LAW SOCIETY
OF IRELAND

Private and confidential
Defamation Act Review,
Department of Justice and Equality
Bishop's Square,
Redmond's Hill,
Dublin 2.

19 December 2016

Re: Defamation Act Review 2009

To whom it may concern,

In response to the Department's public consultation on the operation and effectiveness of the Defamation Act 2009, the Society sought the views of its members. As our members act for both defendants and plaintiffs in defamation actions, the challenge arising from the responses received was to seek to identify issues of common concern to both. Inevitably, some of the views expressed in the attached overview are at odds with each other.

The tension between the constitutional right to a good name and the constitutional right to freedom of expression raises fundamental issues of public policy. In addition, matters pertaining to judicial process and the administration of defamation actions are central to any analysis of the current regime.

Other considerations that arise include the obligations and liability (or lack thereof) that applies to internet service providers (ISPs), to the social media environment and to online news sites. The extent to which current defamation law applies equally across online and offline publication platforms is a matter of some debate.

For the avoidance of doubt, the Society has not adopted a formal policy position in respect of the above issues. In an effort to assist the Department, we attach the comments received from our members, with no comment on the substance, frequency or impact of the issues identified.

Should the Department wish to explore some of the themes emerging from the consultation directly with practitioners and clients, the Society is happy to examine how that may be facilitated.

Yours sincerely,

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Overview of comments and responses to the Statutory Review of Defamation Act 2009

Department of Justice & Equality
December 2016

General Comments Received

The following responses are general views received by the Society in relation to the wider issue of Defamation Law and policy. As noted in the covering letter, the views expressed do not represent Law Society of Ireland policy.

- Defending a defamation action is prohibitively expensive; taxed heavily and greatly exceeds the costs of an ordinary civil High or Circuit Court action.
- Introduce an offence of 'malicious injury to the reputation of another' - as the high costs involved are not a sufficient deterrent for a 'man of straw'.
- Media organisations' 'championing of free speech' and extensive lobbying to reduce damages is being done without considering the importance of a person's right to a good name.
- The Department should try and get the view of the defamed – through their solicitors – it would provide transparency and fairness to conclusions reached.
- Poor case management adds to cost. They should be fast-tracked as the long processing compounds the public glare - no certification process in place, and there should be a dedicated list.
- Irish libel laws are 'fit for purpose' – although some awards are excessive and disproportionate.
- Retain the juries, as they are best placed to assess impact but also act as a deterrent to the more extreme excesses of the media.
- There is a gap in that online media/broadcasters are not subject to the law (only print and traditional broadcast are; including regulation by the Press council). Social media and ISP players should be regulated in the same way, to level the playing field.
- Unpredictability and extraordinarily high damages.
- Lengthy trial period and increased costs.
- Difficulty for juries in determining and applying the law.
- Complexities of the law – e.g. Section 26 too complex to be run effectively.
- If juries are to be retained; should be on an opt-in basis. The issue of direction to juries should not be dominated by the question of quantum of damages, but more balanced towards the issue of liability, in the first instance. – direction should be split evenly.

Consideration of Consultation Questions

The following responses relate to the consultation questions asked by the Department. As noted in the covering letter, the views expressed do not represent Law Society of Ireland policy.

1. Whether any change should be made to the matters which a plaintiff or a defendant is required to prove in a defamation case,

Comment 1:
No

2. Whether any change should be made to the persons currently entitled to bring an action for defamation,

Comment 1:
No

3. Whether any change should be made to section 12 (which provides that a body corporate may bring an action for defamation, whether or not it would incur financial loss as a result of the statement it claims to be defamatory),

Comment 1:
No
Comment 2:
Section 12 confirms that a corporation is not required to prove special damage to bring defamation proceedings. We agree with the current legislative position and consider that it should remain in its current form. We agree that it would be an almost insurmountable hurdle for a company in many cases to prove causation between a defamatory statement and a subsequent loss of income (which may arguably also be due to other factors, both market-driven and economic, as well as the defamatory statement). Furthermore, the jurisprudence has established that a company's good name is, in and of itself, a thing of value. The introduction of a requirement to prove special damage where a company has been defamed would almost certainly give rise to a chilling effect on many claims even though there has been a defamatory and damaging statement and for these reasons we are strongly of the view that no such requirement should be introduced.
Comment 3:
I do not agree that it would represent a 'chilling effect' to require a body corporate to prove special damage. Beyond that, whether State Bodies also have an entitlement to make claims for defamation might be clarified. In the House of Lords Judgment of Derbyshire County Council v Times Newspapers Limited & Others [1993] AC534, it was determined that a State corporation could sue for defamation affecting property and not affecting personal reputation and ultimately that the corporation could not maintain an action for defamation for any words which reflect upon itself. Accordingly, under English

Common Law, a local authority does not have a right to maintain an action of damages for defamation. The position of such entities is not clear in this jurisdiction.

4. The experience regarding the jurisdiction of the Circuit Court in defamation cases,

Comment 1:

We believe that the option of seeking a 'Declaration of Falsity' is very useful and important in circumstances where a Plaintiff does not require or seek monetary damages to vindicate his or her reputation

5. Whether any change should be made to the respective roles of the judge and the jury in High Court defamation cases,

Comment 1:

We firmly believe that the jury should be maintained in High Court defamation cases

6. Whether any change should be made to the level or type of damages which may be awarded in defamation cases, or to the factors to be taken into account in making that determination,

Comment 1:

Steps should be taken to temper the more excessive awards being made by juries, which are clearly punitive as opposed to compensatory in nature

7. Whether any change should be made to the defences of truth, absolute privilege, qualified privilege, honest opinion, fair and reasonable publication on a matter of public interest, and innocent publication, as defined by the Act,

Comment 1:

We believe that the current law is fair and effective

Comment 2:

Section 18 of the Defamation Act 2009 provides legal protection through statutory qualified privilege to reports of press conferences and public meetings "in the State or in a Member State of the European Union". Upon Brexit, this statutory privilege should be extended to the United Kingdom.

8. Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications,

Comment 1:

We believe that the Act's provisions are woefully inadequate in dealing with the publication and dissemination of false and defamatory material on the social networking sites, ISPs and by bloggers generally, and that urgent steps should be taken to remedy the situation and to ensure that online publishers are subject to the same degree of regulation as traditional media.

While we accept that a Plaintiff will have to prove publication, for traditional media publications this is generally not a problem because you simply have the paper or broadcast to hand to show at trial. However, internet publication is different and the Act

fails to take account of this. In a recent Court of Appeal case, the Court found that we had not proved publication in respect of comments posted online. We had to be able to show the number of "hits" the site had from Ireland to prove publication, although we could point to twelve contributors who had recorded their location as Ireland. The Court would not infer publication in this jurisdiction simply because the comments were posted online. We have sought to appeal that decision to the Supreme Court on the basis that it was an interlocutory application and we should not have been required to prove publication at that stage, however we can see this causing problems for Plaintiffs in the future as it will lead to Plaintiffs probably having to seek non-party Discovery from ISPs in California etc. The Act needs to be amended to take in to account the challenges online defamatory comments pose to potential Plaintiffs.

Comment 2:

I think that some focus should be given to user generated content and the availability of the "hosting defence". This is a major concern for websites, particularly newspaper websites. There is uncertainty in relation to the hosting defence in the E-Commerce Directive in respect of comments placed on such websites. The question of whether to monitor in light of this uncertainty is also an issue. Pre-moderation is generally not feasible, given the volume and persistent nature of such postings. There is also contradictory case law in the EU Court (Courts of Justice of European Union) and the European Court of Human Rights (ECtHR). CJEU considered the provisions in the E-Commerce Directive limiting liability for mere hosts and intermediary service providers (ISPs) and ruled that the service provider must play a neutral and passive role whereby it has no knowledge or control over the data that it stores. The ECtHR has held that a newspaper had editorial control over third party comments on its news site and should have prevented unlawful comments from being published, even where it had taken down the offensive comments immediately upon being notified of them. In the Irish High Court, the Courts have treated news websites as traditional ISPs and they have therefore escaped liability for user generated comment content (see recent Judgment of Mr Justice Binchy in Maurema v Facebook Ireland Limited delivered on 23 August 2016 [2016] IEHC 519). The Defamation Act 2013 in the UK provides specific treatment for user generated comments, whereby the operator of the website has a defence if it can show that it did not post a statement on the website and this defence is not defeated where the operator moderates the statements posted on it by others but the operator of the website must not fail to respond to any notice of complaint in relation to such postings. A similar approach would be welcomed in this jurisdiction.

9. The experience in practice regarding the Act's provisions for an offer of amends, an apology, or lodgement of money in settlement,

Comment 1:

Satisfactory

Comment 2:

The judicial interpretation of section 23 of the Act which outlines the offer to make amends procedure has been disappointing and is, we feel, a product of unclear drafting.

Upon its introduction, it was expected that the procedure would facilitate expeditious resolution of defamation actions; hopefully without involving the courts at all and, in all cases, probably without involving a jury. It was welcomed as one of the most important reforms under the Act and it was envisaged that it would take the decision on quantum of damages in such cases out of the hands of a jury. While the equivalent provision in the UK legislation expressly provides that the procedure is operated in the absence of a jury,

the Act merely provides that matters such as damages "shall be determined by the High Court". However, academic commentary suggested that the best interpretation of the Act was that the offer of amends procedure under the Act did not involve any role for a jury, subject to the caveat that the issue was not without doubt and it was a matter of regret that the legislation was not clearer on the point.

Comment 3:

I agree with the comments in relation to the "Offer of Amends" process under Section 23. The recent Court of Appeal Judgment in Higgins v Irish Aviation Authority is at odds with a number of other High Court Judgments in which a Judge alone determined the quantum in an Offer of Amends process. For example, Ward & Quinn v Donegal Times, Judgment delivered on 8 November 2016, the Judge sitting alone determined the relevant amount as part of this process. The amendment required in order to bring clarity to this issue is simple. It requires amending "The High Court" at Section 23(i)(c) to "a Judge sitting alone in The High Court".

10. Whether the range of remedies (including interim, interlocutory and permanent orders) available under the Act is sufficient to provide accessible and effective redress for defamation,

Comment 1:

Satisfactory

11. The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman,

Comment 1:

The Press Council and Ombudsman provide an excellent and often very effective alternative to litigation. Our firm has utilised this option for many of our clients and have considerable confidence in the system.

12. Whether any further legislative or procedural measures should be taken with a view to encouraging the efficient, inexpensive and prompt resolution of defamation claims, reducing the need for court intervention, or otherwise increasing the accessibility or effectiveness in practice of defamation law for plaintiffs and defendants.

Comment 1:

Mediation should be a statutory requirement, or at the very least encouraged by way of sanctions imposed by the Court.

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