

Defamation law reform submission, Business Journalists' Association

The Business Journalists' Association represents media professionals across the bulk of the country's main newspaper and broadcast media and whose work deals with everything from the corner shop to the performance of the world economy.

As working business journalists our members daily cover stories dealing with companies, organisations and individuals whose activities have a real impact on people's lives and livelihoods.

As such, BJA members are an important part of a diverse media that, by and large, serves the people of this country well, and which strives to do its job professionally and fairly.

The association believes that Irish defamation law as it stands has a serious impact on its members' daily working lives.

We argue that the current regime in practice it limits legitimate reporting and debate on the activities of individuals and organisations that wield considerable influence over Irish life and the economy.

We hope, through this submission, to explain how our members' and their employers' resources are frequently eaten up dealing with difficulties that the current regime creates. In a media landscape where resources are increasingly scarce it means that time and resource is lost for reporting.

Our industry already faces challenges on a number of fronts. The Republic's defamation laws needlessly add to those risks, without conferring any real additional protections on the rights of most ordinary people.

The association recognises that a balance must be struck between a citizen's constitutional right to his or her good name and that same citizen's constitutional right to freedom of expression.

It is our view that there is an imbalance in Irish defamation law that favours plaintiffs, to the cost of the wider public's right to a free flow of information. This submission suggests a number of changes that we believe redress that imbalance in a manner appropriate to a fairly functioning democracy that respects both its citizens' good names and their right to freedom of expression.

Definition and proof

A key flaw in the current law from a working journalist's point of view is that it lacks a clear definition. The 2009 act did away with the old-fashioned distinction between libel and slander, but steered clear of actually defining defamation.

Instead the definition is based on case law and generally runs along the lines of "a wrongful statement tending to lower the subject's reputation in the eyes of right-

thinking members of society/the community". It also requires that the statement is published and under section 6 of the Defamation Act, 2009, is actionable without proof of special damage.

This definition is so broad it borders on the nebulous.

The broad definition means that virtually any contentious statement risks being found to be defamatory. Furthermore, once someone, using this broad definition, can show that they have been defamed, they are entitled to damages, irrespective of the real impact that the statement had on their reputation.

This has a number of practical consequences for the media and working journalists.

People and organisations with large financial resources can exploit this by using the law to deaden or stymie reporting on their activities through responding to virtually any coverage with solicitors' letters, threats of legal action, or both.

There is now a significant danger of reporters and media outlets "self censoring" to pre-empt being drawn into legal actions, that even when they amount to nothing, sap reporters and editors time and energy and media organisations finances.

The logic runs that, if a plaintiff has the resources to maintain a potentially expensive legal action, brought on the basis of a law that tends to favour plaintiffs in the first place, and which awards excessive damages to successful claimants, the individual journalist and his or her employer are left with little option but to minimise the risk of clashing with them.

The current regime is particularly flawed because the costs associated with legal action are prohibitively high for most ordinary citizens, but is weighted in favour of those who can afford to initiate and maintain claims against the media.

There is no doubt it can encourage spurious claims by those with deep financial pockets, which, no matter how ill-founded, require a response. This wastes hours and resources. Once a media organisation receives any communication indicating that someone is considering taking an action for defamation, they have to involve their own lawyers, which is expensive. The individual editors and/or reporters responsible for producing the material that is the subject of the complaint may also have to contribute to their employer's response, eating into their time and resources.

Rising costs coupled rising awards in cases where plaintiffs are successful mean the stakes are extraordinary high for media organisations. It can be financially attractive for media organisations to settle claims rather than undertake the financial risk of defending a report. That undermines the public's right to information.

Reporters and editors make every effort to ensure that stories are accurate and true. It is therefore only just that anyone who seeks to recover damages by claiming that reporters and editors published something untrue, should be required to prove this.

What is required is a clear definition that gives reasonable grounds for taking a claim. This should include the following ingredients:

The statement must be published

It must be wrong, that is demonstrably factually incorrect or untrue

It must have caused serious damage to the subject's reputation.

Claimants should be required to prove that they were the subject of the statement, that it was untrue/wrong and that it seriously damaged their reputation.

In the case of companies or businesses, section 12 of the 2009 act, which gives bodies corporate the right to sue for defamation, should be amended to require businesses to demonstrate that the statement caused them a serious financial loss.

As that section stands, it simply allows bodies corporate the right to sue, whether or not they have incurred, or are likely to incur, any financial loss. This position makes little sense, how can an individual or company demonstrate that its reputation was damaged in the first place if it suffered no loss, nor is likely to?

Also, the law as it stands makes it all too tempting for a business which simply objects to negative coverage to claim that it has been defamed in order to restrict or silence that coverage.

Adopting a similar provision to the requirement for serious harm introduced in the English Defamation Act 2013 (which does not apply in Scotland or Northern Ireland), would make sense.

Under this provision, a statement is not defamatory unless "its publication has caused or is likely to cause serious harm to the reputation of the claimant".

The standard of proof should be on the balance of probabilities, which generally applies in civil actions in Irish law.

This change would tackle a number of problems with the current law. It shifts the burden of proof to the plaintiff. Defamation is virtually the only area of Irish law where the general rule, that someone who alleges something must prove it, does not in practice apply.

The change maintains a balance between the Constitutional right to a person's good name and freedom of expression. The sanction of a court action remains for anyone who has been defamed.

It fulfils a requirement of the European Convention of Human Rights that restrictions on freedom of speech should be clear and precise.

Juries and awards

Defamation remains the only area of civil – as opposed to criminal – law where juries still hear trials. There is no real logic for this. The Law Reform Commission in its 1991 report on defamation law, which formed the basis for some of the changes adopted in the 2009 legislation, stated that juries played a valuable role in determining what is defamatory.

Even accepting there is any basis for this statement, (the commission did not provide any), it follows that if the legislation – rather than a jury – determines what is defamatory, then juries would be rendered redundant.

The UK has abolished jury trials in defamation, and there is no evidence to suggest that any party in such cases, plaintiff or defendant, suffered any disadvantage as a result.

Juries add to the expense of defending a case on a number of fronts. Parties are required to hire extra senior counsel for such trials. Trials take longer to come to court and hearings take longer. In short, the costs meter runs twice as fast, and for much longer, than in other civil cases.

However, a critical feature of jury trials is the risk that any damages awarded against a defendant will be high.

A clear illustration of this is the €10 million total awarded to former Kenmare Resources executive, Donal Kinsella after he successfully sued his former employer for the content of a press release.

While the award was not against a media organisation, it broke all previous records by some distance and arguably defied any kind of logic, attaching an astronomical value to the reputation of a relatively unknown executive who worked for a small zinc mining company.

The scale of the award and the context means it is particularly relevant to business journalists – effectively setting a marker for the ‘value’ of an executive’s reputation.

Given the economic challenges that the media industry now faces, an award on such a scale could actually close many media outlets, or at least leave them financially vulnerable. It would almost inevitably lead to job losses.

The €1.87 million High Court award to Monica Leech against Independent Newspapers is a similar example. While the Supreme Court subsequently cut that to €1.25 million, the figure remained high.

Juries have consistently upped the ante in defamation awards. The De Rossa case in the late nineties set a £300,000 (Irish punts) record. However, the Leech case, originally decided in 2004 dwarfed that sum, while the Kinsella case set a new European high.

It is sobering to consider the catastrophic level of personal injury, for example, that would require awards on such a vast scale.

It is our view that a better mechanism is needed to weigh damages fairly and proportionately.

Practitioners argue that defendants can appeal excessive awards. However, the Leech case at least illustrates that this may not make much difference, and taking further action simply adds to a defendant's costs.

The high costs involved in jury trials combined with the likelihood that they will result in excessive awards, aggravate the risks outlined earlier.

Even while the Law Reform Commission felt that juries should have a role, its 1991 report agrees that, by virtue of their training and experience, judges were better placed to decide on damages. Section 31 of the 2009 act simply states that in a High Court action, judges should give directions to juries in relation to the matter of damages. It is hard to know if this mitigates the risk that juries will continue to award excessive amounts to successful plaintiffs.

The odds remain stacked against journalists and publishers. The poorly defined law makes it difficult to defend a case. The high cost of going to trial and the risk that a jury will award excessive damages means that media businesses feel that they have little choice but to try to avoid going to court. All this combines to maintain the "chilling effect" that the law has on public debate.

On balance, the continued use of juries skews the law in favour of plaintiffs. Any change should end jury trials in defamation.

Section 32 of the 2009 act provides for the payment of aggravated damages where it is shown that a defendant deliberately or recklessly published a defamatory statement. While this may seem fair, it should be remembered that media organisations do not set out deliberately to defame anyone.

Defences

The law should clearly allow scope for a full and fair defence against any allegation of defamation, and where appropriate, allow for early settlements so that both plaintiff and defendant can avoid a potentially costly and painful trial.

Section 16 of the 2009 act creates a defence of truth to any action for defamation. This requires the defendant to prove that the statement about which the plaintiff is complaining is true, or largely true.

In practice, this amounts to a defendant “proving their innocence”. Plaintiffs should be required to prove their claims in the first place. A failure on their part to do this should be defence enough in itself.

However, it makes sense that any change in the law retains a defence of truth, which would give the defendant scope to provide evidence of the accuracy or truth of their statement, should defending their case require this.

The qualified and absolute privileges in sections 17 and 18, which include reporting statements made in court and in the Oireachtas, should stand.

Section 20 creates a defence of “honest opinion”. Democratic debate relies on the fact that people in public life should be able to withstand comment, including very robust comment, on their activities. This defence supports that and it makes sense that the law includes this provision.

However, subsections (3) (a) and (3) (b), once again require defendants to prove that the statements of fact on which their honest opinions rely are true. The principle that it is up to the plaintiff to prove that a statement is untrue, before it can be found to be defamatory, should apply here as well as anywhere else in the law.

Sections 22 and 23 cover an offer to make amends. There are likely to be situations where media organisations have inadvertently defamed someone, or where they are prepared to make such an offer because they believe this is a reasonable way of settling the matter.

These provisions clearly cover such situations. However, section 23 (5) rules out the use of any other defence if an action proceeds and the defendant pleads that he or she offered to make amends as a defence.

This is clearly unjust and could act as a disincentive to a company considering making such an offer in the first place.

If a plaintiff refuses a reasonable offer of amends, then it should be open to the defendant to rely on whatever defence or defences they believe are appropriate, including the fact that the claimant refused a reasonable offer to make amends.

Section 26 introduced a new defence of “fair and reasonable publication on a matter of public interest”. Given that it was only introduced in the 2009 act, there has been little or no scope for the courts to explore or interpret this provision, with the consequence that nobody really knows its scope or how it will work as time goes on.

The difficulty with it as it stands is that is unwieldy. In summary, what it should do is allow fair and impartial reporting of material, whose accuracy the claimant disputes, where the journalist and or the media organisation believe that publishing it is in the public interest.

The defence should consist of the following:

The statement complained of was, either in part or in whole, a matter of public interest

The defendant reasonably believed that publishing it was in the public interest

The defendant's reporting was fair and accurate

The defendant provided the plaintiff with an opportunity to respond or comment

The defendant ensured that the plaintiff's response was covered fairly and accurately

If the plaintiff refused to comment or respond, the plaintiff cannot later rely on the fact that his or her comments were not reported

The defendant differentiated between facts, allegations and opinions.

Defendants should be able to rely on this defence irrespective of whether the statement was of fact or opinion.

In determining whether the defendant was reasonable in believing that the matter was of public interest, the court should make allowance for editorial judgement.

Conclusion

In summary, we believe that addressing these points would go some distance to tackling real problems faced by journalists who are merely trying to do their jobs, while continuing, rightfully, to protect citizens' rights to their good name.

We respectfully submit these points for your consideration.

Business Journalists' Association

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