Written remarks of Attorney General Seamus Woulfe SC

on the launch of the Law Reform Commission's Report

Privilege for Reports of Court Proceedings under the Defamation Act 2009

23 July 2019

Introduction

1. President, Commissioners, ladies and gentlemen, good evening. I'm delighted to have been invited by the Law Reform Commission ("LRC") to launch its Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009.

2. At the outset, I would like to thank the LRC for the considerable work and time dedicated to this Report, which amounts to another valuable contribution to the reform of our laws.

3. The Report itself, as its title says, considers Privilege for Reports of Court Proceedings under the Defamation Act 2009, and arises from a specific request of my predecessor, then Attorney General Máire Whelan SC, under s. 4(2)(c) of the Law Reform Commission Act 1975. The Report itself, in the Commission's own words, involves a narrow aspect of the law of defamation. However, the Report is a valuable consideration of this most important area and considers in detail issues which go to the heart of public interaction with the administration of justice.

4. I would like to recommend the Report to you all, and rather than simply re-state the considerations and recommendations therein, I would like to briefly touch on two elements of the report which, I believe, is of particular importance. They are, firstly, the need to fairly balance the administration of justice in public with the right to a good name and reputation, and secondly consideration of reports of court proceedings which are produced and/or published by those who may not be considered members of the traditional media.

Balancing reputation, expression, and access to justice

5. The role played by those that report on court proceedings is a significant one. Article 34.1 of the Constitution requires that administration of justice be done in public, and protection of reports of court proceedings goes to the very essence of this Article – as Mr Justice Charleton said in the High Court[1] in 2010 – *"…the doors* [of the court] *are… always open"*. The absolute privilege afforded by section 17(2)(i) of the Defamation Act to 'fair and accurate' reports of domestic or Northern Ireland court proceedings is one way of giving statutory effect to this requirement. As the oft-cited maxim requires: *Justice must not only be done, but be seen to be done*.

6. The provision of fair and accurate reporting of court proceedings allows for the doors to remain open, and to ensure those reporting on the administration of justice

[1] *Byrne v DPP* [2010] IEHC 382

are protected from unjust attack. It is welcome that the Commission has considered the requirements of this privilege, and whether a further qualified privilege should be afforded to reports which fall short of this standard, but are produced without malice. Thankfully the standard of reporting of court proceedings in Ireland is a high one, and the care, attention, and time which most court reporters give to ensuring fair and accurate reporting occurs should be commended. Because of this we can more easily see the administration of justice on a day-to-day basis, and better vindicate the Constitutional requirements in Article 34.

7. However, it is also the case that in carrying out such functions, there is a need to strike a balance between the administration of justice in public (and reporting on same), and the competing rights to a good name. The Commission notes the need to strike this balance, and that the imposition of a test of a 'fair and accurate' report reflects the "…*importance attached to the need to ensure a high quality of reporting*" (paragraph 1.24 of the Report). In particular, the ninth principle of the *Philpott* case[2] reflects this balance (outlined at paragraph 1.37 of the Report) which states that it is not enough to report part of the proceedings correctly if by leaving out other parts a false impression is thereby created.

8. Similarly, the Commission also notes (in paragraph 1.39) the important *obiter dicta* in the *Philpott* case concerning the reporting of part of the case, for examples days 1 to 3 of a trial, but failing to report the ultimate outcome. While one view may be that the defence applies provided each part is reported fair and accurately, the matter remains open for the Courts to definitively decide.

9. In this regard, it may be worth mentioning the case of *Corbally v The Medical Council*[3] which ultimately made its way to the Supreme Court. It was an application for judicial review of certain decisions made by the Medical Council and its Fitness to Practice Committee regarding the applicant who was a Professor of medicine and a Consultant Paediatric Surgeon and was working in Crumlin's Children Hospital at the relevant time. The Court noted at the time that:

> "*The gravity of the matter from the perspective of the applicant could hardly be greater because he was the subject of extensive media coverage in relation to this case, which, had it been a trial before judge and jury would most certainly have caused the trial to be aborted. The media reports stressed and emphasised that there had been a prior inquiry into the applicant's conduct…while Counsel on both sides say that the FPC had no regard to the prior incident, the nature and extent of the publicity surrounding the hearing were highly prejudicial to the applicant in terms of his career.*"

10. The above quotation highlights the potential damage which can be caused by a public hearing in a professional disciplinary matter, irrespective of the ultimate

[2] *Philpott v Irish Examiner Ltd.* [2016] IEHC 62.

[3] *Corbally v The Medical Council* [2015] IESC 9

result. In this case the Supreme Court dismissed an appeal against judgment of the High Court which granted, inter alia, orders of *certiorari* quashing the first respondent's findings following a fitness to practise inquiry that the applicant, a consultant paediatric surgeon, was guilty of "poor professional performance" and quashing its decision to impose the sanction of admonishment on him. It also highlights the crucial significance of the issue as to whether any oral hearing should be held in public or in private or "otherwise than in public". While the case in the Supreme Court itself concerned *inter alia* the interpretation of the levels of 'seriousness' required to justify imposition of certain sanctions, the case is clearly an example of the need to strike a balance, when reporting fairly and accurately, between the rights of the individual to a good name, and the administration of justice (albeit in a more limited context) in public. The theory must therefore recognise the practical difficulties which arise in many cases.

Non-traditional media

11. I would like now turn to another area which the Report discusses, that is: consideration of reports of court proceedings which are produced and/or published by those who may not be considered members of the traditional media.

12. We live in a fast-paced and ever-changing world. Blog posts, podcasts, twitter threads, live streams, and youtube channels are all elements and facets of our public discourse which did not exist to any appreciable degree 15 years ago, much less when the fundamental principles underpinning defamation law were developed. The traditional media no longer holds a monopoly on news. Broadcasts may now happen from anywhere, and by anyone with as little as a smartphone and an internet connection.

13. All of this of course means that reporters, and those providing valuable insights into the administration of justice may not be 'reporters' in the traditional sense. Ireland is lucky to have a generally high level of reporting of court proceedings, with consistent quality journalism giving the public easy access to our courts. However, to ensure this standard of reporting is maintained, and we must provide journalists with the tools they need.

14. The LRC has considered (particularly in Chapter 2) the persons that can avail of the defence of privilege for fair and accurate reports of court proceedings under s.17(2)(i) of the 2009 Act, and in particular the impact of social media. It is well established that this defence is available to those outside the traditional media, and the Report ultimately concludes that no change is recommended in this regard. (Page 36)

15. However, the Report also rightly points out (at various points, including paragraph 1.50 *et al*) that when it comes to court reporting, there is a wide breadth of tools, guidance, and support afforded to 'journalists' in the traditional sense. The BAI and Press Council provide considerable resources and guidance in this regard. While a broad interpretation of the requirements of 'fair and accurate' reports may be

afforded to ‘citizen journalists’, (as noted at paragraph 2.6), it should be stressed that the standard of fair and accurate reporting applies across the board to all reports. Therefore, the guidance of the Press Council and the BAI should be availed of, by both members and non-members alike.

Conclusion

16. To conclude therefore, the publication of this Report by the Commission is most welcome indeed. It is another example of a specialised and detailed body of work undertaken with great care and attention by the Commission, which produces a valuable addition in the area of law reform. I would like to conclude then, by thanking most sincerely the Commissioners and all their staff for their hard work on this project, and encourage you all to take a copy and consider the issues raised.

Thank you.

ENDS