Tithe an Oireachtais
Houses of the Oireachtas

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Joint Committee on Justice and Equality

Submission on Reform of the Defamation Act 2009

January 2016

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Introduction

This submission has been prepared on behalf of the Houses of the Oireachtas Joint Committee on Justice and Equality, in response to the public consultation being conducted by The Tánaiste and Minister for Justice and Equality in order to review the operation of the Defamation Act 2009, pursuant to section 5 of that Act.

The Committee is of the view generally that the 2009 Act has proven successful in substantially reforming and consolidating Irish defamation law. It has achieved the key objective of balancing important constitutional rights – ensuring effective protection for the right to good name and reputation guaranteed by Article 40.3.2 of the Constitution, while also ensuring due regard for the right to freedom of expression in a democratic society, contained at Article 40.6.1(i).

The scope of the review of the Act is very wide ranging. This submission, however, will confine itself to just a few aspects of the legislation where the Committee believes there is scope for improvement or reform.

The "offer to make amends" procedure

The offer of amends procedure was introduced by Section 22 of the Defamation Act 2009 (the "Act"). It was anticipated that it would lead to the settlement of defamation claims on a cost effective basis and, even where an offer of amends was not accepted, would lead to a discount in the damages awarded at trial. Where the parties do not agree as to damages or costs following an offer to make amends, those matters must be determined by the High Court under Section 23(1)(c) of the Act.

There is no definition of "Court" in the 2009 Act. In the context of Section 23(1), the question therefore arises as to whether the reference to the "High Court" and "the court" means the jury if the High Court is sitting with a jury, or refers to a judge sitting alone.

In *Padraig Higgins v Irish Aviation Authority* [2016] IEHC 245, it fell to Moriarty J to determine whether, in circumstances where an offer to make amends had been made and accepted pursuant to Section 22 of the 2009 Act but the parties were unable to reach agreement as to the issue of quantum of damages or costs, there was an entitlement under Section 23(1)(c) to a jury trial. He held that in the absence of an express intention on the part of the legislature to abrogate the right to jury trial in s.23(1)(c), the plaintiff was entitled to have his damages assessed by a jury, rather than by a judge sitting alone, should he wish to do so.

The Court of Appeal affirmed the High Court's decision. Mr Justice Gerard Hogan felt that although it might have been better had the Oireachtas taken the opportunity to put the matter beyond doubt by the use of clear and express language in the section including or excluding (as the case may be) the role of the jury, the role of the jury in the award of damages in defamation cases is embedded in the fabric of the common law and that right was expressly preserved by Section 48 of the Supreme Court of Judicature (Ireland) Act 1877 and Section 94 of the Courts of Justice Acts 1924. He stated that the failure of the Oireachtas to provide such clarity in this instance "compels me to acknowledge that another key principle of statutory interpretation comes into play in this instance, namely, the presumption against unclear changes in the law."

Conclusion

The Committee feels that, as a result of this decision in *Padraig Higgins v Irish Aviation Authority*, it is doubtful whether defendants will as readily consider making an offer of amends as they would previously have done.

The benefit for a Defendant in making an offer to make amends is that when it comes to awarding damages to a Plaintiff, in a situation where the damages

cannot be agreed between the parties, it empowers the Judge to apply a discount to the damages he/she believes should ordinarily be awarded. Discounts of up to 50% have been applied in the UK where there is a similar process. However, the uncertainty as to what juries may award in damages will most likely deter defendants from availing of the procedure.

The Committee has no issue with the role of juries in defamation actions as a whole. The role of the jury in the award of damages in defamation cases is embedded in our legal system, and that should remain the case. However, in the specific context of ss.22 and 23 of the 2009 Act, the Committee believes there is a need for legislation to clarify that, in circumstances where an offer to make amends had been made and accepted pursuant to Section 22 but the parties are unable to reach agreement as to the issue of quantum of damages or costs, damages should be assessed by a judge sitting alone. Failure to address this deficiency in the 2009 Act will thwart the purpose and intention of s.22 to achieve speedier settlements of defamation claims on a more cost effective basis.

Defence of fair and reasonable publication

Section 20 of the 2009 Act introduced a new defence of "fair and reasonable publication on a matter of public interest." Whilst this was welcome, a defendant faces a considerable burden in seeking to raise this defence. First, the defendant must establish that an allegedly defamatory statement was published a) in good faith; b) in the course of, or for the purposes of discussion of a subject of public interest, the discussion of which was for the public benefit; and c) that in all the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient.

Furthermore, the defendant must show that, in all the circumstances of the case, it was fair and reasonable to publish the statement. In determining whether the publication was fair and reasonable, the court must have regard to such matters as it considers relevant, including any or all of the ten different criteria set out in s.26(2) of the Act.

In a High Court action, it is for the jury to determine whether or not the defence applies. Given the complexity of the defence as currently worded, this could give rise to difficulties, as argued by authors Neville Cox and Eoin McCullough:

> " … [G]iven the complexity of this defence and the extent to which it is caught up in policy considerations, this may pose problems. The English experience of the role of a jury in the operation of the *Reynolds* defence has not been a particularly happy one. It may be extremely difficult for a judge to direct a jury on the criteria listed in s.26 and, in particular, it may be unrealistic to give adequate directions on the nature of the policy arguments that underpin the existence of the defence in the first place."[1]

The Committee is of the view that it should remain within the competence of the jury, as the trier of fact in Irish defamation cases, to determine whether or not the defence has been made out. However, there is scope to revise the wording of s.26 along simpler lines. In this regard, the wording of the equivalent defence in s.4 of the English Defamation Act 2013 may be instructive. It provides that:

> "(1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement
>
> complained of was in the public interest.

[1] *Defamation Law and Practice*, Cox & McCullough, Clarus Press, Dublin, 2014, pp.340-1.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

Conclusion

The wording in the English Defamation Act 2013 is not without fault either. However, the Committee is of the view that there is scope to streamline the defence of fair and honest publication on a matter of public interest, and that the wording of s.26 of the 2009 Act should be revisited as part of any broader reform of defamation law.

Limitations of Actions

Section 38 of the 2009 Act provides for a general limitation period of one year for the bringing of an action "from the date on which the cause of action accrued".

However, it goes on to provide in section (3B) that:

> "For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.".

The additional proviso in relation to the medium of the Internet – "the date on which it is first capable of being viewed or listened to through that medium", creates unnecessary confusion, and would seem to create a potential unfairness to plaintiffs in circumstances where publication has taken place, but a defamatory statement is not yet "capable of being viewed or listened to through the medium of the Internet", and therefore may not yet have to come to their attention.

The Committee is of the view that this additional wording should simply be deleted, and that the standard rules in relation to publication should apply to the Internet as to any other medium.

Recommendations

In conclusion, the Committee makes the following recommendations:

- That a legislative amendment be introduced to clarify that, in circumstances where an offer to make amends had been made and accepted pursuant to Section 22 of the 2009 Act, but the parties are unable to reach agreement as to the issue of quantum of damages or costs, damages should be assessed by a judge sitting alone;

- That the wording of section 26 of the 2009 Act be revisited in order simplify or streamline the defence of fair and honest publication on a matter of public interest; and

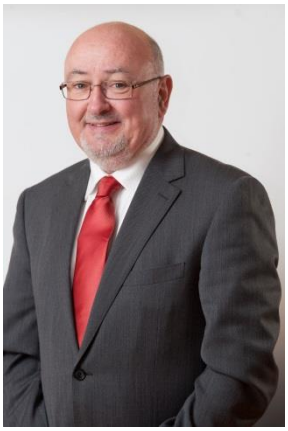
- That section 38(3B) of the 2009 Act be amended by deleting certain words in order to provide simply as follows:

  "For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is [~~first~~] published [~~and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium~~]."

Appendix 1 – Committee Membership

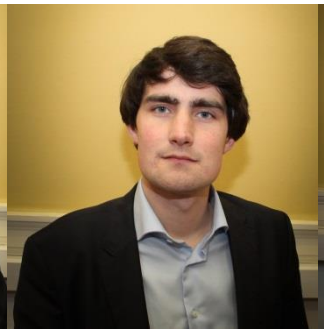
Joint Committee on Justice and Equality

Deputies

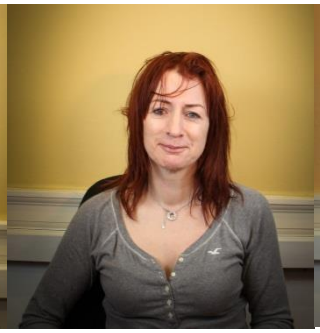


Caoimhghín Ó Caoláin TD
(SF) [Chair]

Colm Brophy TD
(FG)

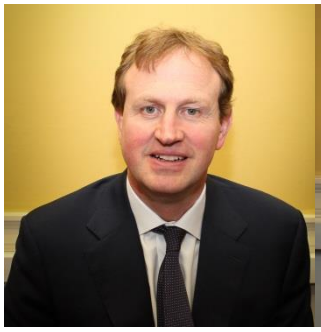


Jack Chambers TD
(FF)

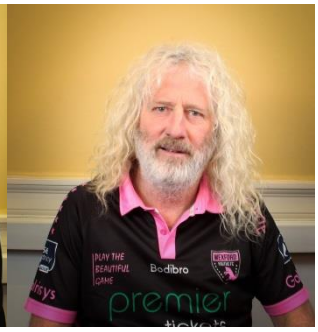


Clare Daly TD
(I4C)

Alan Farrell TD
(FG)



Jim O'Callaghan TD
(FF)



Mick Wallace TD
(I4C)

Senators

Frances Black
(CEG)

Lorraine Clifford-Lee
(FF)

Martin Conway
(FG)

Niall Ó Donnghaile
(SF)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 16th June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 20th July 2016.

Appendix 2 – Term of Reference of Committee

JOINT COMMITTEE ON JUSTICE AND EQUALITY

TERMS OF REFERENCE

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

(1) The Select Committee shall consider and report to the Dáil on—

(*a*) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and

(*b*) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—

(*a*) Bills,

(*b*) proposals contained in any motion, including any motion within the meaning of Standing Order 187,

(*c*) Estimates for Public Services, and

(*d*) other matters

as shall be referred to the Select Committee by the Dáil, and

(*e*) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and

(*f*) such Value for Money and Policy Reviews as the Select Committee may select.

(4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

(*a*) matters of policy and governance for which the Minister is officially responsible,

(*b*) public affairs administered by the Department,

(*c*) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,

(*d*) Government policy and governance in respect of bodies under the aegis of the Department,

(*e*) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

(*f*) the general scheme or draft heads of any Bill,

(*g*) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,

(*h*) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

(*i*) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,

(*j*) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (*d*) and (*e*) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

(*k*) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—

(*a*) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,

(*b*) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(*c*) non-legislative documents published by any EU institution in relation to EU policy matters, and

(*d*) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

(*a*) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,

(*b*) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(*c*) at the invitation of the Committee, other Members of the European Parliament.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]

(1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and

(2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.

(3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and

(4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].

(5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(a) a member of the Government or a Minister of State, or

(b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

(6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.