. St. Josephs Kilkenny* [2006] IEHC 119, *Todd v. Cinelli* [1999] IEHC 124 and *FW v. BBC* [1999] IEHC 145.

106. Accordingly, the respondents submit, the award in respect of aggravated damages should be substantially reduced.

Discussion

107. This appeal raises five issues:

(1) Did the trial judge err in ruling that evidence as to the proceedings in the District Court could not be adduced?

(2) Did the trial judge err in withdrawing the claim of malicious prosecution from the consideration of the jury?

(3) Did the trial judge err in allowing the claim in respect of intentional infliction of emotional suffering to go to the jury for consideration?

(4) Were the damages awarded by the jury excessive and, related to that question, were the jury in error in making an award of aggravated damages?

and,

(5) Did the trial judge err in awarding the appellant only 65% of his costs?

108. Other issues are raised by the appellant's Notice of Appeal, and by his submissions, but these are either peripheral to or subsidiary to one or other of the issues raised above.

The first question: Did the trial judge err in ruling that no evidence could be given as to the proceedings in the District Court?

109. The appellant raises this issue because he claims that had the trial judge permitted the admission of this evidence, it would have provided the jury with more evidence of malicious prosecution. In view of my conclusion on the next question, the answer to this question is somewhat academic, but since it may be disposed of briefly, I shall address it in the interests of completeness.

110. I think that the trial judge was correct in the decision that he made on this issue. So far as the views of the District Court judge are concerned, these could not have any bearing at all on the issues required to be decided by the jury in these proceedings, upon which the jury was obliged to reach its own decision based on the evidence it heard as regards the events giving rise to the proceedings, and the subsequent decision to prosecute the appellant. The views of the District Court judge on the merits of the prosecution of the appellant are entirely irrelevant to the issues to be decided by the jury and I consider that the trial judge was correct

in his assessment that evidence as to any comments made by the District judge or views expressed by him in relation to those proceedings would be more likely to be prejudicial than probative.

111. As to the admission in the trial of the evidence given in the District Court, I think that the appellant's concerns are misconceived. His concerns were mainly related to two issues. Firstly, he wanted the jury to be made aware of the unreliability of the evidence of Mr. Keenan in the District Court, and secondly, he wanted the jury to be aware of the evidence given by Garda Keogan and Garda Kelly in the District Court, and specifically that they gave evidence in the District Court that was inconsistent with their knowledge that Ms. Hyland was not the person with whom Garda Keogan had spoken, or from whom Garda Kelly collected the CCTV tapes.

112. Taking the latter first, the fact is that all this evidence *was* elicited from Garda Keogan and Garda Kelly in the High Court, so the jury was fully aware of precisely those matters about which the appellant complains they were not informed (by reason of the trial judge's ruling on this issue) in relation to the evidence of Garda Keogan and Garda Kelly, and it seems very likely that this awareness informed the decision of the jury favourably to the appellant. So this complaint was really rendered moot by the evidence given subsequent to the ruling of the trial judge.

113. As to the evidence of Mr. Keenan, he did not give evidence in the High Court, and apart from anything else it is unclear to me how it was proposed to adduce in the trial the evidence he had given in the District Court. In so far as the appellant may have wished to apprise the jury of the views of the District Court judge as to Mr. Keenan's credibility, it is difficult to see what relevance this could have had to the task facing the jury, which was to determine the appellant's case by reference to the evidence presented in the High Court, and not by reference to the views formed by the District judge as to the quality of the evidence

and the reliability of the witnesses. In any case, the appellant succeeded with his case on the claims of assault and false imprisonment, and to that extent the issue is moot. So far as the claim of malicious prosecution is concerned, while that issue was still live when the trial judge made this ruling, nonetheless it is difficult to see what relevance the evidence given by Mr. Keenan in the District Court could have had to the basis upon which the prosecution was advanced against the appellant.

114. For the foregoing reasons I am of the view that there was no error on the part of the trial judge in ruling that evidence as to the proceedings in the District Court (save for those matters that he excluded from that ruling) could not be adduced by the appellant.

The second question: Did the trial judge err in withdrawing the claim of malicious prosecution from the consideration of the jury?

115. Before addressing this question, it is useful to consider, at the risk of repetition, the case made by the appellant that he was prosecuted maliciously. In the Statement of Claim, it is pleaded, *inter alia*, that Gardaí unlawfully arrested, assaulted and falsely imprisoned the appellant; that the first named respondent failed to investigate the appellant's complaints and that such investigation would have shown the appellant to be innocent of the charges brought against him. It is claimed that Inspector Murray, who was appointed to investigate his complaint, was not independent in view of her appointment as investigating officer under the Garda Síochána (Discipline) Regulations. The appellant claims he was misled by Superintendent Conway, who informed him that he could make a complaint to the Garda Complaints Board, which has no jurisdiction to hear complaints made by the Gardaí. The respondents failed to prosecute the taxi driver for overcharging. The prosecution of the appellant was rushed, and the decision to prosecute was taken before any statements were

made. The respondents failed to seek out and preserve CCTV footage, and Garda Keogan and Garda Kelly fabricated statements relating to the same.

116. At the conclusion of the appellant's case, the trial judge had a discussion with counsel about the case the appellant was making. He asked counsel if it was the appellant's case that he was prosecuted because he had made a complaint about their behaviour, specifically that they had attacked him, after he had complained about the taxi driver. Counsel agreed that was the appellant's case. The trial judge asked what evidence had been advanced in support of that case, and counsel referred to the matters summarised in the last paragraph. However, the trial judge made it clear that he had reservations as to whether there was a sufficient case of malicious prosecution to go to the jury. At the conclusion of the respondent's case, the respondents then moved an application to withdraw from the jury the appellant's claims as to intentional or reckless infliction of emotional harm and malicious prosecution. The former application was refused by the trial judge, but the latter was successful for the reasons set out earlier (see paras. 38-59 above). In summary these were:

1. He found that there was reasonable and probable cause to initiate the prosecution, and that at that time, the Chief Superintendent was unaware of the appellant's complaint, which was submitted three days later;
2. None of the matters relied upon by the appellant were matters that required the Chief Superintendent to revoke the decision to prosecute;
3. The claim of malicious prosecution was based on an outlandish conspiracy theory for which there was no evidential basis.

117. In the ordinary course these reasons would be subjected to rigorous scrutiny and analysis in an appeal such as this. However, that exercise becomes unnecessary and for that matter, redundant, by reason of the conclusion that I have reached that the trial judge erred in withdrawing the issue of malicious prosecution from the jury for an altogether different

reason, that being that it was erroneous to withdraw the issue from the jury in circumstances where the determination of the jury on the appellant's claim of assault would resolve the issue of malicious prosecution, on the authority of *McIntyre v. Lewis*.

The *McIntyre v. Lewis* argument

118. At the hearing of this appeal, the appellant relied upon the decision of the Supreme Court in *McIntyre v. Lewis* [1990] IESC 5, in support of his argument that the issue of malice should have been left to the jury. That case also involved an assault by a Garda on the plaintiff, following which the same Garda prosecuted the plaintiff for assaulting him. The plaintiff successfully defended the prosecution, and then issued proceedings claiming malicious prosecution. In the Supreme Court, Hederman J. held:

“I am also of the opinion that once the jury accepted that the assault was committed by the defendants on the plaintiff and that the plaintiff did not assault the defendants they could not on the evidence before them have brought in a verdict in favour of the defendants, either in respect of false imprisonment or malicious prosecution because to do so would have rendered their verdicts inconsistent. While there may well be cases where the trial judge should decide the issue of reasonable and probable cause, this is not one of them. [...] There was a single, solitary, stark fact to be determined: who had committed the assault. Those with the obligation to determine the facts in this case were the jury and once they had made a finding that the assault had been committed by the gardai and not the reverse then everything else inevitably followed.”

119. In response to this argument, the respondents argue that the case run in the High Court was not simply run on the basis of “a single solitary fact”, i.e. that if the jury found that it was the Gardaí that had assaulted the appellant, and not the other way around, then the appellant had to succeed in his claim of malicious prosecution. Instead, the respondents contend, the claim of malicious prosecution as advanced at hearing in the High Court was

far more wide ranging in scope, involving as it did allegations of cover up and conspiracy against senior members of the force who had no involvement at all in the original events. Counsel for the appellant described it in colourful terms as “the Empire striking back”, meaning that B District as a whole brought and sustained the prosecution in response to the appellant’s complaints, or threatened complaints. Moreover, apart from not advancing the substantive case within the more narrow framework of *McIntyre*, the appellant did not rely upon *McIntyre* in resisting the respondents’ application to withhold the issue of malicious prosecution from the jury, and he cannot do so now on this appeal.

120. While there are many references to *McIntyre v. Lewis* in the transcript of the proceedings in the court below, the respondents are correct in their submission that no specific argument was advanced on behalf of the appellant that the issue of malicious prosecution should be allowed to go to the jury, because, on the authority of *McIntyre v. Lewis*, the determination of who assaulted who would also determine the claim for malicious prosecution. The closest that counsel for the appellant came to advancing this argument specifically was in arguing that the injuries that the appellant suffered constituted evidence of assault upon him, in respect of which the appellant was entitled to a determination by the jury.

121. Nonetheless, the trial judge did in fact consider this very question in discussion with counsel for the respondents at the end of day 8 of the hearing. This discussion was in the context of the preparation of an issue paper for the jury. On page 174 of the transcript, from line 17, the following exchange between counsel and the judge took place:

Judge: “I have a (sic) reading of the law as thoroughly as I can about what goes to the jury, and I am finding it a little bit difficult to figure out a hierarchy.”

Counsel: “It is extremely difficult and that’s why, and you have mentioned it already, judge, there is something terribly attractive about *McIntyre v. Lewis*.”

122. It appears that both counsel and the judge were concerned about sending multiple questions to the jury, and about trying to keep the issues as simple as possible. There was then a further exchange as follows (Page 176 of the transcript, from line 4):

Judge: “On a simple view of the matter.... If the jury resolved the factual dispute about what happened on the night, doesn’t that answer basically the question as to whether there was false imprisonment, and doesn’t it answer basically the question as to whether there was malicious prosecution? So there is an attractiveness about asking – rather than asking them whether the cause of action was committed; was there malicious prosecution, asking them: ‘do you believe the plaintiff’s evidence, or do you believe the defendant’s evidence in respect to what happened on the night?’ Or is that too simple?”

Counsel: “Well I am just going back to *McIntyre v. Lewis*. Was the plaintiff assaulted? Was the question asked there. Now some people might say, well you are leaving a legal question to the jury.... It may be the simplest way. Certainly, it wasn’t condemned in *McIntyre v. Lewis* and I don’t think there was any conversation on it.”

123. The issue was not the subject of any further discussion or submission from counsel for either side. Nonetheless, what emerges from this exchange is that the trial judge gave serious thought to allowing the issue of malicious prosecution go forward for determination by the jury on the basis that whosever evidence was believed on the issue of assault would determine the issue of malicious prosecution also. The fact that counsel for the appellant made no submission to the trial judge on the issue is not in my view relevant; the trial judge clearly considered the question and made a decision upon it and the question that now arises for determination is whether or not that was the correct decision.

124. In my view it was not. The principle established by *McIntyre v. Lewis* is no more than a statement of common sense. If a Garda assaults a member of the public, and then uses his

or her position to prosecute or bring about a prosecution of the victim of the assault, on the basis that it was the Garda assaulted by the victim, then as a matter of common sense, the prosecution must be malicious. Since the issue of who assaulted who was inevitably going to resolve the issue of malicious prosecution, in my view, the trial judge, having given consideration to this very issue, erred in withdrawing the issue of malicious prosecution from the jury.

125. While hindsight has no role to play in this determination, what we do now know with the benefit of hindsight is that the withdrawal of the issue from the jury has given rise to an injustice depriving the appellant of a determination in his favour on the issue of malicious prosecution, with an award of whatever damages the jury considered appropriate under this heading. Accordingly, and notwithstanding the passage of time, this matter must be referred back to a newly empanelled jury, not for a determination on the substantive issue – which is already determined by reason of the finding of an assault upon the appellant – but for assessment of damages only. However, as will be seen, it is also necessary to refer other matters to a newly empanelled jury.

126. I should add that, in arriving at this conclusion, I have given consideration to the fact that the decision to prosecute was taken by the Chief Superintendent, and the appellant has failed to establish any malice on his part in taking that decision. However, in my view this is irrelevant. A prosecution grounded upon what is later established to be fabricated evidence is no less a malicious prosecution than one initiated by a prosecutor himself/herself acting maliciously. To suggest otherwise would be absurd, and would exonerate the State from wrongful actions of members of an Garda Síochána simply because they did not take the decision to prosecute.

127. If authority for what I am saying is required, this can be found in *Clerk and Lindsell On Torts* (23rd edn, Sweet & Maxwell 2020), at paras. 304 and 305, wherein the following is stated:

“A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of the charges is deemed to prosecute it, and is called the prosecutor. A person who lays before a magistrate an information stating that he suspects and has good reason to suspect another, or who prefers a bill of indictment, is engaged in a prosecution; and he may be responsible for the prosecution even though the charge made by the magistrate is an oral one, and even though after making the charge before the magistrate, or even without making one, he is bound over to prosecute and does so.

305....a person who provides information to the police in such a way as to be actively instrumental in the making or prosecuting of a criminal charge may be liable for malicious prosecution even if he is not technically the prosecutor.”

128. There is no doubt that the appellant advanced a far wider case than was necessary to establish that he had been prosecuted maliciously, and in so doing made allegations against senior members of an Garda Síochána that should not have been made without a strong evidential foundation. However, the trial judge found that there was no evidential basis at all for the allegations, never mind a strong basis. Those allegations are therefore to be strongly deprecated. Moreover, any time devoted at trial to these issues should be taken into account proportionately in the treatment of the costs of the proceedings in the High Court, and I address this below.

129. Having decided as I have on this question, it is neither necessary nor appropriate to address the arguments relating to absence of reasonable and probable cause.

The third question: Did the trial judge err in allowing the claim of intentional or reckless infliction of emotional suffering to go to the jury?

130. In making an application to the trial judge that this matter should not be allowed to go to the jury, counsel for the respondents submitted that the tort of intentional or reckless infliction of emotional suffering was one that had developed in order to fill a lacuna in the common law, so that a plaintiff who had suffered emotional suffering at the hands of another, but who was not otherwise wronged, would have recourse against a person who intentionally or recklessly caused that suffering. In this case, since the appellant was pursuing claims for assault, false imprisonment and malicious prosecution, any emotional suffering that he may have suffered as a consequence (assuming that he succeeded with any one or more of these claims) arose in the context of those torts.

131. The respondents accordingly submitted that it was inappropriate to allow this matter to go to the jury, as this would in effect amount to the appellant being compensated twice for the same wrong. In my view, this submission is well founded. An award of damages for any and all of the torts of assault, false imprisonment and malicious prosecution is intended to compensate the plaintiff for all the adverse consequences of those wrongs, including physical and psychological injury, such as the distress, hurt and upset occasioned to the plaintiff. There is no basis in law for being compensated separately under a different heading, or cause of action, for the same damage, namely the wrongful infliction of emotional suffering.

132. While the trial judge may well have been correct to say that the tort of wrongful infliction of emotional suffering is recognised in Irish law, it is inapplicable in circumstances such as arise here. It was, therefore, otiose to let the appellant's claim of intentional or reckless infliction of emotional suffering go to the jury in circumstances where the

appellant's complaints of emotional suffering were directly linked to the claims of false imprisonment, assault and malicious prosecution. For this reason also it is necessary to refer back to a freshly empanelled jury the question of assessment of damages for assault, false imprisonment and malicious prosecution.

The fourth question: Was the award of aggravated damages disproportionate?

133. By their respondents' Notice, the respondents claim that the amount of damages for false imprisonment (€23,000) and for aggravated damages (€49,000) were excessive and disproportionate. At the hearing of this appeal, this heading of appeal was confined to the issue of aggravated damages only.

134. The trial judge clearly explained to the jury the purposes underlying both aggravated damages and punitive damages, the differences between each form of damages and the circumstances in which they may be awarded. He did so by reference to *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305, and indeed he read an extract from that decision of the Supreme Court.

135. The respondents do not suggest that the trial judge erred in any way in his charge to the jury on these matters, and rightly so because I think his charge was unimpeachable in respect of these matters. Rather, the respondents claim that the jury award in respect of aggravated damages was disproportionate and had more of the characteristics of an award of punitive damages, which the jury had declined to award.

136. The scope of the argument on this issue before this Court was somewhat limited. However, it is most unusual, if not unprecedented, for aggravated damages to exceed the general damages awarded in a case. By definition, they are a component of general damages (see the passage from the judgment of O'Flaherty J. in *McIntyre* at para. 104 above) and without deciding the issue it seems to me that, in principle, aggravated damages should not

exceed the sum otherwise awarded for general damages and should, in the normal way, represent a percentage uplift on that award. Accordingly, while the decision of the jury to award aggravated damages shall remain undisturbed, I consider it appropriate that the newly empanelled jury should also re-consider the quantum of aggravated damages to be paid by the respondents, in accordance with the principles in *Conway* and whatever further directions the High Court considers appropriate having received submissions on this issue.

137. Since all headings of damages awarded by the jury are to be considered afresh by a new jury, it seems to me to follow that the new jury should also be asked to consider whether or not exemplary damages are appropriate, and if so in what amount, and I would propose to direct that accordingly.

The fifth question: Did the trial judge err by awarding the appellant 65% only of his costs?

138. I have already addressed above (at para. 33) the complaints of the appellant regarding events between 8 April 2016 and 17 January 2017 in relation to the perfection of the order of the High Court in respect of costs. Nothing further needs to be said about that aspect of the appellant's complaint.

139. It is obvious that the background landscape against which the trial judge made his decision to reduce the costs awarded to the appellant has now altered significantly. When making that decision, the trial judge did so on the basis, *inter alia*, that the appellant had failed entirely with his claim for malicious prosecution. On that basis, subject only to a reasonable measurement of the extent to which the trial was taken up with that issue, the trial judge was, in my view, entitled to fashion a costs order to reflect the appellant's lack of success on this issue. Now that the appellant has been successful on that issue however, the basis upon which the trial judge made the costs order that he did has altered fundamentally;

the appellant has been successful in his claim of malicious prosecution, and, in the ordinary course would be entitled to an award of his costs on that issue, unless there is some basis for a different order.

140. Section 169 (1) of the Legal Services Regulation Act 2015 provides, in material part as follows:

“**169.** (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings”

141. While the appellant has now succeeded with his claim of malicious prosecution, nonetheless two questions arise in relation to the costs associated with that issue. Firstly, has the appellant been *entirely* successful in his claim of malicious prosecution and, secondly, was the manner in which he pursued this heading of claim reasonable?

142. I do not believe it can be said the appellant has been entirely successful his claim of malicious prosecution, because in the manner by which he advanced this heading of claim at the trial of the action he cast the net far wider than was necessary to establish malicious prosecution by reason of the assault upon him, *per McIntyre*. While the appellant himself in his evidence expressly declined to use the word “conspiracy”, it was clear from his evidence that he considered there were more people involved in the malicious prosecution than those who assaulted him, and his counsel described the prosecution as the “empire striking back”, meaning that B District, from the top down, decided to take action against the appellant to protect itself and its members from the appellant’s complaints and possible legal action. In

answer to a specific question on the fourth day of trial, as to whether it was the appellant's case that the "the young Guards on the street, the Garda doctor, the Garda Superintendents and Inspectors [...] were in some way all out to get – [the appellant]?", the appellant replied that he "was taking on basically the B District on [his] own at the time".

143. At the hearing of this appeal, counsel for the respondents submitted that it was this expansive allegation that justified the trial judge in awarding the appellant only 65% of his costs, because that expansive case took up far more time than was necessary to establish that the appellant had been assaulted. In order to address this case, it was, it was submitted, necessary for the respondents to call witnesses, such as Chief Superintendent Donoghue, Superintendent Conway and Inspector Murray, whose evidence would not otherwise have been required, to reject the allegation of what amounted to a conspiracy to prosecute the appellant maliciously. Even though the appellant has now succeeded with his claim of malicious prosecution, the same argument could be advanced in so far as the appellant has not succeeded in establishing that there was anybody else involved in his malicious prosecution other than those who assaulted him, and so if this more expansive claim unnecessarily engaged a significant amount of court time, it is the appellant should bear the cost of it, and not the respondents. But did this more expansive claim engage the High Court in significantly more time than the narrower basis upon which the appellant has succeeded?

144. It seems to me that there were really only three witnesses called by the respondents to deal with this issue alone, or substantially with this issue alone, namely Chief Superintendent Donoghue, Superintendent Conway and Inspector Murray. I think it is very likely that Chief Superintendent Donoghue would have to have been called anyway, as he was the person who authorised the prosecution of the appellant, although his time in the witness box would surely have been much more brief than the two hours and twenty three minutes he had to spend giving evidence because of the claim that the "empire struck back". Inspector Murray

spent approximately one hour and forty minutes giving evidence. Superintendent Conway spent fifty one minutes approximately giving evidence. So approximately five hours of evidence on the respondent's side was spent in dealing with this more expansive case.

145. Other than that however, I do not think it can be said that very much more time was taken up at trial with the more expansive case than with the narrower case of malicious prosecution. There was certainly a lot of legal argument about malicious prosecution, much of which would have been necessary anyway. There was also a lot of evidence about the efforts made to obtain CCTV footage, which the trial judge considered a waste of time and irrelevant, but his comments in that regard were made within the context that he was withdrawing the issue of malicious prosecution from the jury. In circumstances where the jury preferred the evidence of the appellant over that of the Gardaí, that evidence cannot now be seen as irrelevant, as it may well have influenced the views of the jury as to the credibility of the evidence given by the Garda at the scene, and that of Garda Keogan in particular.

146. Having regard to all of the above, I have reached the following conclusion. The appellant has succeeded on the issue of malicious prosecution, but he has not succeeded in proving the more expansive case that he made, which took up at least one full day of the trial. Moreover, that expansive case carried with it an insinuation which impugned the integrity of senior members of an Garda Síochána, and which the trial judge found, and found correctly in my view, had no basis whatsoever. For those reasons it is appropriate in my view that the appellant should be held responsible and accountable for such time spent at the trial that is *clearly* identifiable with that issue.

147. While the trial judge reduced the costs awarded to the appellant by 35% to reflect that he had lost on the issue of malicious prosecution, that is clearly no longer sustainable in light of the success of the appellant on appeal. Accordingly, I propose vacating the order of the trial judge on costs, and substituting instead an order that the appellant recover all of his

costs of the proceedings in the court below, save for one day of trial, the costs of which he shall be ordered to pay to the respondents as an approximate reflection of the time spent by Chief Superintendent Donoghue, Superintendent Conway and Inspector Murray in giving evidence. The order, when drawn up shall provide for the offset of the costs of this day against the costs awarded to the appellant.

Conclusions

148. Having considered *McIntyre v. Lewis*, the trial judge fell into error in withdrawing the issue of malicious prosecution from the jury, since if the appellant succeeded with his claims of assault and false imprisonment, it followed that he had to succeed in a claim of malicious prosecution, notwithstanding the absence of any evidence of a conspiracy involving any more than those involved in the assault of the appellant.

149. The trial judge fell into error in ruling that the claim of intentional infliction of emotional suffering should go to the jury, in circumstances where the appellant was also claiming damages for assault and false imprisonment (the claim for malicious prosecution having been withdrawn from the jury by the trial judge when making this ruling). An award of damages in respect of any of those torts is intended to compensate for all the adverse consequences arising therefrom, including physical and psychological injury, such as the distress and hurt caused to a plaintiff. Accordingly, by allowing this claim to go the jury, the trial judge created a risk of the appellant receiving more than one award of compensation for the same wrong.

150. The proceedings shall be referred back to a freshly empanelled jury to:

1. Assess and measure the appropriate amount of damages that the appellant should receive in respect of malicious prosecution on the basis that malicious prosecution has

been established by the determination of the first jury that the appellant was assaulted by the Gardaí, and on no wider a basis;

2. Assess and measure the appropriate amount of damages the appellant should receive in respect of the false imprisonment and assault committed upon him;

3. Assess and measure the appropriate amount of damages that the appellant should receive in respect of aggravated damages and

4. Consider whether or not the appellant should receive an award of exemplary damages in respect of the torts committed upon him, and, if so, assess and measure the appropriate amount of exemplary damages.

151. The respondents shall discharge the costs of the appellant incurred in the High Court, less the costs of one day which shall be paid by the appellant to the respondents, in each case to be determined by adjudication in default of agreement. The order shall provide for a set off of the latter against the former.

Costs of this appeal

152. Each of the parties has enjoyed a measures of success on this appeal. While it might be argued that the overturning of the trial judge's order as to costs would tip the scales in favour of the appellant, the conclusion that I have reached on the issue of aggravated damages - being a conclusion arrived at by reason of the respondents' cross appeal - tilts the scales in the other direction. In any case, the appellant as a lay litigant before this Court is at most entitled to an award in respect of his outlay. However, I consider that the fairest treatment of the costs of this appeal is to make no order as to costs. If either party wishes to contend that a different order as to costs should be made, they may contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. In light of the fact that this judgment is

being delivered during the legal vacation the parties should make any such request no later than 16 September 2022. The parties should note that in the event that either of them request such a hearing and are unsuccessful in altering the provisional order for costs which I have indicated, the party requesting the hearing may be required to pay the costs of that additional hearing.

153. Since this judgment is being delivered electronically, Noonan and Faherty JJ. have authorised me to confirm their agreement with it.