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STATUTORY REVIEW OF THE DEFAMATION ACT 2009 - SUBMISSIONS BY RONAN DALY JERMYN SOLICITORS

1. **Trial by Jury**

These are very challenging times for the traditional media, namely newspapers, radio and television, where it is proving difficult on an ongoing basis to reconcile attempts to run a profitable business providing a return for shareholders on the one hand with maintaining their role as a watchdog for members of the public through the likes of investigative reporting on the other hand. Investigative reporting is labour intensive and thus an expensive function to run. Nevertheless, it is a vital service in a modern democracy.

Given technological advances, with the likes of social media, it is difficult for the traditional media, to continue to perform the public watchdog role mentioned above and to run a profitable operation. Clearly the maintenance of such a public watchdog role is considered by the current Government as important given recent discussions around a broadcasting levy to financially support newspapers. Leaving aside this type of financial support, it would serve as an encouragement to their watchdog/ investigative reporting function if the primary issue with the current defamation legislation is addressed, namely the abolition of jury trials save in exceptional cases. This is not a radical position to adopt. One only needs to look at legislation in England and Wales for suggested wording for any amending defamation legislation.

Section 11 of the Defamation Act 2013 in England and Wales provides for trial without a jury "unless the Court orders otherwise". The circumstances under which the Courts in England and Wales could order a trial by jury was considered in the case of *Yeo v Times Newspapers Limited [2014] EWHC 2853(QB)*. In that case the main advantages of a trial by Judge alone were considered, namely:

- A reasoned judgement;
- Proportionality – trial by jury takes longer and is more expensive than trial by judge alone; and
- Case management – preliminary issues, such as meaning, fact, comment and points of concern arising from the interplay of the various defences, can be tried and resolved before much of the costs associated with a full trial have been incurred.

Defamation cases in this jurisdiction do not currently operate on a level playing field. Jury trials are unpredictable in terms of the damages that juries can award. For example the highest award in a defamation claim was €10 million in 2010. Prior to that award the highest award had been €750,000 (in 2006). Bizarrely this latter award was

in a case where the claimant had been awarded €250,000 and this was appealed. On appeal the Supreme Court sent the matter back to the High Court where a different jury had awarded €500,000 more than the previous jury that had been empanelled notwithstanding that the facts of the case had not changed! Jury trials also offer nothing by way of precedent, as the members of the jury change from trial to trial.

Not only do the disadvantages of a jury trial act as a disincentive to the media performing their public watchdog role but it also acts as a disincentive to defending defamation claims. Defamation claims are by their nature expensive, partly due to the fact that trials are by jury, and this coupled with uncertainty surrounding Jury trials means that while media defendants may often have good defences very few cases are actually fully defended because of the disadvantages of a trial by Jury. This is not a good model for justice in defamation claims.

An amendment similar to that in the English and Welsh legislation does not mean there will never be jury trials. A claimant, or indeed a defendant, can still make an application for a jury trial.

2. **Serious Harm**

In order to attempt to balance the unlevel playing field referred to at 1 above, it is also suggested that a "serious harm" requirement similar to that in the Defamation Act 2013 in England and Wales should be included in any amending legislation.

Section 1 of the Defamation Act 2013 provides as follows:

"(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of the section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss".

Since the enactment of this legislation, the English High Court has held that a claimant will have to prove, on the balance of probabilities, that the statement complained of has caused, or will probably cause, serious harm to the reputation of the claimants *(Lachaux v Independent Print Limited [2015] EWHC 2242 (QB) 3025/2015)*[1].

It was further held in the Lachaux case that if the defendant argues that serious harm has not been caused to the claimant then this point is treated as a preliminary issue and a defendant would not be required to file a full Defence before preliminary issues are decided. This would have positive costs consequences for defendants and make

[1] This case has been appealed to the English Court of Appeal.

Court lists more manageable as cases which do not meet the "serious harm" requirement would be concluded at an earlier stage. The "serious harm" requirement would also allow defendants an opportunity to remedy any wrong at an early stage by for example publishing an apology, thus encouraging the expedient resolution of claims caused by errors in reporting.

The introduction of a "serious harm" requirement in amending legislation would also serve to discourage "forum shopping" by claimants with no or a negligible connection to this jurisdiction. One of the factors that a Court might take into account in determining whether "serious harm" has been caused to the reputation of a claimant is the circulation of a publication in this jurisdiction and the effect of the publication on the claimant's reputation in this jurisdiction.

3. **Offer of Amends**

Prior to the enactment of the Defamation Act 2009, it was widely considered that the "offer of amends" provisions in the Defamation Act 1961 were unwieldy and thus not used by defendants in defamation claims. Amendments were made to the "offer of amends" provisions in the Defamation Act 2009 to make it more user friendly, which would encourage the early resolution of claims. While there is little doubt that the amending wording is an improvement on the 1961 Act a recent decision by the Court of Appeal serves as a discouragement to defendants in defamation claims to use the offer of amends procedure.

In that Court of Appeal decision, it was held that where an offer of amends has been accepted but the parties cannot agree on what damages should be paid by the defendant, then the damages must be decided by a jury. The wording of the Defamation Act 2009 referred to that decision being one for the "High Court". It is widely believed that the Oireachtas intended that such a decision would be one for a Judge sitting alone. However the legislation is ambiguous and this was so held by the Court of Appeal which found that if the legislature had intended that such a decision be made by a Judge sitting alone, then it should have taken the opportunity to put the matter beyond doubt by the use of clear and express language given that the role of the jury in the awarding of damages in defamation cases was "embedded in the fabric of the common law" and was preserved by legislation.

This recent Court of Appeal decision renders the offer of amends procedure largely unusable for defendants in defamation claims. It is the writer's view that this is a legislative error and should be corrected in amending legislation so that the offer of amends procedure serves as a useful tool for the resolution of defamation complaints, thus reducing costs and easing the burden on Court lists.

4. **The Defence of "fair and reasonable publication of the matter of public interest"**

The codification of this defence was welcomed prior to the enactment of the Defamation Act 2009. Section 26 of the Defamation Act 2009 is drawn from the test in what was known as "Reynolds Privilege" and the criteria to be taken into account by a jury in determining whether the defence applies are set out in Section 26 (2) and are drawn from the House of Lords findings in the *Reynolds v Times Newspapers case*. While the Section was welcomed in principle, in practice it has proven to be somewhat of a let-down for defendants in defamation claims notwithstanding that it is probably the most widely used defence. Since the Defamation act 2009 was enacted in January 2010, the writer is not aware of any High Court case in which this defence has been successfully invoked (or even properly tested before a jury). The writer believes that this is so because it is considered that the section, as drafted, is far too technical for members of the jury to understand all of the moving pieces within it. It is considered by the writer that a simplified section should replace the existing Section 26 along the lines of the section in the English Defamation Act 2013 on "publication on a matter of public interest" which is a much less cumbersome section[2].

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[2] The comments in relation to Section 3 and 4 above would only apply in the event that juries continue to be involved in hearing defamation cases in the High Court.