

Local Ireland

Submission to Review of the Defamation Act 2009
public consultation
by
the Department of Justice and Equality

January 16 2017

Introduction

Local Ireland, welcomes this opportunity to provide its submission to the Review of the Defamation Act 2009. Local Ireland is the promotional brand of the Regional Newspapers and Printers Association of Ireland (RNPAI). It was founded in 1919 and formerly known as the Provincial Newspaper Association. Local Ireland is the oldest newspaper association in Ireland. As the longest serving news service in Ireland, local press presents a unique local news offering to its readers each week and forms a core part of public discourse in the regions.

In recent times this unique voice has found itself adversely affected by Irish defamation law. The operation of defamation law as it stands is, in practice, having a chilling effect on members' ability to provide news stories to our readers. The commercial reality of the cost of defending defamation cases, coupled with the potential for prohibitively high levels of damages being awarded in these cases, is such that members have reported a distinct reluctance to take on the enormous financial risk of defending a defamation case. Many members report that they consequently adopt an over-cautious approach to news reporting. This approach, it is contended, does not serve the public interest. Nor does it serve the interests of either plaintiffs or defendants in defamation cases. Perhaps most significantly of all, it ill-serves the interests of our readers and public discussion of matters of social, political and cultural importance in the communities we serve.

Irish law recognises the media as a cornerstone in our democracy, the need for the media to impart information to the public and the entitlement of the public to receive that information. Equally the Irish Constitution provides protection for the right to freedom of expression of convictions and opinions, in tandem with the right to have the good name of individuals protected and vindicated by our law. Local Ireland contends that there are changes required to the current Defamation Act to ensure that the needs of those seeking to vindicate their reputations, the interests of the public in receiving information and the exercise of the right to freedom of expression, are balanced more fairly in the interests not only of the individuals and businesses concerned, but in the interests of our democracy overall. This submission will point to where Local Ireland believes concerns arise and suggests measures that could usefully be implemented to better achieve that balance.

Many of our members are also members of NewsBrands Ireland and we fully endorse the submission made by that organization in the context of this public consultation.

High damages, high costs

In comparison to its European neighbours, awards in Irish defamation cases are clearly and disproportionately much higher. This is well exemplified by the case of *Leech v Independent Newspapers* where an award was made by a jury of €1.87 million in 2009 which was reduced to €1.25 million by the Supreme Court in December 2014. The case is currently under appeal to the European Court of Human Rights in Strasbourg, on grounds that awards at such levels militate against the exercise of the right to freedom of speech and have a chilling effect on the exercise of that right. Local Ireland supports and endorses this contention.

It is sobering to note that in the Supreme Court judgment in the *Leech* case, the court expressed the view that the defamatory statements published in that case did not comprise a defamation at the most serious end of the defamation spectrum. It is submitted by Local Ireland that awards of this astonishingly high level have a seriously detrimental effect on freedom of expression. There is a very real prospect that any of our members could be forced to close down in the event of having an award at this, and indeed any much lower level, being made against them. By way of comparison the current Book of Quantum for personal injury cases issued by the Injuries Board <http://www.injuriesboard.ie/eng/How-to-make-a-claim/compensation-calculator/> provides a guideline for the highest level of general damages at €450,000.

It is submitted that a similar approach should broadly be taken in defamation awards made by courts and that the general approach taken in damages awards should not exceed awards made in personal injury claims.

It is now widely accepted that given the level of awards achievable in the Irish jurisdiction that Dublin is rapidly becoming a 'libel tourism' capital. When this moniker was originally applied to London as a favourable (from a claimant's point of view) jurisdiction in which to bring a defamation claim, legislation ensued, which effectively avoids this situation developing further.

In parallel to the prospect of high damages being awarded, the costs of running defamation cases is often high due to the fact that cases taken in the High Court (where the majority of cases are taken) are jury trials. These cases take twice as long to run and frequently involve the engagement of two senior counsel to run the case on each side (plaintiff and defendant). The legal issues engaged are often complex and take time to explain to a jury that consists of individuals not versed in the nuances of the law.

Local Ireland has carried out an informal survey of our members. Insofar as we can ascertain, based on the responses to our questionnaire, no Local Ireland member-publication has contested a defamation claim to a trial in either the Circuit Court or the High Court in the last ten years. The reason for this is the disproportionate risk to the commercial viability of the newspaper in the event of an unsuccessful defence, even where the defendant publication believes it has a substantive defence. Furthermore, for costs reasons, fewer and fewer of our member publications can afford to carry media liability insurance. Even those that do carry such insurance, where the underwriters are invariably based in the UK, are required by their insurers to settle claims on the basis of commercial considerations only, such is the unpredictability of outcome – particularly on quantum – of defamation cases in this jurisdiction.

Local Ireland submits that there are a number of ways in which these issues can be addressed in the context of a review of the 2009 Act. These comprise;

- (i) introduction of a 'serious harm' test;
- (ii) abolition of juries in defamation actions;
- (iii) changing the nature of liability for user generated comment;
- (iv) review of the fair and reasonable publication defence;
- (v) qualified privilege and press conferences – extension and clarification of application of privilege; and
- (vi) court reporting – exemption for genuine error;

(i) Introduction of a Serious Harm Test

Under Irish law the threshold required to be passed by a plaintiff in order to succeed in a defamation action is merely to show that the statement published about them 'tends to injure [their] reputation in the eyes of reasonable members of society' (section 2, Defamation Act 2009). The plaintiff is under no obligation to prove that any actual or significant level of harm was caused to them. In 2013 the UK enacted a serious harm threshold to its new Defamation Act with great effect. In order to succeed in a defamation action, a claimant before the UK courts must now show that the publication resulted in 'serious harm' to their reputation. Thompson Reuters has reported that this resulted in a 27% reduction in cases in 2014¹. The serious harm test has already therefore acted as a deterrent to minor or vexatious claims, to claims brought or threatened merely to intimidate a publisher and to forum shopping by 'libel tourists' from other jurisdictions who have suffered little if any real damage to their reputation in the UK.

(ii) Abolition of Juries

Local Ireland submits that consideration needs to be given to abolishing the use of juries in defamation cases. Using juries to determine not only liability but also the quantum of damages to be awarded has led to a high level of unpredictability for media defendants. Media defendants find themselves unable to even begin to evaluate whether the commercial risks of defending a defamation action where they have a substantive defence to the claim, merit defending the case. Invariably, their commercial interests are better served by settling, even where a substantive defence to a publication exists. As has already been argued in this submission, this results in a serious and, we believe, socially harmful chilling effect on freedom of expression in this country.

Additionally, the jury system does not allow for reasoned decisions that refine the law and provide greater clarity on the judicial interpretation of this complex area of law. There were two new statutory defences to defamation actions introduced under the 2009 Act, namely 'fair and reasonable publication' (section 26) and 'honest opinion' (Section 20 – replacing the previous common law defence of 'fair comment'). Both these defences have been relatively under-utilised, it is argued, since the commencement of the 2009 Act. To date only one case has been run to completion at trial using the 'honest opinion' defence. Lawyers involved in this case attest to the fact that it was clear to them from the verdict that the jury did not fully understand the defence. However, it is difficult to be definitive on this in that the jury process, by its very nature, does not require the delivery of any reasoned basis for the decision reached. Where a judge sitting alone

¹ <https://inform.files.wordpress.com/2015/09/thomson-reuters-press-release.pdf>

hears a case, particularly in the High Court, reasoned decisions are required and provide valuable precedent and judicial analysis of how a particular defence applies to a particular case. Relying on jury trials as we do, under Irish defamation law, such reasoned precedent is simply absent from our defamation law, other than from appeal cases.

It is submitted that making legally nuanced defences in this complex area of law requires the application of specialised knowledge such as can be more appropriately provided by judges sitting alone without a jury.

Judge-only trials would clearly expedite the hearing of defamation cases, thereby cutting down on the costs involved in lengthy cases where submissions to the court by counsel on complex areas of defamation law could be made more concisely and in significantly less time than it would take to explain these areas of law to a jury of non-lawyers. The need for complex and often lengthy judicial directions to juries would be obviated. This latter consideration applies both in respect of liability and quantum in defamation actions.

It is submitted that the hearing of defamation actions without the involvement of juries would inevitably significantly lower the costs of defamation trials, expedite timely hearing of trials (without the need to wait months at a time for civil jury hearings) and result in more reasoned and equitable assessment of damages. Currently a defamation case can take over a decade to run to its natural conclusion, as was the position in the Leech case, referred to above. In that case the publication giving rise to the claim was made in 2004. Unfortunately, it is not uncommon for a defamation claim to continue to wind its way through the courts system thirteen years after initial publication, as is the position with that case.

The updated Offer of Amends procedure introduced by sections 22 and 23 of the 2009 of the Act were intended, Local Ireland understands, to provide a relatively speedy and cost effective mechanism for resolving defamation cases where the statement is, or parts of it are, clearly defamatory, and liability (in whole or in part) is not an issue. While it is usually possible to agree the wording of an appropriate apology with a claimant / plaintiff in such cases, issues have arisen on the quantification of compensation by the court where this aspect of the Offer cannot be agreed by the parties. A recent decision by the Court of Appeal in the case of *Higgins v The Irish Aviation Authority*² has determined that there is a right, in the absence of legislative provision to the contrary, for the plaintiff to have this evaluation of quantum carried out by a jury. Local Ireland submits that this is contrary to the overall intent of the introduction by the legislature of this defence. The 2009 Act should be amended, it is submitted, so that any determination required of the court where an Offer of Amends is at issue, must be made by a judge sitting alone without a jury.

(iii) Liability for User Generated Comment

The capacity for contribution to debate on matters of public interest and significance is critical to the vibrancy – and in turn commercial appeal – of online news sources. Providing a parallel online service to complement and enhance the print offering by a newspaper is critical to the commercial viability of newspapers at this point of the 21st Century. At present, any mediation or editing of such user generated content (UGC) by an online news service provider, exposes that service provider to the risk of being held liable for content posted by third party users, that may transpire later to be defamatory.

² [2016] IECA 322

It is submitted that good faith moderation and / or modification or editing of UGC by an online news service proprietor should not automatically deprive that provider of the defences that would otherwise be available to it under EU and Irish law in its capacity as an online service provider. Currently the E Commerce Regulations (SI 68/2003) introduced on foot of the E Commerce Directive of 2000, provide for a 'hosting' defence. Under that defence, expeditious take-down of defamatory UGC by an online service provider on receiving notice or becoming aware of its defamatory nature exempts the online service provider from liability in defamation for that UGC. Similarly, the recent High Court decision in *Muwema v Facebook Ireland Ltd*³ indicates that an online service provider can avail of the 'innocent publication' defence provided by section 27 of the 2009 Act. It should be made clear in amending legislation that good faith moderation and / or modification of UGC should not deprive a defendant online service provider of the defence.

(iv) Fair and Reasonable Publication Defence (s.26)

The reality is that this defence has to date, yet to be pleaded and run at trial in any meaningful way. The defence is intended to enable, without fear of defamation liability, the discussion and examination in the media of matters of public interest and for the public benefit. It is submitted that the criteria set out in section 26 which a court is required to consider in determining whether or not the defence should apply, does not effectively facilitate that type of debate and discussion.

It is submitted that this defence would better serve the public good were it to objectively address the pivotal role that the media plays in a contemporary democratic society where the media conveys information and opinion on matters of public interest in a responsible way, taking the commercial realities of news production and dissemination into account.

(v) Press Conferences

Schedule 1 Part 2, paragraph 5, further to section 18 of the 2009 Act, permits qualified privilege to attach to fair and accurate reports of press conferences of the nature set out in that paragraph ("Press Conferences"). This covers most of the press conferences on which a journalist would usually be expected to report. Local Ireland submits that this privilege be set out in more detail and should expressly permit the privilege in question to apply to:

- (i) Press releases issued at or to explain what occurred at Press Conferences
- (ii) Press Conferences in any jurisdiction and not merely those held in Ireland and other EU countries. In the context of Brexit, this consideration is all the more pressing.

(vi) Court Reporting – genuine error

Court reporting is a cornerstone element of the news provided by regional newspapers. The role of the media in court reporting has also been recognised by the judiciary as being a fundamental pillar of the constitutional requirement for the public administration of justice.

³ [2016] IEHC 519

It has arisen on occasion that even very experienced court reporters have been sued for defamation in situations where genuine errors have been made by them in their court reports. Local Ireland submits that court reports containing a genuine factual error, where that error is promptly corrected and published to a similar readership / audience to that to which the original report was made, should entitle the reporter / publisher in question to rely on the defence of statutory qualified privilege. It is a highly undesirable position that the essential work of court reporters be in any way curtailed or lead to punitive claims being made against those reporters / their publishers, when they are invariably willing and able to correct any such genuine errors promptly resulting in minimal if any genuine loss or serious harm to the reputation of the claimant.

END.