



An Roinn Dlí agus Cirt
Department of Justice

Report of the Review of the Defamation Act 2009



Report of the Review of the Defamation Act 2009

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Chapter 1: Context and approach of this review

1.1 Introduction

The Programme for Government, *Our Shared Future*, commits to “*review and reform defamation laws to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation, and the right of access to justice*”.

Ireland is proud to rank in the top 12 countries globally for press freedom¹. Previous legislative reforms have abolished defamation as a criminal offence², and repealed Constitutional³ and statutory⁴ provisions regarding a historic offence of blasphemy.

This Report completes a statutory review of our law on civil liability for defamation, the Defamation Act 2009, and makes a number of recommendations for further reform.

Defamation law in Ireland seeks to protect a person’s right to their good name and reputation against unfair attack, while also protecting the right to freedom of expression, taking account of the vital role in our democracy played by a free and independent press, and other civil society actors, in providing information and debate on matters of public interest. Both rights are protected under the Constitution: the right to good name and reputation is expressly guaranteed by Article 40.3.2°, while the right to freedom of expression is set out at Article 40.6.1°(i).

Similarly, the European Convention on Human Rights protects the right to freedom of expression in a democratic society, under Article 10 ECHR, and the right to reputation (and to private and family life, also relevant in some defamation cases) under Article 8 ECHR.

The right of access to justice, also mentioned in the Programme for Government, is important to ensuring the effectiveness in practice of both of the previously mentioned rights.

Defamation law also has to strike the right balance, in the public interest, when the rights to good name, free expression, or access to justice of one party appear to conflict with those of another. Both under the Constitution and under the Convention, such rights are not absolute: the judgments of the Irish courts and of the European Court of Human Rights provide many examples where conflicting rights have been interpreted and reconciled, in order to find a solution which protects both rights in as harmonious a manner as possible. National legislation seeks to establish a general framework for resolving defamation disputes that is consistent with that mapped out under the Constitution and under the Convention. The objective set for the review from the outset was to ensure that the Defamation Act 2009 still strikes the right balance between competing rights, as well as ensuring effective access to justice.

Following a public consultation, the review has focused, in particular, on how Irish defamation law can best be reformed to:

¹ Ireland ranks 12th globally in the Reporters Without Borders’ *World Press Freedom Index* for 2021.

² Section 35 of the Defamation Act 2009 abolished the criminal offences of defamatory libel, seditious libel and obscene libel. See Cox, N. and McCullough, E., *Defamation: Law and Practice*, (2014), paras 1.25-1.26.

³ By the Thirty-Seventh Amendment of the Constitution (Repeal of the offence of publication or utterance of blasphemous matter) Act 2018, which removed the offence of blasphemy from the Constitution.

⁴ By the Blasphemy (Abolition of Offences and Related Matters) Act 2019, which repealed sections 36 and 37 of the Defamation Act 2009.

- avoid the risk of disproportionate and unpredictable awards and high legal costs exercising a “chilling effect” on freedom of expression, and particularly, on investigative journalism or public debate on issues of public interest;
- ensure effective and proportionate protection against unfair damage to a person’s good name;
- develop the use of alternative dispute resolution processes and solutions, and avoid defamation as a “rich man’s law”; and
- tackle effectively the new and specific problems raised by online defamation.

1.2 The approach of this Report

This Report presents to the Minister the results of the Department’s review of the Defamation Act 2009. The Report sets out the Department’s analysis of the issues raised by the review, identifies a range of options for reform, and makes recommendations for action.

However, the nature of any changes to be made to the Defamation Act remains, of course, a matter for decision by Government.

In the first instance, following publication of the Report, the Minister and her Department will consult in detail with the Attorney General and his Office on the preferred policy options set out in the Report and approved by Government. That consultation will seek advice from the Office on some constitutional and legal issues which may arise.

The General Scheme of the Defamation (Amendment) Bill will be prepared. The Minister intends to then seek Government agreement for the detailed content of the Scheme, and for the Bill to be prepared for publication.

1.3 Nature and objectives of the Review

Our current law on defamation is the Defamation Act 2009, which extensively updated and consolidated Irish defamation law⁵, repealing the Defamation Act 1961 and implementing many of the recommendations for reform made in Reports by the Law Reform Commission in 1991⁶ and by the Legal Advisory Group on Defamation in 2003⁷.

Important changes made by the 2009 Act included:

- replacing the old civil wrongs of libel and slander, which applied different rules as between written and spoken statements, with a single civil wrong of defamation;
- modernising and clarifying the definition of defamation;
- introducing clarified and modernised defences to defamation, including the important defence of reasonable comment in the public interest that had been recently developed by the courts;

⁵ Details of the main changes made by the 2009 Act are set out at Appendix 1 to the present Report.

⁶ *LRC Report on the Civil Law of Defamation* (LRC 38-1991), available at: <https://www.lawreform.ie/fileupload/Reports/rDefamation.htm>

⁷ *Report of the Legal Advisory Group on Defamation*, March 2003, available at: <http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>

- providing for more defamation cases to be taken in the Circuit Court, and heard by a judge sitting without a jury, with a maximum award in damages currently fixed at €75,000, in order to reduce legal costs;
- providing for statutory recognition of an independent Press Council, subject to statutory criteria set out in Schedule 2 of the Act, to protect freedom of expression of the press; membership of the Council would be voluntary and the Council would have powers to establish a Code of Standards for its members, and to hear and determine complaints brought against its members by members of the public;
- introducing new remedies and mechanisms, intended to better expedite resolution of cases.

At the same time, the 2009 Act continued the use of juries in High Court defamation cases: the jury had been abolished for most all other civil cases (including personal injuries) by the Courts Act 1988.

Under section 5(1) of the Defamation Act 2009, the Minister for Justice is required to carry out a review of the operation of the Act⁸. The tasks set for the review were:

- to review the operation in practice of the changes made by the 2009 Act,
- to review recent reforms of defamation law in other relevant jurisdictions,
- to examine whether Irish defamation law, and in particular the Defamation Act 2009, remains appropriate and effective for securing its objectives: including in the light of any relevant developments since 2009,
- to explore and weigh the arguments (and evidence) for and against any proposed changes in Irish defamation law intended to better respond to its objectives, and
- to publish the outcomes of the review, with recommendations on appropriate follow-up measures.

1.4 The work of the review

The main elements in the work of the review have been:

- a ***public consultation***, and analysis of the extensive and detailed submissions received from a wide range of stakeholders;
- a ***symposium*** on the key themes arising from the submissions, with papers from Irish and international experts and discussion panels for key stakeholders;
- a desk review of the relevant ***case-law of the European Court of Human Rights***;
- a ***comparative review*** of reports and legislative reform to defamation laws in other relevant common law jurisdictions;

⁸ Under section 5(1), the review is to be commenced ‘not later than 5 years after the passing of this Act’ and under s. 5(2), it is to be completed ‘not later than one year after its commencement.’ In practice, this review has had to be commenced and concluded outside the timeframe envisaged, due to the impact of the banking and financial crisis from 2012 onwards, and the intervention of other, very urgent legislative priorities arising from its negative economic effects; and more recently, from very urgent legislative priorities arising from BREXIT and from the COVID-19 pandemic.

- analysis of a number of very important *intervening judgments* of the European Court of Human Rights and the Irish superior courts on core issues in Irish defamation law;
- analysis *of relevant EU law*, particularly in relation to the duties and liabilities of internet intermediaries for online defamation, to jurisdiction in cross-border defamation disputes and concerns about so-called “defamation tourism”, and to the recent EU “Rule of Law” initiative⁹; and
- monitoring a number of *parallel reform initiatives in Ireland* that have relevance to reform of Irish defamation law, particularly work in progress on the reform of civil procedures in Irish courts (the “Kelly Report”), on insurance costs and the reform of personal injuries litigation, and on online harms and media regulation.

1.4.1 Public Consultation

In order to seek stakeholder feedback on the operation of the legislation in practice, a public consultation in relation to the review was launched on 1 November 2016,¹⁰ continuing into early 2017.

The review received 41 submissions, many high quality and detailed. They raised a diverse range of issues, reflecting the priorities and interests of different sectors.¹¹ Stakeholders who made submissions included the national and local print media, RTE, the Irish SME Association (ISME), the Irish Council for Civil Liberties (ICCL), Free Legal Advice Centres (FLAC), the National Union of Journalists (NUJ), specialised journalists and broadcasters, the Bar Council, Law Society, legal firms and individual lawyers, academics, the Press Council and the current and previous Press Ombudsmen, and social media platforms (including Facebook, Twitter, Google and Yahoo!).

All submissions were published on the Department’s website: a list, with links, is provided at Appendix 3 of this Report.¹²

Arising from the submissions, key themes for the review were identified: how best to reform Irish defamation law to:

- avoid “chilling effects” of high/unpredictable awards and legal costs on public interest media reporting;
- ensure effective and proportionate protection against unfair damage to a person’s good name;
- develop the use of alternative dispute resolution processes and solutions, and avoid defamation as a “rich man’s law”; and
- tackle effectively the new and specific problems raised by online defamation.

⁹ This element is covered below, at point 1.6.

¹⁰ The notice of consultation is published on the Department’s website and is at Appendix 2 to the Report.

¹¹ See Appendix 3 for the list of submissions received.

¹² A small number of further submissions was received after the symposium held in November 2019: these are included on the website and in Appendix 3.

1.4.2 Symposium

In November 2019, the former Minister for Justice and Equality hosted a ‘Critical Perspectives’ Symposium, at the Royal Irish Academy, on the key themes identified for reform of Ireland’s defamation laws. The Symposium was moderated by RTE’s Legal Affairs Correspondent, and brought together media, academics, the legal profession, social media companies, NGOs and relevant state bodies. It heard papers from three leading experts¹³ on reforms to defamation law from the Irish, European Convention on Human Rights, and international common law perspectives, followed by two discussion panel sessions for key stakeholders.

1.4.3 Reforms to defamation law in other jurisdictions

Given that the rights to freedom of expression and to protection of reputation¹⁴ are both protected by the European Convention on Human Rights, the review has included a careful examination of the case-law of the European Court of Human Rights on the balance to be struck between these interests.

The review has also examined a range of recent reviews and reforms to defamation law in other relevant common law jurisdictions, particularly those listed below:

- changes made to defamation law in England and Wales, by the Defamation Act 2013 (which was cited in a number of submissions to the review);
- the *Report on Defamation Law in Northern Ireland*, Recommendations to the Department of Finance, published in 2016;
- the Final Report of the Law Commission of Ontario on *Defamation Law in the Internet Age*, published in March 2020;
- the Australian Model Defamation Provisions, as updated on 27 July 2020 (including the Background paper on the Model Defamation Amendment Provisions (Consultation Draft)); and
- the recently enacted Defamation and Malicious Publications (Scotland) Act 2021.

The review has not examined US defamation law to the same extent, principally because the very strong protection afforded to freedom of expression by the US Constitution is not subject to a constitutional balance with the right to the protection of individual privacy or the right to reputation and good name, in the same manner as it is under the Irish Constitution or under the European Convention on Human Rights.¹⁵

¹³ Dr Andrew Scott of the London School of Economics, who was a consultant to the Northern Ireland, Scottish and Ontario Law Reform Commissions on defamation law reform; Professor Neville Cox (TCD), and Professor Tarlach McGonagle (Universities of Leiden and Amsterdam). Their papers to the symposium are published on the Department’s website, at: http://www.justice.ie/en/JELR/Pages/Symposium_Reform_of_Defamation_Law

¹⁴ Usually, as part of the right to respect for private life under Article 8 of the Convention.

¹⁵ Cox, N. and McCullough, E., *Defamation: Law and Practice*, 2014, para 1.07 – “.. comparative models of defamation law such as those that exist in the United States, where the Constitution protects free speech in terms that are very robust and do not protect any express right to a good name, are unlikely to be of any relevance in so far as the Irish model is concerned.”

1.4.4 Recent significant judgments

There have been a number of very important judgments, interpreting core issues for Irish defamation law, since the 2009 Act was enacted. These are discussed in the relevant chapters of the Report, and summaries of a number of them are included in Appendix 5.

Three examples are particularly important for this review, as they touch on the interaction between Irish defamation law and the European Convention on Human Rights. These are:

- the judgment of the Supreme Court in 2014 in *Leech v Independent Newspapers*¹⁶,
- the judgment of the European Court of Human Rights in June 2017 in *Independent Newspapers (Ireland) Ltd v. Ireland*¹⁷ and
- the judgments of the Supreme Court in July 2017 in *McDonagh v Sunday Newspapers Ltd.*¹⁸

The *Leech* case gave rise to considerable concerns among the media. The case clearly involved a very serious defamation of the plaintiff, in respect of both her personal and professional life, and the courts found that the defamation was exacerbated by the newspaper having published doctored photographs to support the story. However, the award of €1.8 million in damages, made by the High Court jury, was (at that time) the highest made by an Irish court in a defamation case.

The Supreme Court on appeal reduced the award to €1.25 million, categorising the defamation in this case as “very serious”, but not among “the most serious”, such as the defamation in a previous case, *de Rossa v. Independent Newspapers*¹⁹. However, this element of the judgment gave rise to confusion, as the reduced award of €1.25 million seemed to significantly exceed the £300,000 awarded in 1997 in the *de Rossa* case (even if adjusted for inflation). Media stakeholders argued that there appeared to be no clear upper limit for a “most serious” defamation.

This anomaly in the Supreme Court’s reasoning was the focus of the European Court of Human Rights’ judgment in *Independent Newspapers v. Ireland*²⁰, that the Supreme Court had not sufficiently explained its reasons for the amount allowed on appeal, and that accordingly, the Defamation Act 1961 had not provided sufficient procedural safeguards in Irish law against the risk of an excessive or disproportionate award of damages. The Court therefore found a procedural breach by Ireland of the right to freedom of expression under Article 10 of the European Convention of Human Rights, underlining that unpredictably large awards of damages in defamation cases are considered capable of exercising a chilling effect on media freedom of expression under Article 10.

¹⁶ [2014] IESC 79.

¹⁷ [2017] ECHR 567 (App no. 28199/15).

¹⁸ See: *McDonagh v Sunday Newspapers*. [2017] IESC 46 and *McDonagh v. Sunday Newspapers (No. 2)* [2017] IESC 59. Both *Leech* and *McDonagh* referred to defamation that occurred before the Defamation Act 2009 came into force, and were therefore decided under previous legislation, the Defamation Act 1961.

¹⁹ [1999] IESC 63 [1999] 4 IR 432.

²⁰ [2017] ECHR 567 (App no. 28199/15).

The Strasbourg Court noted, however, in its judgment that the *Leech* case had been decided under the 1961 Act, and that the 2009 Act had since introduced a number of additional procedural safeguards in defamation cases. It held that Irish defamation law was pursuing the legitimate aim of protecting the person’s reputation, and her right to private and family life. It also accepted the findings of the Irish courts regarding the gravity of the defamation in this case, which it described as “a sustained and unusually salacious campaign” by the newspaper. The month after the European Court’s judgment, in July 2017, the Supreme Court judgments on appeal in another defamation case, *McDonagh v Sunday Newspapers Ltd*²¹, considered and adopted principles set out in the Strasbourg Court’s judgment, emphasising the need for Irish courts to ensure proportionality and transparency in defamation awards.

In concrete terms, where the High Court jury in *McDonagh* had awarded damages of €900,000, the Supreme Court indicated that it would have considered an award of €75,000 as fair and proportionate (the parties had settled the appeal just before the Supreme Court gave judgment, so no actual order was made by the Court.)

Following the proportionality principle set out by the Supreme Court in *McDonagh*, the Court of Appeal has applied similarly significant reductions to previous jury awards in a series of defamation cases, and this development is expected to continue. Other important examples include *Kinsella v Kenmare Resources*²², in February 2019, where the High Court jury had previously awarded an entirely unprecedented €10 million in damages, and the Court of Appeal reduced the award to €250,000; and *Higgins v Irish Aviation Authority*²³, in June 2020, where the High Court jury had awarded €387,000, and the Court of Appeal reduced the award on appeal to €76,500.

These cases, and the issues arising from the judgments, are discussed further in chapters 4 and 6 of the Report.

1.4.5 Parallel reform initiatives

The review has also monitored a number of parallel reform initiatives in Ireland that have relevance to reform of Irish defamation law. In particular:

Administration of civil justice

The work of the Working Group on Review of the Administration of Civil Justice, established by Government Decision in March 2017 and chaired by the former President of the High Court, Mr Justice Peter Kelly, which presented its Review of the Administration of Civil Justice (“the Kelly Report”) to the Minister in October 2020.

The Report puts forward a comprehensive range of recommendations aimed at reforming the administration of civil justice in Ireland, including in such areas as case management, litigation costs, procedural reform and discovery, which are relevant to defamation proceedings.

Damages and costs in personal injuries litigation

²¹ *McDonagh v Sunday Newspapers* [2017] IESC 46, *McDonagh v. Sunday Newspapers (No. 2)* [2017] IESC 59.

²² [2019] IECA 54.

²³ [2020] IECA 277.

Ongoing work, across different Government Departments and statutory and public bodies, on insurance costs and the reform of personal injuries litigation. This includes the Cost of Insurance Working Group, established in 2016; the Report of the Law Reform Commission on Capping Damages in Personal Injuries Litigation (September 2020); the enactment of the Judicial Council Act 2019, with its provisions for establishment of a Personal Injuries Guidelines Committee; and the adoption by the Judicial Council, on 6 March 2021, of the Personal Injury Guidelines, which will replace the Book of Quantum in personal injuries cases, and seek to promote a better understanding of the principles governing the assessment and award of damages for personal injuries, with a view to achieving greater consistency in awards.

Harmful communications and media regulation

The Report of the Law Reform Commission on Harmful Communications and Media Safety (2016); and work (formerly under the Minister for Communications and now under the Minister for Media, Tourism, Arts, Culture, Sports, and the Gaeltacht) on developing a regulatory framework to tackle the spread of harmful online content, with the publication in December 2020 of a revised General Scheme of the Online Safety and Media Regulation Bill. The Online Safety and Media Regulation Bill 2022 was published on 25 January 2022²⁴. That Bill does not cover online defamation as such, but it proposes to reform the regulatory structures for online media, including replacing the Broadcasting Authority of Ireland with a new Media Commission and Online Safety Commissioner.

A further Report of the Law Reform Commission which has been taken into account by this review is its *Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009*²⁵, published in 2019. This Report examines a specific privilege provided for fair and accurate reports of court proceedings under section 17 of the Defamation Act 2009, following a request made by the then Attorney General. It recommended a small number of changes: this Report proposes to adopt those recommendations.

1.5 Defamation law under the Constitution and ECHR: need to balance rights

Defamation law in Ireland seeks to balance rights which are protected under both the Irish Constitution²⁶ and the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights, (ECHR).²⁷

These are:

- the right to freedom of expression under Article 40.6.1°(i) of the Constitution;

²⁴ <https://www.oireachtas.ie/en/bills/bill/2022/6/>.

²⁵ LRC *Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009*, (LRC 121 – 2019), available at:

<https://www.lawreform.ie/fileupload/Reports/LRC%20121-2019%20Privilege%20for%20Reports%20of%20Court%20Proceedings%20under%20the%20Defamation%20Act%202009.pdf>

²⁶ Constitution of Ireland (Jan, 2020), available at:

<http://www.irishstatutebook.ie/eli/cons/en/html#article40>

²⁷ European Convention on Human Rights, as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010; available at:

https://www.echr.coe.int/Documents/Convention_ENG.pdf

- the right to protection of good name and reputation, under Article 40.3 of the Constitution;
- the right to respect for private and family life under Article 8 of the ECHR;
- the right to freedom of expression under Article 10 of the ECHR.

Although the ECHR does not explicitly protect the right to a good name, the Irish Constitution lists it as one of the very few personal rights that should “in particular” be protected.²⁸ This gives rise to what has been described as a “constitutional tightrope”; necessitating the appropriate balancing of recognised rights of reputation and free speech, not only with that of a defamation law fit for purpose of protecting reputation, but also recognising the important role played by an independent media and robust public debate pertaining to matters of public interest.²⁹

The connection between the law of defamation and the constitutional right to one’s good name has been made previously in Irish case-law³⁰ – such as, acknowledging the role of defamation law in vindicating a citizen’s right to their good name;³¹ and, invoking that right as a dismissal against a claim of qualified privilege.³² Alternately, it has also been found that the right to a good name does not prevail over the right to life where it would be endangered by unwanted disclosure.³³ Judicial views on the issue of appropriate balancing of the right to a good name with freedom of expression have also been articulated in recent years.³⁴

In 2019, the authors of the Law Reform Commission (LRC) Report on *Privilege for Reporting of Court Proceedings under the 2009 Defamation Act* noted a change over time in Irish case-law. Having initially given weight to the right to a good name, and rather less to freedom of expression, the courts, in recent years, have given more weight to freedom of expression; having been influenced by the case-law of the European Court of Human Rights under Article 10 of the ECHR.³⁵

1.6 Relevance of EU law

There are also important EU law dimensions to the review, for example in relation to the legal responsibilities of online service providers for defamatory content hosted on their platforms.

The e-Commerce Directive and proposed “Digital Services Act”

²⁸ Professor Neville Cox, ‘Defamation Law and the 2009 Defamation Act’, presentation to Symposium on Reform of Defamation Law, 14 November 2019,

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

²⁹ Cox, 2019; McGonagle, Tarlach, ‘Defamation law reform, the European Convention on Human Rights and EU law’, presentation to Symposium on Reform of Defamation Law, 14 November 2019,

http://www.justice.ie/en/JELR/McGonagle_Paper_Defamation.pdf/Files/McGonagle_Paper_Defamation.pdf;

Cox N. and McCullough E. (2014), *Defamation: Law and Practice*; McMahon and Binchy (2013), *Law of Torts*, 4th ed; Maher (2011), *The Law of Defamation*.

³⁰Hogan, Whyte, Kenny, & Walsh, ‘Kelly: *The Irish Constitution*’ (5th edn, Bloomsbury Professional 2018), at para. 7.3.69

³¹ *Kennedy v Hearne* [1988] ILRM 531.

³² *Hynes-O’Sullivan v O’Driscoll* [1988] IR 436.

³³ *Burke v Central Independent Television plc*, [1994] 2 IR 61, 189.

³⁴ *Hunter v Duckworth and Co Ltd* [2003] IEHC 81; *McDonagh v Sunday Newspapers Ltd* [2017] IESC 46, (No.2) [2017] IESC 59.

³⁵ Law Reform Commission - *Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009* (LRC 121 – 2019).

The e-Commerce Directive,³⁶ adopted in 2000, seeks to facilitate free movement of information society services between EU Member States. However, it also contains important rules, which effectively decide the liability and responsibilities of online service providers (such as Twitter, Google or Facebook) for the content of defamatory material posted by users on their websites.

Part 4 of the Directive:

- prohibits Member States from imposing any general obligation on an online services provider to monitor the information that they transmit and store (Article 15);
- sets out specific rules that *exempt online service providers from legal liability for the content held on their websites*, if the provider has no actual knowledge of the nature of that content or of any illegality;
- specifies three different levels of exemption, at Articles 12-14, depending on whether the service provider is hosting, caching or is a “mere conduit” for the content concerned;³⁷
- makes each exemption conditional on the service provider complying with a graduated “notice and takedown” regime (for example, if a hosting service provider is informed of illegal content on its website, it must “*act expeditiously to remove or to disable access to the information*”); and
- reserves the possibility of a court or administrative authority, in accordance with the national legal system, requiring the service provider to terminate, or to prevent, an infringement.

These provisions establish the context for online service providers complying with key directions of national courts, such as take-down notices or “*Norwich Pharmacal*” orders, as discussed in chapter 7 of the review.

On 15 December 2020, the European Commission published two important new legislative proposals: the proposed “Digital Services Act” and the proposed “Digital Markets Act”. These proposals aim to put in place a much more modern and more comprehensive EU regulatory framework, applying the same framework of rules to a wider range of digital service providers. In particular, the Digital Services Act includes new procedures aimed at ensuring faster takedown of unlawful material, and aims to rebalance and better protect the fundamental rights of users. These are discussed in more detail at Chapter 7 of the Report.

The legislative proposals will need to be considered and approved by the European Parliament and by the Council before coming into effect.

1.7 Specific nature of online defamation

A fundamental change to defamation law, since the enactment of the Defamation Act 2009, has been the rapid development of online and digital communication, which has new and distinctive features.

³⁶ The e-Commerce Directive, Directive 2000/31/EC of 8 June 2000. Transposed in Ireland by the European Communities (Directive 2000/31/EC) Regulations, S.I. No 68/2003

³⁷ ‘*Mere conduit*’ services focus on passive transmission of large volumes of data (e.g. a traditional internet access provider). ‘*Caching*’ services store large volumes of data temporarily for onward transmission: e.g. a proxy server. ‘*Hosting*’ services provide a platform on which users can upload, store, and transact with their own data (e.g. a web-hosting company.)

These developments have major implications for defamation law. The 2009 Act expressly applies to electronic communication as it does to the written or spoken word. However, it is very clear from the work of the review that online and digital communications are often not addressed effectively by traditional defamation law, and that new, specific legal mechanisms need to be developed which take account of their specific characteristics. Indeed, the Law Reform Commission's *Report on Harmful Communications and Digital Safety*,³⁸ in 2016, concluded that civil remedies currently available, including those under the 2009 Act, do not provide adequate and effective redress for online defamation.

As discussed in the previous section, reforms in this area are complicated by the application of EU law, for example the exemption from liability for defamation provided by the e-Commerce Directive for online platforms who are hosting user-generated material but are not expressly on notice of its content. The European Commission's legislative proposal for a new Digital Services Act may offer a welcome development here.

The specific features of online and digital communication include:

- the special nature of online publication – material can disseminate worldwide almost instantly, and is often difficult to erase effectively once it's online;
- the rapid and continuing development of different forms of online publication (for example, the increasing use of phone based communications apps such as Whatsapp or Instagram, in parallel to, or instead of, traditional internet platforms like Facebook);
- the sheer complexity of publication — it can be very difficult to attribute liability for publishing a defamatory comment given the range of different actors and capacities involved (for example, a person posting to social media, a person re-tweeting or “liking” a post in passing, an internet platform provider, a search engine which turns up defamatory material, a newspaper hosting a user-generated comments page, ...);
- it is extremely easy for online comments to be posted anonymously or under a false name, making it hard to identify the poster;
- online defamation also has a specific legal dimension under the European Convention on Human Rights –in the case of *Delfi v Estonia*,³⁹ in 2013, the European Court of Human Rights held that it was not contrary to freedom of expression rights under the European Convention for national law to impose liability for defamation on the owners of an Internet news portal for (largely anonymous) defamatory comments uploaded by third parties - even though the portal had removed the comments when notified of them; the Court seems to have nuanced this approach in subsequent judgments by underlining that the material amounted to hate speech;
- lawyers and courts across different jurisdictions have developed ad hoc remedies suited to the online defamation context (the best known are the “*Norwich Pharmacal*” order, requiring an internet service provider to identify an anonymous poster where so required by a court; and the “takedown order”, a court injunction directing an internet service

³⁸https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf.

³⁹ [2015] EMLR 26 (App no. 64569/09).

provider to remove a post held to be defamatory). Arguably such remedies should be expressly provided by legislation;

- online communication can raise complex issues about which country's courts have jurisdiction to deal with complaints— for example, online comments may be posted in one country, tweeted or linked onwards by a user in a second, accessed in a third, and hosted in a fourth. Major online service providers with an Irish base (e.g. Facebook) sometimes make it a condition of service users' contracts that any litigation about the service will be taken in the Irish courts.

These issues are considered in more detail in chapter 7 of the Report, but they have had to be taken into account across all aspects of the review.

1.8 Range of proposals made during consultation

The main issues and proposals raised in submissions are as follows: a more detailed list is provided in Appendix 4 to the Report.

1.8.1 General issues

Many stakeholders considered that in practice, Irish law currently affords too much weight to the protection of reputation, at the expense of freedom of expression.

Many submissions referred particularly to changes to defamation law introduced in England and Wales in 2013, which they wished to see reproduced in Irish defamation law (these included introduction of a “serious harm” test, and the abolition of juries in all but very exceptional cases).

Some submissions raised the point that the right to good name is among the personal rights expressly protected by the Constitution, and questioned whether some reforms advocated in other submissions would be compatible with this, or with the right of access to the courts.

1.8.2 Awards of damages

Many stakeholders argued that Irish defamation awards are far too high, and are disproportionate compared to awards in serious personal injuries cases, or to awards for defamation in other jurisdictions. (Later submissions acknowledged that headline awards were being reduced significantly on appeal, following the Supreme Court judgments in *McDonagh*, but overall concerns persisted.)

Media stakeholders, in particular the print media, considered that high and unpredictable awards exercise a real chilling effect on public interest reporting and on media freedom of expression, and could threaten the economic viability of some national newspapers, given the increasingly difficult operating environment for traditional print media.

Submissions proposed introducing a limit on the maximum award of damages, or introducing proportionality guidelines on appropriate levels of defamation awards.

The continuation of very high awards was also seen as reducing the effectiveness of the informal resolution and redress scheme operated by the Press Council of Ireland and the Press Ombudsman.

1.8.3 Role of juries

Stakeholders generally considered that the continued use of juries leads to seriously excessive awards. They mainly recommended that High Court defamation cases should be decided by a judge, sitting alone without a jury. If juries were retained, they should be restricted to deciding whether a statement was defamatory, with the judge determining how much to award in damages.

Many stakeholders felt that juries added extra days and increased the cost of defamation hearings, and some argued that as juries are scarce and allocated primarily to criminal cases, waiting for a jury can cause significant delays to defamation cases getting into hearing.

Submissions also complained that there was no transparency to jury decisions (juries are not permitted to give, or discuss, the reasons for their decisions). This lack of predictability and transparency was seen as generating a high rate of appeals, adding to costs and delays.

Stakeholders also complained that the intention of the 2009 Act to move more defamation cases into the Circuit Court jurisdiction (where legal costs are lower than in the High Court) is not working to full effect, with too many plaintiffs choosing to take the risk of bringing their case in the High Court, given the very large damages that might be awarded there by a jury.

Submissions argued that keeping juries in High Court defamation cases is contradictory, when they have been abolished for almost all other civil cases. Some argued that juries have been abolished (save in very exceptional circumstances) in England and Wales since 2013, without negative effects.

1.8.4 Taking defamation proceedings

Some submissions argued that defamation cases can be taken without concrete proof of material damage, and that it should be made more difficult, generally, to bring a defamation case. A range of proposals included:

- introducing a “serious harm” test, as in England and Wales. This would require an intending plaintiff to prove that the statement complained of has caused, or is likely to cause, serious harm to his/her reputation, before a defamation case goes to hearing;
- abolishing the “presumption of falsity” in defamation cases – this would require an intending plaintiff to prove the disputed statement is untrue, before the court could consider whether it was defamatory;
- requiring an intending plaintiff to first prove that actual damage was caused by the defamation, and prove the amount of loss caused; and
- requiring an intending plaintiff to give meaningful advance security that they will pay the defendant’s costs if they lose.

One submission argued that all defamation cases should have to be taken in the Circuit Court, with access to the High Court only on appeal.

Some submissions proposed limiting the capacity of a company or a public body to take a defamation case by:

- providing that a company or other body cannot sue for defamation of its reputation, or that it must prove actual financial loss before it can do so, and/or
- providing that a corporate or public body that carries out governmental or regulatory functions cannot sue for defamation.

One submission advocated introducing specific measures to deter the making of vexatious claims, saying there had been a recent increase in Circuit Court defamation claims taken by customers against restaurants, pubs and shops in respect of trivial incidents.

1.8.5 Streamline court procedures

Stakeholders proposed changes to dispose of a backlog of inactive claims before the courts, particularly a new power for a judge to dismiss a case that was not progressed by the plaintiff within two years of issuing proceedings.

Submissions also called for more proactive case management by judges of defamation cases, as in England and Wales, to cut down the issues in dispute at an early stage and reduce costs and delays. Introduction of pre-action protocols was suggested for the same reason.

There were also calls to clarify the statutory tests for obtaining declaratory orders, correction orders, summary disposal orders or orders prohibiting further publication, where the required standard was seen as unclear, or too difficult to prove.

A small number of submissions proposed amending a provision in the Civil Legal Aid Act 1995, which expressly excludes defamation from the list of matters that may be eligible for legal aid. They argued that the blanket exclusion may be contrary to the European Convention on Human Rights.

Some submissions proposed changes to deter “defamation tourism”, suggesting that the Act might require the court to be satisfied that Ireland is “clearly the most appropriate place” for a case to be brought.

1.8.6 Defences

Proposals were made regarding the following defences and privileges under the Act:

Defence of “*fair and reasonable comment on a matter of public interest*” - it was suggested that the statutory definition is too complex and too difficult to prove: the defence should be clarified and simplified, closer to the earlier common law test;

Defence of “*honest opinion*” – similarly, it was suggested that the statutory formulation made it too difficult to avail of this defence: it should be amended to revert to the previous common law defence, known as “fair comment”;

Live broadcasts – it was proposed to extend the “innocent publication” defence, so that the publisher of a live broadcast would not be liable for a defamatory statement made on air, provided that it had taken reasonable precautions to prevent this happening;

Defence of having *made an offer of amends* - this defence was designed to facilitate early resolution of defamation cases, and avoid unnecessary costs and delays. It essentially allows a defendant who realises that it has in fact defamed the claimant, to “put its hands up” at an early stage, publish an apology and correction, and offer to pay a sum in damages and costs. If the parties agree on this approach, but differ on the appropriate amount, the figure is determined “by the court”. In 2018 the Supreme Court held⁴⁰ that in the context of assessing damages, that phrase must be interpreted as meaning by a jury. Submissions to the review argued that in practice, this interpretation undermines the effectiveness and attractiveness of the offer of amends as a means of early resolution; and proposed amendment to specify that in default of agreement, the amount shall be fixed by a judge sitting alone.

*Absolute and qualified privilege*⁴¹ - the changes proposed included clarifying their application to citizen journalists and bloggers, expanding their geographical scope to cover reports from certain international organisations and certain countries outside the EU, and clarifying their application in cases of honest mistake.

1.8.7 Alternative dispute resolution (ADR)

Proposals to encourage mediation and other alternative dispute resolution included:

Awareness-raising

Including a reference in the Act to encourage parties to avail of mediation;

Introducing a legal obligation for solicitors acting for claimants in press defamation cases to inform them of the alternative dispute resolution available via the Press Council and Press Ombudsman.

Role of the Press Council

Clarifying that online publications and online-only news sites fall under the Press Council’s remit;

Allowing broadcasters, and individual journalists or self-publishers, to become members of the Press Council and to subscribe to the standards of the Press Council Code of Practice;

Changing the remit of the Press Council, by allowing it to levy fines on its members for breach of the Code of Practice (up to €25,000).

Courts to take account of a party’s engagement with ADR

Allowing or requiring judges to take account of whether a party has engaged with ADR mechanisms;

⁴⁰ *Higgins v. The Irish Aviation Authority*, [2018] IESC 29 [2018] 3 IR 374 Dunne J.

⁴¹ Absolute privilege and qualified privilege are older defences to defamation, which protect fair and accurate reporting of a range of specified events (parliamentary debates, court proceedings, ...) which are considered to be of general public interest.

Introducing a requirement for courts to consider whether parties took part in the Press Council complaints process, when considering the appropriate level of damages;

Requiring an intending defamation plaintiff to take part in alternative dispute resolution before they can issue legal proceedings.

1.8.8 Digital and online defamation

There was demand from some stakeholders to strengthen sanctions for digital and online defamation: but other stakeholders opposed such changes.

The print media argue that their online publication activities do not enjoy an equal playing field with those of internet service providers, due to the EU e-Commerce Directive.

Internet service providers benefit, under that Directive, from a wide exemption from liability for defamatory material posted by third parties, and opposed changes to their existing regime.

The main other proposals made:

- provide a quick, cheap statutory process as an alternative to a “*Norwich Pharmacal order*”⁴² - the Norwich Pharmacal process is seen as expensive and risks being too slow to prevent damage;
- introduce a preliminary court mechanism to rule quickly on whether material appears defamatory – to enable an online platform to take down the material quickly under protection of initial court ruling;
- provide legal clarity and certainty on the legal requirements for a person who is the subject of online defamation, and is seeking to notify the online service provider who hosts that user-generated content, and to require the provider to take down the defamatory content, in accordance with the e-Commerce Directive;
- introduce a Notice of Complaint procedure for the above situation, defining a standard form of notice to be given, and the process to be followed;
- to provide legal certainty and clarity for online service providers, define the expected time period for the notified online service provider to take down the material “expeditiously” as required by the Directive;
- review the definition of the limitation period (deadline) for issuing proceedings in a case of online defamation - the current wording is seen as confusing.

1.9 Main changes recommended by this review

The key recommendations proposed by the Report are set out below: the full list of recommendations is provided in Chapter 8 of the Report.

⁴² A “Norwich Pharmacal” order is a common-law court order issued to an internet service provider who hosts a platform for user-generated content, directing them to identify an anonymous poster/account holder who has posted defamatory material so that he/she can be served with proceedings or court orders.

Damages and juries

- Abolish the use of juries in High Court defamation cases: provide that all defamation cases will be heard by a judge alone, sitting without a jury. The judge will decide the nature and level of redress, including the amount of any damages, as well as whether defamation has occurred;

(As well as reducing the incidence of excessive or disproportionate awards, this change is expected to significantly reduce delays and legal costs, reduce the length of hearings, provide greater certainty which will facilitate earlier settlement, and ensure greater transparency on the reasoning behind decisions);

- Clarify (following the 2018 Supreme Court judgment in *Higgins v Irish Aviation Authority*) that where a defendant makes an offer of amends, the damages to be fixed by the court, in default of agreement between the parties, will be fixed by a judge sitting alone, not by a jury;
- It is not recommended to introduce a book of quantum for defamation damages;

(Superior court judgments have expressed the view that such an approach is very difficult to apply to the defamation context, where the injury is mainly intangible; the book of quantum was based on data from about 51,000 personal injuries cases with extensive specialised medical evidence on the extent and progression of the defendant's injuries, but there are far fewer defamation cases to generate a range of data and as High Court defamation cases are normally decided by a jury, no information is available on the reasons for the amount awarded);

- Allow a defendant to make a lodgement in court, by way of reasonable compensation offer, where it has made an offer of amends but the parties cannot agree on quantum of damages - in order to facilitate early settlement of proceedings;
- It is not recommended to introduce a cap on damages in defamation cases.

(This would give rise to difficult constitutional issues, which would need very careful consideration. Moreover, a statutory cap would also risk being too rigid. In England and Wales, there is no statutory cap for damages in defamation cases, and an informal judge-made maximum is used. This suggests that the guidance on proportionality and appropriate ranges for awards that is provided in judgments of the Supreme Court and Court of Appeal may similarly, in Ireland, prove more effective than a statutory cap.)

Taking defamation proceedings and court procedures

- To reduce delays and address the proliferation of stale claims, provide an express power for the court to dismiss a defamation claim that is not progressed by the plaintiff within 2 years of issue, unless special circumstances justify the plaintiff's delay;

- To address the perceived risk of international forum-shopping or ‘defamation tourism’ into Ireland: require the court to be satisfied that Ireland is ‘clearly the most appropriate place’ for action to be brought (as in England and Wales), in cases not falling under the rules of the Brussels I Recast Regulation or of the e-Commerce Directive;
- It is not recommended to abolish the presumption of falsity in defamation cases (i.e. to require that a person claiming defamation must prove that the defamatory statement is untrue, before the court will consider whether it is defamatory).

(The fairest approach is that the responsibility to proving the truth or untruth of a defamatory statement should lie with the person who chose to make that statement. To reverse that approach risks preventing the plaintiff from being able to vindicate their reputation - it may be very difficult to ‘prove a negative’ for example – and could raise constitutional difficulties.

However, keeping the presumption of falsity should be balanced by this Report’s other recommendations (below) on introducing a ‘serious harm’ test in relation to certain ‘transient defamation’ claims, on strengthening the defence of fair and reasonable publication in the public interest, and on introducing an ‘anti-SLAPP’ summary dismissal mechanism.

The latter two recommendations also address the concern expressed, that an investigative journalist might be unable to prove that their article was true, if journalistic ethics prevented them identifying their sources.);

- It is not recommended to introduce a general requirement for a plaintiff to first prove a ‘serious harm’ test; however, this should be considered in the two instances below:
 - Consider introducing a ‘serious harm’ test for certain ‘transient defamation’ claims (claims regarding a statement made in non-permanent form, in the course of providing or refusing retail services) to prevent frivolous or vexatious actions;
 - Provide (as in other common law jurisdictions) that a body corporate may not sue for defamation of its reputation unless it first shows that the statement has caused or is likely to cause serious harm: in the case of a body that trades for profit, this means serious financial loss; consider whether smaller entities (such as SMEs) should be exempted from this requirement);
- Consider whether to provide (as in England, Wales and Scotland) that a public body is not entitled to sue for defamation of its own reputation (such a change would not prevent it from suing on behalf of one of its employees or officers, if they are defamed arising from their work);
- Introduce a new ‘anti-SLAPP’ mechanism, to allow a person to apply to court for summary dismissal of defamation proceedings that he/she believes are a SLAPP.

(SLAPP stands for ‘Strategic Lawsuit Against Public Participation’: the concept originated in North America in the 1990s, but is now widely used. Essentially, it refers

to the strategic and abusive use by a powerful entity of vexatious litigation, to weaken and deter public interest discussion (and in particular, investigative journalism).

A typical SLAPP is a groundless or grossly exaggerated lawsuit - typically issued by wealthy companies or individuals, against weaker parties who have engaged in criticism or debate that is uncomfortable to the litigant, on an issue of public interest. The purpose of the lawsuit is to censor, silence and intimidate the critics, by burdening them with deliberately maximised costs of legal defence until they abandon their criticism or opposition.

Many of the submissions to the Review echoed this concept, with media organisations in particular complaining of defamation proceedings, and maximised legal costs, being used by wealthy interests to threaten and silence investigative journalism.);

- Recommend removal of the blanket exclusion of defamation claims from eligibility for civil legal aid, under the Civil Legal Aid Act: this issue, together with the relative priority to be afforded to defamation cases, should be considered within the forthcoming overall review of civil legal aid;
- Encourage proactive judicial case management of defamation claims, in line with the Kelly Report, in order to reduce delays and costs;
- No increase in the limitation period to bring a defamation action (currently one year, exceptionally the court may authorise up to two).

Defences

- Simplify and clarify the defence of ‘fair and reasonable comment in the public interest’, on the lines applied in UK jurisdictions and in Canada, to provide a defence where a statement is on a matter of public interest, the publisher reasonably believed that its publication was in the public interest and the defendant acted responsibly in the circumstances regarding trying to verify the accuracy of the statement;

(This defence is particularly important for the media, but is available to any publisher of a statement);

- Amend the defence of innocent publication, as recommended by the Report of the Legal Advisory Group and proposed by NUJ, to exempt a broadcaster from liability for a defamatory statement made by a third party during a live broadcast, provided that it has taken reasonable precautions prior to the broadcast, and exercises reasonable care during the broadcast;
- Amend the defence of ‘honest opinion’ to remove the condition that the speaker must have believed the opinion to be ‘true’. The opinion will still have to be ‘honestly held’.

Promoting ADR

- Provide a statutory obligation for parties to a defamation dispute to consider mediation (as under the General Scheme of the Online Safety and Media Regulation Bill 2020);

- Require solicitors representing clients in defamation cases to advise their clients, before issuing proceedings, of the availability of mediation under the Mediation Act 2017, the redress and mediation options provided by the Press Council and Press Ombudsman, and the right of reply scheme provided by the Broadcasting Authority of Ireland;
- Clarify that online publications by members of the Press Council, and online-only news sites who apply for membership of the Press Council, are included within its remit; consider also opening membership to online publications by broadcasters (which, unlike broadcasts, are not covered by the Broadcasting Act);
- Include participation by a party in alternative dispute resolution processes among the factors to be considered by a judge in assessing the redress to be awarded in defamation proceedings.

Special measures for digital or online defamation

- Provide for a statutory Notice of Complaint process, on the lines envisaged by the e-Commerce Regulations, recommended by the Law Commission of Ontario, and provided by the Australia Model Defamation Law - to make it easier, quicker and cheaper to notify an online publisher (including intermediary platforms) of defamatory content and request its takedown, or request identification of the poster; and define a timeframe for the required ‘expeditious’ removal of defamatory content, to provide clarity and support early and quick resolution of disputes;
- Provide that the defence of innocent publication applies to operators of websites (including non-commercial websites) in relation to user-generated comment, (as in UK jurisdictions, Australia and Ontario), subject to the obligation to take down content expeditiously, and/or identify the poster, if notified of defamatory content;
- Provide a statutory power to grant a ‘*Norwich Pharmacal*’ order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material). This will make it easier and quicker to obtain an identification order, by providing that such orders can also be granted by the Circuit Court, along the lines recommended by the Law Reform Commission in 2016, rather than only by the High Court, as at present. .

Special measures for both online and non-online defamation

- Following recent court judgments, revise sections 28, 30, 33 and 34 of the Defamation Act 2009 to clarify the tests that must be satisfied for the court to make an order (including an interlocutory order) prohibiting further publication (a ‘take-down order’), an order declaring that a statement is defamatory, a correction order, or an order for summary relief;
- Review the statutory requirement at section 33 of the Defamation Act for the plaintiff, having proved that the statement is defamatory, to also establish that the defendant has no defence likely to succeed, before the court can grant an interlocutory take-down order;

- Amend section 30 of the Act ('Correction order') to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

Chapter 2: Bringing Defamation Proceedings

2.1 What is meant by defamation?

In an action for defamation, the plaintiff must prove that the statement complained of was published, that it concerned him/her, and that it carried a defamatory meaning.⁴³

Publication means “*the publication, by any means, of a defamatory statement ... to one or more than one person*”, other than the person concerned by the statement⁴⁴.

A ‘statement’ “includes -

- (a) a statement made orally or in writing,
- (b) visual images, sounds, gestures and any other method of signifying meaning,
- (c) a statement –
 - (i) broadcast on radio or television, or
 - (ii) published on the internet, and
- (d) an electronic communication.”⁴⁵

A defamatory statement concerns a person⁴⁶ if it could reasonably be understood as referring to him/her.⁴⁷

A defamatory statement is one which:

*“tends to injure a person’s reputation in the eyes of reasonable members of society”.*⁴⁸

A statement is defamatory if it has an objective tendency to lower a person’s reputation; it is not necessary to show that the plaintiff suffered identified financial damage, but the extent of any damage suffered is relevant for the purposes of assessing the appropriate level of damages.

Determining whether a statement has a defamatory meaning involves determining (i) the “natural and ordinary meaning” of the statement, including any inference which may be drawn from it; (ii) if necessary, any innuendo understood only by people with particular additional information or knowledge; and (iii) whether the meaning that may be attributed to the statement is defamatory.⁴⁹

⁴³ Maher J., *The Law of Defamation*, 2nd edn. at p.19.

⁴⁴ Section 6(2) Defamation Act 2009. However, there is no publication if a defamatory statement is published to the person to whom it relates and to another person where (a) it was not intended that the statement would be published to the other person, and (b) it was not reasonably foreseeable that publication of the statement to the first person would result in it being published to the other person (section 6(4)).

⁴⁵ Section 2.

⁴⁶ A ‘person’ includes a body corporate (section 12).

⁴⁷ Section 6(3)

⁴⁸ Defamation Act 2009, section 2. (There is an exception if the statement is true or substantially true – see below.)

⁴⁹ Maher, *The Law of Defamation*, 2nd edn., at p. 19.

In accordance with the “single meaning rule”:

*“the court – and, in a jury action, in effect the jury – must settle on a single meaning to be ascribed to the relevant words of a particular, discrete charge contained in the publication in question.”*⁵⁰

A publication can however contain “two or more distinct allegations which are conveyed by different sets of words”.⁵¹

Section 14 of the Act provides that the court (judge)⁵² may give a ruling as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and as to whether that imputation is reasonably capable of bearing a defamatory meaning.

A defamatory statement may give rise to more than one defamatory imputation but, in accordance with section 9 of the 2009 Act, a plaintiff has only one cause of action in respect of the statement.⁵³

2.2 The presumption of falsity

2.2.1 The current legal position

A statement is not considered to be defamatory if it is true in all material respects – even if it would tend to lower the person’s reputation in the eyes of reasonable members of society.

However, the plaintiff is not required to prove that the contested statement is untrue. Once they have shown that the statement concerns them, tends to injure their reputation, and was published by the defendant, defamation law then assumes that the statement was untrue – this is called the “*presumption of falsity*”.

It is for the defendant, if they want to rely on arguing that the statement is not defamatory because it is true, to prove that this is so - this is called the “*defence of truth*” (see chapter 3).

2.2.2 Issues arising for the review

The presumption of falsity is a long-established feature of defamation law across common law jurisdictions. However, earlier reviews of Irish defamation law have also been asked to consider whether it should be changed - in 1991 and in 2003 (see below).

There are arguments on both sides of this debate.

In favour of ***maintaining the presumption of falsity***, it can be argued that it would be unfair to require a person who has been defamed to prove that the statement is untrue, before they can

⁵⁰ *Speedie v Sunday Newspapers Ltd*, [2017] IECA 15.

⁵¹ *ibid* [*Speedie*].

⁵² Section 14(6) provides that an application under this section ‘shall be determined, in the case of a defamation action brought in the High Court, in the absence of the jury’.

⁵³ Section 9 provides:

A person has one cause of action only in respect of the publication of a defamatory statement concerning the person even if more than one defamatory imputation in respect of that person is borne by that statement.

ask the court to vindicate their reputation. A person who is alleged to be a “habitual liar”, dishonest, incompetent, involved in criminal wrongdoing, or to have been sexually unfaithful to their partner, for example, may well wonder how they are to find evidence to “prove a negative”, and may feel that trying to do so will require them to publicise the defamatory allegation even further. The plaintiff will point out that it was not their choice to make such a statement, or to publish it in the manner chosen by the defendant, and that the defendant should therefore bear the responsibility of justifying the statement by producing evidence to show why they say it is true.

In favour of *removing the presumption of falsity*, it can be argued that it can also be difficult to prove the truth of a true statement, and that this applies particularly to a journalist or news editor - who may be prevented by professional ethics from identifying their source, or who may – under acute time pressure on an important public interest story - have run with publication, only to discover subsequently that some element of the article goes beyond what can be authenticated.

In 1991, in the *Law Reform Commission Report on the Civil Law of Defamation*,⁵⁴ the majority of the Commission argued that the practical consequences of the presumption of falsity may result in defendants being in a position where they have good reason to believe that material they have published is true, but may find it difficult to establish its truth in court. They expressed the view that it is neither just nor in the public interest that defendants should “*be affected in such cases by the existence of an artificial presumption at variance with the facts*”.⁵⁵

It should be noted however that this recommendation was made before the defence of reasonable publication in the public interest (see chapter 6) had been developed.

The minority view of the Commission was that “*(t)he person who asserts, from his sources of information, that a particular state of affairs exists should bear the burden of proving his assertion.*” They noted that it is not always easy to prove a negative and argued that a requirement on the plaintiff “*to prove his or her innocence is..., inconsistent with the spirit of the constitutional requirement that the State vindicate the good name of every citizen in the case of injustice done*”.⁵⁶

The *Report of the Legal Advisory Group on Defamation*⁵⁷, in March 2003, recommended maintaining the presumption of falsity.

The Group noted that the presumption of falsity is only relevant where the defence of truth is pleaded, and that the vast majority of plaintiffs would normally choose to give evidence that the allegations against them were false, and would therefore be available for cross-examination. However, bearing in mind that a plaintiff could choose not to give evidence on his/her own behalf and of the burden which this might place on a defendant, the Group recommended that the law should require a plaintiff to swear an affidavit verifying the particulars of his/her claim. It pointed out that the consequences of this would be that a plaintiff could be examined in relation to the contents of the affidavit.

⁵⁴ December 1991.

⁵⁵ Law Reform Commission *Report on Civil Law of Defamation*, p. 56.

⁵⁶ *ibid* at p. 57.

⁵⁷ *Report of the Legal Advisory Group on Defamation* (March 2003), p. 11.

This was the approach adopted in the 2009 Act⁵⁸, which imposes an obligation on the plaintiff (and defendant) to swear an affidavit verifying any allegations or assertions of fact, in any action other than an application for a declaratory order, and to make himself/herself available to give evidence in court and be cross-examined by the other party. It is an offence for a person to make a statement in an affidavit that is false or misleading in any material respect, or that he/she knows to be false or misleading.

In the course of the *Oireachtas debates on the Defamation Bill 2007*, the then Minister for Justice explained that the “*Government took the view,, that the presumption of falsity is an important safeguard for the plaintiff*” and that the new requirement under the Bill to swear an affidavit⁵⁹ was introduced to “*ensure at least that truth is a premium in these actions*”.⁶⁰

A number of submissions to the review argued that the presumption of falsity should be abolished and that the plaintiff should be obliged to prove the statement untrue as part of proving that it was defamatory.⁶¹ This suggestion was based on the 1991 Law Reform Commission recommendation, mentioned above, that the presumption of falsity should be abolished.⁶² Moreover, it was argued that the presumption of falsity means that a plaintiff can win a defamation case, notwithstanding that the words about which they complain are true (if a defendant has difficulty in proving their truth in court).⁶³

In his presentation to the Symposium on Reform of Defamation Law, in 2019, Professor Neville Cox noted that the burden of proving that the contested statement is true falls on the defendant. He stated that “*for investigative journalists who are relying on confidential sources (and are known to be so relying), this can be impossible even if the statement is, in fact, true*”⁶⁴.

Professor Cox went on to say that the alternative approach, perhaps only or especially in cases of public interest publication and where the standards of reasonable journalism outlined in section 26 of the Defamation Act have been followed, would be to reverse the burden of proof, and require the plaintiff to prove that the contested statement is untrue. Without taking a position on the issue, he stated that “*to the extent that this appears to be an issue that represents an impediment to sound investigative journalism, it is something that, arguably, merits consideration*”.⁶⁵

2.2.3 The requirements of the European Convention on Human Rights

One submission to the review questioned whether the presumption of falsity was compatible with the right to freedom of expression under Article 10 of the European Convention on Human Rights⁶⁶, arguing that the European Court of Human Rights “*has found that the presumption*

⁵⁸ Section 8

⁵⁹ Section 8.

⁶⁰ Seanad Committee Stage, 7 December 2007.

⁶¹ Business Journalists’ Association, Irish Times, Newsbrands, ICCL.

⁶² *Report of the Law Reform Commission on the Civil Law of Defamation*.

⁶³ See for example, Newsbrands submission on the Review of the Defamation Act 2009,

http://www.justice.ie/en/JELR/NewsBrands_Ireland.pdf/Files/NewsBrands_Ireland.pdf

⁶⁴ Prof. Neville Cox, (Trinity College Dublin), ‘*Irish defamation law: the 2009 Act and the need for reform*’ at

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

⁶⁵ *ibid*.

⁶⁶ Irish Council for Civil Liberties, referring to *Steel and Morris v UK* [2005] ECHR (App no. 68416/01) and *Wall Street Journal Europe v United Kingdom*, [2009] ECHR 471(App no. 28577/05) at p. 4.

of falsity can infringe on the right to freedom of expression, in particular where a statement is made in order to contribute to public debate and where there is already significant imbalance in the equality at arms”.

The European Court of Human Rights (‘ECtHR’) has held in a series of judgments that the presumption of falsity in civil defamation proceedings is not, in principle, incompatible with the right to freedom of expression in Article 10 of the ECHR⁶⁷. But it is worth considering in more detail the exceptions identified by the Court and the factors that are taken into account.

In 2002, the ECtHR considered *McVicar v. UK*.⁶⁸ The applicant, a journalist, had published a newspaper article, held to be defamatory, which alleged that a prominent national athlete was using prohibited drugs illegally to boost his sporting performance. The journalist claimed that the presumption of falsity in English law, which required him to prove that the allegations made in his article were “*substantially true on the balance of probabilities*” to avoid a finding of defamation, was a disproportionate interference with his right under Article 10.2 of the Convention to freedom of expression. However, the Court held that the presumption was a justified restriction on freedom of expression rights:

“84. [The Court] recalls further that, in Bladet Tromsø and Stensaas (cited above, § 66) it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements that were defamatory of private individuals. The question whether such grounds existed depended in particular on the nature and degree of the defamation in question and the extent to which the newspaper could reasonably regard its sources as reliable with respect to the allegations.

87. In all the circumstances, the Court considers that the requirement that the applicant prove that the allegations made in the article were substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10 § 2 of the Convention, in the interests of the protection of the reputation and rights of Mr Christie.”

In 2005, in *Steel and Morris v. UK*,⁶⁹ the ECtHR was asked to consider defamation proceedings taken by McDonald’s, the fast-food restaurant chain, against two members of a small NGO in London which campaigned on social and environmental issues. In 1986, Ms Steel and Mr Morris had published and distributed a leaflet which accused the company of a range of unethical global policies and practices with serious negative environmental and social effects. They argued that these statements were not defamatory - or alternatively, were substantially true or amounted to fair comment on matters of fact.

Both the High Court, and the Court of Appeal, upheld the trial judge’s finding that a number of the leaflet’s allegations were defamatory.

Ms Steel and Mr Morris were unemployed, or in low-wage employment, throughout the proceedings but were ineligible for legal aid. They therefore represented themselves, apart from occasional short-term pro-bono assistance, throughout the “*longest trial (either civil or criminal) in English legal history*” (313 court days spread over two and a half years), with the defamation proceedings including the appeal continuing over nine years altogether. In contrast, the applicants pointed out that McDonald’s economic power exceeded that of many small countries, with global sales in 1995 amounting to some \$30 billion: the UK Government

⁶⁷ Maher, *The Law of Defamation*, 2nd edn, (2018) at para.5.05; Gately on Libel and Slander, 12th edn., para 11.4.

⁶⁸ [2002] 35 EHRR 22 (App no. 46311/99) at paragraphs 84 and 87.

⁶⁹ [2005] ECHR (App no. 68416/01).

estimated that McDonald's had spent over £10 million on its legal costs in this case. The ECtHR was asked to consider whether, in these circumstances, the presumption of falsity was compatible with Article 10 of the Convention.

The Court considered that while the NGO members were not journalists, *"in a democratic society even small and informal campaign groups, [such as in this case] ... must be able to carry out their activities effectively, and there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."*

Nonetheless, it recalled that *"The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism, and the same principle must apply to others who engage in public debate. ... in a campaigning leaflet, a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgements."*⁷⁰

The Court added that:

"... in McVicar ... it held that it was not in principle incompatible with Article 10 [ECHR] to place on a defendant in libel proceedings the onus of proving to the civil standard [i.e. on the balance of probabilities] the truth of defamatory statements. ...

*The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made."*⁷¹

However, *"If ... a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in freedom of expression and open debate that a measure of procedural fairness and equality of arms is provided for."*

The Court had already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6.1. It added that inequality of arms was also relevant to the Court's assessment under Article 10. Effectively, under English law, *"the applicants had the choice either to withdraw the leaflet and apologise to McDonalds, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression, and the need to protect McDonald's rights and reputation. ... The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case."*

In 2009, in *Wall St Journal Europe v. UK*⁷², the ECtHR again considered whether the presumption of falsity in English defamation law was compatible with Article 10 of the

⁷⁰ *ibid*, paras 89-90.

⁷¹ *Steel and Morris v UK* [2005] ECHR (App no. 68416/01), at paras 93-94.

⁷² [2009] ECHR 471 (App no. 28577/05).

Convention. In February 2002, the paper had published a front page article, claiming that the Saudi Arabian monetary authority was monitoring bank accounts associated with certain prominent named businesses, including the Jameel Group of companies, to prevent funds being transmitted to terrorist organisations. Mr Jameel sued for defamation. The paper argued that the article was based on investigative journalism in Saudi Arabia, confirmed with sources in the US Treasury Department, but that it could not disclose its five Saudi sources without exposing them to brutal reprisals. Accordingly, it was unable to use truth (then termed “justification”) as a defence. The paper argued that this rendered the presumption of falsity unfair.

The paper also invoked the “*public interest journalism*” privilege, established in 1999 by the House of Lords in *Reynolds v. Times Newspapers*⁷³. That argument failed in the High Court and Court of Appeal, but succeeded in the House of Lords, which held that the Wall St Journal article perfectly fitted the *Reynolds* privilege, which the lower courts had interpreted too narrowly. The article was on a subject of great public interest, and it demonstrated “responsible journalism” - written by an experienced specialist reporter, using responsibly gathered material, approved and verified by senior staff, unsensational in tone, and factual in content. Accordingly, the article was protected by “*Reynolds* privilege” (see chapter 3) and was not defamatory.

The ECtHR held that the *Wall St Journal* application was inadmissible. In view of the House of Lords judgment that the article was protected by *Reynolds* privilege, the paper could not complain that its Article 10 rights had been violated.

The Court again recalled that the protection afforded to journalists under Article 10 “*is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism*” (*Bladet Tromso v Norway*). It repeated (as in *McVicar* and *Steel and Morris*) that “*In assessing the legitimacy of statements of fact, the Court considers that it is not, in principle, incompatible with Article 10 to place on a defendant in libel proceedings who wishes to rely on the defence of justification [truth], the onus of proving to the civil standard the truth of defamatory statements*”.

The Court recalled, however, that its own judgments recognised that a newspaper might be “*dispensed from its ordinary obligation to verify statements*” in certain circumstances – for example, if the defamatory statements “*are derived from a source that could reasonably be relied on*”- and in such cases, “*it would not be consistent with Article 10 to require that the newspaper establish the truth of the statements at trial.*”

Conversely, the Court observed that “*the plea of qualified privilege based on Reynolds v. the Times Newspapers is an exceptional defence, intended to ensure free communication without the fear of litigation, even if that involves making defamatory statements of fact which cannot be proved to be true. It exempts newspapers from their ordinary obligation to verify factual statements that are defamatory, so long as they have, taking into account all the relevant circumstances, acted in accordance with the standards of ‘responsible journalism’.*”

Finally, in *Kasabova v. Bulgaria*⁷⁴, the ECtHR considered a case where a journalist had been convicted of criminal libel, and was ordered to pay damages, fines and legal costs. The Court

⁷³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

⁷⁴ [2011] ECHR (App no. 22385/03).

found a violation of Article 10, because the financial penalties imposed (totalling almost three years' salary for the journalist) were considered disproportionate. However, the legal requirement that the journalist establish the truth of the allegations, to avoid a finding of defamation, was not considered contrary to Article 10.

The defamatory article, published in the local newspaper, alleged that bribes were taken by four named Education Ministry officials for falsely admitting children to special secondary schools offering a more prestigious range of subjects, without the children having to pass the normal competitive examination, and at a fraction of the normal school fees. However, the journalist was unable to prove that these allegations were true. A witness gave evidence on her behalf that a number of local parents admitted to him privately that they had personally paid such a bribe, but he could not name them for obvious reasons.

The Court held that *“The statements made by the [journalist] were clearly allegations of fact ... and as such susceptible to proof... . There was therefore nothing inherently wrong with her being asked to demonstrate the truth of her assertions ... [this] embodies the so-called ‘presumption of falsity’ The Court has dealt with this matter in the context of civil proceedings in the case of McVicar, and has concluded that it is not, in principle, incompatible with Article 10 to place on the defendant in libel proceedings the burden of proving to the civil standard the truth of defamatory statements. It later confirmed that ruling in Steel and Morris, subject to the proviso that the applicant must be allowed a reasonable opportunity to do so. In Romyana Ivanova, [the Court] held, in referring to criminal libel proceedings, that a requirement for defendants to prove to a reasonable standard that the allegations made by them were substantially correct did not, as such, contravene the Convention... .”*

The Court *“considers it necessary to emphasise that the reversal of the burden of proof operated by that presumption [of falsity] makes it particularly important for the courts to examine the evidence adduced by the defendant very carefully, so as not to render it impossible for him or her to reverse it and make out the defence of truth...”* (para. 62).

However, it was *“not persuaded that the presumption of falsity, in the instant case, ran counter as such to Article 10, for two reasons. First, the right to freedom of expression is not absolute and its exercise must not infringe other rights protected by the Convention, such as the right to private life under Article 8 States cannot be said to have gone beyond [their margin of appreciation] as a result of using legislative techniques – such as the presumption of falsity – whose aim is to enable those subjected to potentially defamatory attacks to challenge the truth of allegations which risk harming their reputations.*

Secondly and more importantly, the presumption, as applied in the instant case, had a limited effect on the outcome ... [In determining whether criminal libel is established,] the Bulgarian courts seek, as they did in the case in hand, to establish whether [the person] has complied with the tenets of responsible journalism... libel defendants may be relieved of the obligation to prove the truth of the facts alleged in their publications, and avoid conviction, simply by showing that they have acted fairly and responsibly. That mechanism greatly reduces the presumption of falsity’s potential negative effect on freedom of expression.” (para 61).

“Indeed, in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist has acted professionally and in good faith becomes paramount ... ”. (para 63). In this case, the national courts had considered this issue

carefully and their “*finding that the [journalist] had failed to sufficiently research her article before going to press, and had thus failed to act as a responsible journalist, could not be considered as manifestly unreasonable... .*” (para. 68). Accordingly, the presumption of falsity did not breach the right to freedom of expression under Article 10.

In summary, therefore, it appears that:

- The Court affords particular protection to the Article 10 freedom of expression rights of journalists - and also to NGOs or individuals - seeking to stimulate discussion on matters of genuine public interest.
- It underlines however that such protection depends on journalists – and NGOs or individuals – acting professionally and in good faith, seeking to provide accurate and reliable information, checking their facts, and acting fairly and responsibly/in accordance with the ethics of journalism. If a source is one which can reasonably be relied on, the journalist may be dispensed from the obligation to verify the facts in issue.
- The more serious the allegation, the higher the standard of care in checking the facts.
- The Court recognises the presumption of falsity as a measure designed to protect the right to reputation or the right to privacy of individuals.
- In principle, it is not contrary to Article 10 to require a journalist/NGO/individual to prove, on the balance of probabilities, that a disputed statement is true or substantially true, in the interests of protecting individual reputations.
- However, courts should be vigilant to ensure that the journalist is allowed a reasonable opportunity to prove that the disputed statement is true. If particular circumstances make it very difficult for the person to do so - e.g. the very striking ‘disparity of arms’ in *Steel and Morris*, or a particular procedural unfairness– the presumption may then become incompatible with Article 10.
- In a case where a journalist cannot demonstrate the truth of the disputed statement for reasons such as the need to protect sources from serious threat, the presumption of falsity could infringe Article 10 unless it is accompanied by other procedural safeguards.
- Where the presumption of falsity applies, but a journalist can invoke a defence of fair and reasonable publication in the public interest, such as the Reynolds privilege applied in *Wall Street Journal Sprl v Jameel*,⁷⁵ the presumption of falsity is unlikely to be incompatible with Article 10.

2.2.4 Comparative Perspectives

In most common law jurisdictions (England and Wales, Scotland, Northern Ireland, Australia, New Zealand, Canada, South Africa), the presumption of falsity remains part of defamation law.⁷⁶

⁷⁵ [2006] UKHL 44, [2007] 1 AC 359.

⁷⁶ Gately on Libel and Slander, Sweet and Maxwell, 12th edn. (2017) at para 11.4 and footnote 23.

In **England and Wales**, the presumption of falsity continues to apply, and no change was made to it by the Defamation Act 2013. This issue was considered in 1975 by the Faulks Committee, which concluded that:

“... the principle of requiring a publisher of defamatory words to prove their truth (subject of course to other defences like qualified privilege) is a sound principle, it tends to inculcate a spirit of caution in publishers of potentially actionable statements which we regard as salutary, and which might well be severely diminished if the burden of proof were shifted. Moreover such a shift would, we think severely upset the balance of the law of defamation against defamed persons.”⁷⁷

The same view was taken by the Neill Committee on Practice and Procedure, in 1991⁷⁸.

There have been a number of high profile cases in England and Wales where the presumption of falsity has resulted in plaintiffs successfully suing newspapers in respect of statements that subsequently proved to be true. For example, the case of the former Welsh Police Superintendent Gordon Anglesea who was awarded £400,000 for defamation in 1994 after having been accused of being a paedophile in the early 1990s by a number of British publications. However, in 2013, he was convicted of the abuse of several young boys.⁷⁹ Similarly, there have been several well-known cases where sporting personalities or celebrities successfully sued for defamation, in response to media articles suggesting that they were using banned drugs to boost their performance, or were attending rehabilitation for drug use, where the truth of the allegation could not be shown – but the person was subsequently established to be in the situation suggested, at a date some years afterwards.

In **Ontario**, the Law Commission of Ontario’s report on *Defamation Law in the Internet Age* notes that the falsity of a defamatory statement is presumed unless the defendant establishes the defence of justification. The Canadian courts have held that the presumption of falsity is consistent with the values in the Canadian Charter of Rights and Freedoms (“Charter values”).

The Report provides a number of arguments in support of the presumption. The publication of a statement is viewed as the “accusation” to be proved by the defendant which “*protects victims of reputational harm from having to prove their worth*”; it is difficult to “prove a negative”, and requiring the plaintiff, in the case of serious reputational harm, to prove the falsity of an allegation may be impossible in practice⁸⁰; it is also believed that the presumption inculcates “*a spirit of caution*” in publishers against publishing statements that they could not prove to be true”.

The Commission therefore recommends retaining the presumption of falsity, which it argues is “*crucial to achieving access to justice*” for plaintiffs. It considers that investigative journalism is more appropriately protected by a defence of reasonable publication in the public interest.⁸¹

⁷⁷ *Report of the Committee on Defamation* (chaired by Mr Justice Faulks), March 1975, at para. 141.

⁷⁸ Supreme Court Procedure Neill Committee *Report on Practice and Procedure in Defamation* (1991) (London, Lord Chancellor's Department)

⁷⁹ From Dr Andrew Scott’s paper to the Symposium on Reform of Defamation Law, 19 November 2019.

⁸⁰ The Commission noted that in the absence of the presumption, the plaintiff in *Magno v Balita* (2018 ONSC 3230) would have been required to prove that he is not “a habitual liar”, as the contested statement had claimed.

⁸¹ Law Commission of Ontario, *Final Report: Defamation Law in the Internet Age*, March 2020, pp. 26-27.

Gatley notes that the presumption of falsity has also been retained in **Australia** and **South Africa**, as well as in Ireland⁸².

Conversely, the presumption of falsity no longer applies in certain cases in the **United States**, based on the particular protection for free speech contained in the First Amendment to the US Constitution. A public figure who claims to have been defamed, or any person who claims to have been defamed by the media in a statement about a matter of public concern, must prove that the statement is substantially false⁸³. In other circumstances, however, it appears the presumption of falsity continues to apply⁸⁴.

2.2.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- abolish the presumption of falsity;
- reverse the burden of proof and make falsity an element of the tort to be proved by the plaintiff where the standards of responsible journalism outlined in section 26 of the Act have been followed;
- retain the presumption of falsity, but ensure that it is balanced by measures to protect investigative journalism, such as an effective defence of reasonable publication in the public interest and/or an anti- anti-SLAPP mechanism;
- do nothing.

Option 1: Abolish the presumption of falsity

This would mean that the plaintiff would have to prove that the statement complained of is untrue.

Arguments in favour

- The law of defamation should protect individuals from defamatory statements which are untrue, not from those that are true. It is in principle unsatisfactory that the plaintiff should be relieved of the burden of proving all the essential ingredients of the wrong which has been alleged.⁸⁵
- There is no public interest in penalising the authors of true statements, particularly when they relate to matters of public concern.⁸⁶
- It may be impossible to prove the truth even of a true statement, for example the statement may be based on information provided by a confidential source who is not willing to testify in court. “*In such circumstances the publisher’s ability to publish the (true) statement is severely compromised by the threat of an indefensible defamation action*”.⁸⁷

⁸² Gatley, 12th edn. & 2nd Supplement, para 11.4.

⁸³ *Philadelphia Newspapers v Hepps* [1986] 475 US 767.

⁸⁴ Maher J., 2ndedn., para 5.06; Gatley, 12thedn., para 11.4.

⁸⁵ Law Reform Commission, *Report on the Civil Law of Defamation*, December 1991.

⁸⁶ *ibid.*

⁸⁷ Cox N. and McCullough E., *Defamation: Law and Practice*, (2014), at para.1-11.

- While the defence of truth is available to defendants, it appears that it is rarely pleaded on its own.⁸⁸ Moreover, there is a significant risk for the defendant in putting forward a defence of truth. If the defence fails, the court or jury will have grounds to award aggravated damages.⁸⁹
- The presumption may have adverse consequences on freedom of expression.

Arguments against

- Requiring a plaintiff to prove that a statement is untrue may have constitutional implications which would require careful consideration.
- A person who asserts, from his sources of information, that a particular state of affairs exists should bear the burden of proving this assertion.⁹⁰
- Requiring a plaintiff to prove his/her innocence is inconsistent with the spirit of the constitutional requirement that the State vindicate the good name of every citizen in the case of injustice done.⁹¹
- It is not always easy to prove a negative.⁹² It “is invidious that any individual should have to live with a publication about him/her that is, in fact, untrue, but whose falsity s/he cannot prove”.⁹³
- The balance of justice is better served by not requiring the plaintiff to prove that a statement is false.
- Defamation is a tort of commission so that a person who publishes a statement should be able to stand over it.
- The presumption is only relevant where the defence of truth is pleaded. There are other defences available to defendants, particularly the media.
- The current law is in line with the approach adopted in many other common law jurisdictions, in particular England and Wales, Scotland, Northern Ireland, Australia, New Zealand and Ontario.

⁸⁸ According to Professor Marie McGonagle, *Media Law* p. 108 (Dublin; Round Hall Press, 2003) truth was pleaded as the only defence in only 5% of cases.

⁸⁹ Maher J., *The Law of Defamation*, 2nd edn, (2018) at p. 137.

⁹⁰ Law Reform Commission, *Report on the Civil Law of Defamation*, December 1991 at p. 57.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ Cox N. and McCullough E., *Defamation: Law and Practice*, (2014), at para. 5-12.

Option 2: Reverse the burden of proof and make falsity an element of the tort to be proved by the plaintiff where the standards of responsible journalism outlined in section 26 of the Act have been followed

Arguments in favour

- It would facilitate the publication of ‘true’ statements where the publisher may have concerns that he/she will not be able to prove the truth of the statement while protecting the right to a good name.

Arguments against

- It may not adequately protect a person’s right under the Constitution to protection of their good name.
- The presumption of falsity is only an issue where the defendant seeks to avail of the defence of truth;⁹⁴ there are other defences available to the media.

Option 3: Retain the presumption of falsity, but ensure that it is balanced by measures to protect investigative journalism and other public-interest debate, such as an effective defence of reasonable publication in the public interest (see chapter 3) and/or an anti-SLAPP mechanism (see further in this chapter)

Arguments in favour

- Arguments against option 1 would apply.
- Such an approach would seem more compatible both with the Constitution, and with the case-law of the European Court of Human Rights under Article 10 of the European Convention on Human Rights.
- This would also accord with the approach proposed by the Ontario Law Reform Commission.

Arguments against

- Arguments in favour of option 1 would apply.

Option 4: Do nothing

Arguments in favour

- Arguments against option 1 would apply.

Arguments against

- Arguments in favour of option 1 would apply.

⁹⁴ *Report of the Legal Advisory Group on Defamation*, March 2003, <http://justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>

Recommendations

The following option is recommended:

- Option 3: Retain the presumption of falsity, but ensure that it is balanced by measures to protect investigative journalism and other public-interest debate, such as an effective defence of reasonable publication in the public interest (see chapter 3) and/or an anti-SLAPP mechanism.

The following options are not recommended:

- Option 1: Abolish the presumption of falsity;
- Option 2: Reverse the burden of proof and make falsity an element of the tort to be proved by the plaintiff where the standards of responsible journalism outlined in section 26 of the Act have been followed; and
- Option 4: Do nothing.

2.3 Proposed ‘Serious Harm’ Test

2.3.1 The current legal position

As mentioned at the beginning of this chapter, a defamatory statement is defined by the Defamation Act 2009 as one which:

“ tends to injure a person’s reputation in the eyes of reasonable members of society”⁹⁵.

In Irish law, a person is not obliged to prove that the injury to his/her reputation has reached any specified minimum level of seriousness, before he/she can proceed with an action for defamation.

In practice, the plaintiff will normally wish to prove the full extent and gravity of any injury to his/her reputation, in the course of the defamation proceedings: not least because the nature, extent and seriousness of the damage caused is relevant to the level of redress that will be awarded. Thus section 31(4) of the Defamation Act specifies that the court in a defamation action *shall*, in making an award of general damages, have regard to-

- “(a) the **nature and gravity** of any allegation in the defamatory statement concerned,*
- (b) the means of publication of the statement, including the **enduring nature** of those means,*
- (c) the **extent to which** the defamatory statement was **circulated**,*
- and*
- (e) the **importance** to the plaintiff of his reputation in the eyes of **particular or all recipients** of the defamatory statement,” .*

It is worth also noting that in defamation, as in other types of cases, the High Court or Circuit Court judge has an express power to strike out (terminate) a case where the pleadings (written statements by the plaintiff and defendant about the case) *do not disclose a reasonable cause of action*, or a case which appears from the pleadings to be *frivolous* (have no real content) or

⁹⁵ Section 2 Defamation Act 2009.

vexatious (seeking to exert leverage by causing annoyance).⁹⁶ The judge may do so either on his/her own initiative, or on application of the defendant.

However, there is no provision in Irish defamation law equivalent to the statutory “serious harm threshold”, introduced in England and Wales by section 1(1) of the Defamation Act 2013, which is discussed below.

Nor have the Irish courts been disposed to follow an earlier judgment of the English Court of Appeal, *Jameel v Dow Jones*⁹⁷, which held that defamation cases could be struck out where a court considered them to be insubstantial or disproportionate. The *Jameel* case arose from an article published on a subscriber-only website, which claimed to identify a number of persons who provided financial support to global terrorism, based on material obtained on the computer of an organisation linked to al-Qaeda. The reader had to click on a link to obtain access to the list. Mr Jameel, a Saudi-based businessman, issued defamation proceedings in England, claiming that the article defamed his reputation in that jurisdiction.

However, the website brought evidence that only five people in England had clicked on the link: the plaintiff’s solicitor, two associates of the plaintiff whose view was favourable to him, and two other persons who stated that they did not know the plaintiff and did not remember reading his name in the list. It argued that the article therefore had no significant impact on the Mr Jameel’s reputation in England, and the court should exercise its power to dismiss the defamation proceedings as a waste of court time. The Court agreed, concluding that any damage to the plaintiff was “minimal” and did not justify the costs and the court time that would be expended.

The Irish Court of Appeal was asked to apply the *Jameel* approach, in *Gilchrist and Rogers v. Sunday Newspapers*⁹⁸. This case referred mainly to publication of a newspaper article about alleged misadministration of the State’s witness protection programme. The article was claimed to defame the plaintiffs, a retired Detective Inspector and a psychotherapist who had previously worked with the programme and were named by the article.

But the plaintiffs also complained that the journalist had published similar and related defamatory statements about them to Mr O’Brien, a retired Chief Superintendent, two days before the article was published. The newspaper asked the court to strike out the claims about the statements made to Mr O’Brien, arguing that this was publication to just one person, who should be considered as sympathetic to the plaintiffs (see para. 34 of judgment).

Finlay-Geoghegan J, giving the judgment of the Court of Appeal on this particular point, concluded that the English courts, in *Jameel* and several subsequent judgments, had identified and exercised “*an inherent jurisdiction to strike out as an abuse of process a libel (or a defamation) claim which may yield a plaintiff some benefit, but where the probable damage to the defendants in terms of costs and the impact on court resources will be disproportionate to the probable benefit for the plaintiff in succeeding.*” (para 18).

⁹⁶ Under the Rules of the Superior Courts, O19 R 28 RSC; applied also to the Circuit Court, by O67 R 16 Circuit Court Rules. See *Review of the Administration of Civil Justice*, (‘the Kelly Report’), 2020, para 3.3.1.

⁹⁷ [2005] EWCA Civ 75, [2005] QB 946. See discussion below.

⁹⁸ *Gilchrist v Sunday Newspapers & others*, [2017] IECA 190, Finlay-Geoghegan J, 21 June 2017. The judgment was interpreted by one submission as holding that “*there is no triviality threshold in Irish defamation law.*” (McCann Fitzgerald, July 2020).

There were, however, differences between English and Irish law on this issue. In Irish law, the court's "*jurisdiction to strike out proceedings or a claim without a hearing on the merits is one which limits the constitutional right of access to the Courts. Also, it is of course a jurisdiction which must be exercised sparingly and only in clear cases.*" (para 32).

Strike out might arise where the proceedings were frivolous, vexatious, were repeat litigation on points already decided by the court, or were bound to fail. However, the plaintiffs' claim regarding the publication to Mr O'Brien did not fall into any of those categories, as section 6(2) of the 2009 Act expressly provides that publication of a defamatory statement about a person to one other person constitutes defamation.

Otherwise, the Irish authorities required the defendant to establish that there would be *no* benefit to the plaintiff in pursuing their claim, before the courts would strike out a claim. That did not extend (as in *Jameel*) to striking out proceedings where there *would* be a benefit to the plaintiff in continuing, but the court assessed that benefit as disproportionate:

"What does not appear permissible [in Ireland], on an application to strike out proceedings as an abuse of process, is to conduct ... 'in essence a cost-benefit calculation' between the potential probable benefit to the plaintiff if successful, and probable costs and use of court time if the proceedings continue, and determine whether it is proportionate to permit the proceedings to continue." (para 31).

As the newspaper had not established, in this case, that there would be no benefit to the plaintiffs if they succeeded in their action, the court held that there was no abuse of process and refused the application to strike out the claim.

Maher suggests that "*the effect of the Jameel decision*⁹⁹ *and of section 1(1) of the Defamation Act 2013 in England has been a divergence of English and Irish law. In Irish law, it remains the case that publication to one person may suffice for an action to proceed. In English law, cases where publication is very limited, or the meaning of the statement is not obviously damaging, risk falling at the 'serious harm' hurdle.*"¹⁰⁰

2.3.2 Main issues raised during the review

Submissions to the review argued that the ease of bringing a defamation action against a publisher, in contrast to the cost, time and resources required to defend such a claim, creates an imbalance that incentivises financial settlements, and acts as a deterrent to possible resolutions without a drawn-out legal process.¹⁰¹ It was also argued that people or organisations with large financial resources can use the law to deaden or stymie reporting on their activities, through responding to virtually any coverage with solicitors' letters, threats of legal action, or both.¹⁰²

⁹⁹ *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75, [2005] QB 946. See discussion below.

¹⁰⁰ Maher, J. *The Law of Defamation*, 2nd edn., Dublin, at para 3.63.

¹⁰¹ Journal Media.

¹⁰² Business Journalists' Association.

A large number of submissions to the review recommend the introduction of a ‘serious harm’ test that would require proof that the statement complained of has caused, or is likely to cause, serious harm to the plaintiff’s reputation before an action for defamation goes to trial.¹⁰³

This suggestion is based on the test introduced in section 1(1) of the England and Wales Defamation Act 2013, which provides that “[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant”. (The legal effect of this provision was the subject of differing judicial interpretations in England, but it appears to have been clarified by a UK Supreme Court judgment in 2019 – see discussion below.)

The arguments put forward in favour of this proposal include that it would:

- discourage trivial and vexatious cases or cases with little merit intended to intimidate a publisher;
- reduce legal costs for defendants;
- help to ensure effective and appropriate use of court resources;
- assist in ensuring an appropriate balance between Article 8 ECHR (right to protection of one’s reputation) and Article 10 ECHR (right to freedom of expression); and
- discourage ‘forum shopping’ (this argument is considered separately in Chapter 4).

It was also argued that an appropriate threshold test can be expected to discourage those who might seek to use defamation law to suppress legitimate criticism, or to stifle the expression of facts important to the public interest.

Concerns were raised in one submission at what was described as a substantial increase in trivial defamation actions being taken in the Circuit Court against small businesses in the hospitality and retail sectors.¹⁰⁴ The concerns centre around the ability of shops, restaurants and petrol stations to question or stop customers who are suspected of shoplifting, driving (or attempting to drive) from a garage forecourt without paying, leaving a restaurant without paying, paying for goods with a counterfeit note, or refusing admission to premises, without risking a defamation action being taken against them. It was argued that the threat of defamation actions means that SMEs are, for example, faced with a choice of accepting the loss resulting from a suspected theft or risking a substantial award of damages and legal costs. It was therefore suggested that the Act should be amended to provide that any defamation alleged must be material and demonstrable and must cause serious harm to the plaintiff.

However, a submission to the review, made after the Symposium, took the view that in Ireland, a “serious harm” test would likely be found to offend against the constitutional right of access to the courts. It suggested however, that it should be possible to legislate for a summary disposal mechanism for claims in which publication is limited, whereby a financial limit to jurisdiction would be imposed, such that access to justice would be maintained but there would be reasonable limits to the costs that may be incurred by defendants defending such claims and to the damages payable to the plaintiff.¹⁰⁵ (See chapter 4)

¹⁰³ Business Journalists’ Association, Google, Independent News and Media, Irish Times, Journal Media, Local Ireland, MGN Ltd, National Union of Journalists, Newsbrands Ireland, Dr. Eoin O’Dell, Ronan Daly Jermyn Solicitors, Technology Ireland, and Yahoo.

¹⁰⁴ ISME.

¹⁰⁵ McCann Fitzgerald.

2.3.3 Comparative perspectives

In **England and Wales**, section 1 of the Defamation Act 2013 introduced a serious harm test 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.*¹⁰⁶

The rationale for the introduction of the serious harm test was to reduce the number of defamation actions taken in court, by putting in place a threshold to demonstrate actual reputational harm before a case can proceed. The Explanatory Notes on the Act state that section 1 builds on cases such as *Jameel v Dow Jones*¹⁰⁷ and *Thornton v Telegraph Media Group Limited*¹⁰⁸, which held that common law already required a defamation case to raise a real and substantial wrong, and said that it “*raises the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation can be brought*”.¹⁰⁹

The meaning of the serious harm test has now been decided by the UK Supreme Court in *Lachaux v Independent Print Ltd and another*.¹¹⁰ The High Court and Court of Appeal had both interpreted section 1 as largely re-stating the common law standard of seriousness as explained in *Jameel* and *Thornton*. However, the Supreme Court underlined that the Defamation Act 2013 had set a significantly higher threshold of seriousness for defamation cases than the previous common law test. Section 1(1) requires that the “serious harm” to the plaintiff’s reputation must be determined by reference to the actual facts about the impact of the defamatory statement, and not just by the meaning of the words. The words complained of must not only be inherently injurious, but must also be shown to produce serious harm in fact.

The Court held however, that serious harm can be inferred in certain circumstances. In this case, it was inferred from evidence in relation to the scale of the publication; the fact that the statement had been read by people in England and Wales who knew the plaintiff; others who knew the plaintiff or would get to know him in the future were likely to read the publication; and the gravity of the statements. The Supreme Court judgment is generally acknowledged as raising the bar on proving serious harm in England and Wales, and making it more difficult to take defamation actions under the 2013 Act.¹¹¹ There has been speculation that it will also

¹⁰⁶ In the case of a body that trades for profit, the statement must have caused, or be likely to cause, serious financial loss (Defamation Act 2013, s. 1(2)).

¹⁰⁷ [2005] EWCA Civ 75, [2005] QB 946, the Court of Appeal held that a statement published online in Brussels which only reached 5 people in England and Wales did not amount to a real and substantial tort, departing from the principle of the tort of defamation being actionable *per se*. The court concluded that the extent of the damages the plaintiff could expect to receive by way of vindication would have been ‘*out of all proportion*’ to the cost of the litigation, and thus struck the case out as an abuse of process.

¹⁰⁸ In *Thornton v. Telegraph Media Group Limited* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985, the High Court concluded that the common law imposed a threshold regarding causes of action in defamation. This, according to the court, had the effect of barring trivial claims.

¹⁰⁹ Defamation Act 2013, Explanatory Notes, <https://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/1>

¹¹⁰ *Lachaux v. Independent Print Ltd and another* [2019] UKSC 27, [2019] 3 WLR 18. The case arose from articles published in two UK newspapers about a family law dispute, which were held to contain a number of defamatory allegations about the husband’s conduct.

¹¹¹ See for example Eversheds Sutherland, Solicitors, ‘*Lachaux v. Independent Print: It just got harder to sue for libel*’, 14 June 2019 https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Litigation_Supp.ort/Lachaux_v_Independent_Print-It_just_got_harder_to_sue_for_libel; McCann Fitzgerald, Solicitors, ‘*UK Supreme Court Raises the Bar in*

increase costs and delays for both plaintiff and defendant in cases which do proceed, possibly requiring extra preliminary hearings to determine whether the plaintiff has put forward sufficient evidence of “serious harm” in practice to be allowed to proceed.

In his presentation to the Symposium on Reform of Defamation Law, Dr Andrew Scott expressed the view that the likely outcome of this judgment in England and Wales is “*an increase in arguments, correspondence and costs of litigation*”¹¹² though he noted the court’s statement that inferences may be drawn in light of the circumstances of the case, which might reduce this risk.

In **Scotland**, the Defamation and Malicious Publications (Scotland) Act 2021 provides for a serious harm test similar to section 1 of the Defamation Act 2013.¹¹³

In **Northern Ireland**, the *Report on Defamation Law in Northern Ireland*,¹¹⁴ recommended the introduction of a serious harm test, but noted that the arguments for the introduction of such a provision are “less compelling” than arguments for other reforms.¹¹⁵

Before 2005, each **Australian** jurisdiction had a different regime for regulating defamation actions. In November 2004, state and territory Attorneys-General endorsed the Model Defamation Provisions 2005. The Model Provisions retain (with some modifications) the common law approach to determining civil liability for defamation. Each jurisdiction subsequently enacted legislation, collectively referred to as the National Uniform Defamation Law, to give effect to the Model Defamation Provisions. Each state and territory therefore has substantially uniform defamation law.¹¹⁶ Following a review of the 2005 Model Defamation Provisions, the Model Defamation Amendment Provisions 2020 were approved by the Council of Attorneys-General on 27 July 2020 and must be incorporated into the laws of each state and territory.

The 2005 Model Defamation Provisions provide for a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication were such that the plaintiff was unlikely to sustain harm (defence of triviality). This defence is considered challenging to mount successfully and has generally only been successful in circumstances where the publication of the material has been limited, such as where an oral statement is made in front of a small number of people.¹¹⁷ The Model Defamation Amendment Provisions 2020,

Proving Serious Harm for Defamation Actions, 26 June 2019,

<https://www.mccannfitzgerald.com/knowledge/disputes/uk-supreme-court-raises-the-bar-in-proving-serious-harm-for-defamation-actions#:~:text=UK%20Supreme%20Court%20Raises%20the%20Bar%20in%20Proving%20Serious%20Harm%20for%20Defamation%20Actions,-Created%20with%20Sketch&text=The%20UK%20Supreme%20Court%20has,harm%20to%20the%20plaintiffs%20reputation>

¹¹² Prof. Andrew Scott, (London School of Economics), ‘*Defamation law reforms on these themes in common law jurisdictions*’ at http://www.justice.ie/en/JELR/Pages/Symposium_Reform_of_Defamation_Law#_blank.

¹¹³ The Act further limits the circumstances in which proceedings for defamation may be brought where the plaintiff is a legal person whose primary purpose is to trade for profit.

¹¹⁴ *Report on Defamation Law in Northern Ireland*, Dr Andrew Scott, June 2016.

¹¹⁵ *ibid* (Recommendations).

¹¹⁶ Council of Attorneys-General, *Review of Model Defamation Provisions, Discussion Paper*, February 2019, <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/discussion-paper-stage-2.pdf>

¹¹⁷ Model Defamation Amendment Provisions (Consultation Draft), Background Paper, p. 27.

now provide for the introduction of a serious harm test which will require a plaintiff to prove that the publication “has caused, or is likely to cause, serious harm to the reputation of the person”; in the case of certain legal persons, harm to reputation is not serious harm unless it has caused, or is likely to cause, serious financial loss. The rationale given for the introduction of the serious harm test is that it would prevent vexatious or oppressive litigation tactics by claimants, where no significant harm is suffered.

In **New Zealand**, the Defamation Act 1992 (as at 1 March 2017) provides that defamation is actionable without proof of special damage.

Conversely, in **Canada**, the Law Commission of Ontario in its report on *Defamation Law in the Internet Age*¹¹⁸ recommended that a serious harm test should not be introduced. The justifications given for this recommendation are that (i) the presumption of damage is a core element of the tort of defamation; (ii) Ontario has already adopted a different approach to trivial claims i.e. defendants to defamation actions involving expressions on matters of public interest may apply at an early stage of the proceedings to have the action dismissed and in order to prevent dismissal, the plaintiff must establish harm that is “sufficiently serious” to meet the public interest hurdle (under the Ontario anti-SLAPP legislation);¹¹⁹ and (iii) a serious harm threshold is considered to be a barrier to access to justice (it places a relatively stringent evidentiary burden on plaintiffs to prove serious harm at an early stage of the proceedings; it may have the effect of front-loading litigation proceedings; and the additional costs of a preliminary hearing may create significant economic and practical barriers to access to justice).

2.3.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- introduce a serious harm test;
- introduce a serious harm test in cases of limited publication in a non-permanent form during the provision of goods and services.

Option 1: Introduce a serious harm test

Any proposal to introduce a serious harm test would require careful consideration, in light of the constitutional right of access to the courts and the constitutional protection of the right to a good name.

Arguments in favour

A serious harm test would:

- Raise the bar in defamation cases, reduce trivial applications and potentially reduce the numbers of cases taken.
- Reduce the cost and time it takes to defend cases that don’t meet the serious harm threshold.

¹¹⁸ Law Commission of Ontario, *Defamation Law in the Internet Age*, Final Report, March 2020

¹¹⁹ Anti-SLAPP motion under section 137.1 of the Courts of Justice Act.

- Enable better case management and better use of court resources, because cases that do not meet the “serious harm” requirement would be concluded at an earlier stage.

Arguments against

- The introduction of a serious harm test could give rise to constitutional issues in relation to access to the courts and the obligation on the State under Article 40.3.2° to “*protect as best it may from unjust attack and, in the case of injustice done, vindicate the ... good name, ... of every citizen*”.¹²⁰
- Requiring serious harm to a plaintiff’s reputation to be demonstrated before a case can proceed to hearing may give rise to mini-trials at a preliminary stage, thus increasing the complexity and costs of proceedings.
- Given the diffuse and often intangible nature of harm to reputation, it could be difficult in practice for plaintiffs to provide concrete material evidence of serious harm.
- The serious harm test would remove a core question relating to the alleged defamatory statement from the consideration of the jury which has long been embedded in the Irish legal system in defamation cases.
- A serious harm test may not have the intended impact of significantly reducing the volume of claims being taken.

Option 2: Introduce a serious harm test, limited to cases where the alleged defamation consists of limited publication in a non-permanent form during the provision of goods and services

The purpose of this provision is to address the concerns raised by SMEs operating in the hospitality and retail sectors set out above.

The Circuit Court has decided a number of “retail defamation” cases recently. In those decisions, the Circuit Court made it clear that it is not intrinsically defamatory for a retailer to ask a customer at the checkout to confirm that he/she has paid for an item, or for a restaurant to ask a customer to pay for a meal that he/she has consumed.¹²¹

Clearly, there may also be cases where problems arise from poor communication, lack of appropriate staff training, or real or perceived unfairness (particularly regarding groups at risk of discrimination). Cases of discrimination in the provision of goods or services, on any of the grounds protected under the Equal Status Acts, can be taken to the Workplace Relations

¹²⁰ In the report on capping of damages in personal injuries cases, the LRC considered that a threshold rule in New South Wales legislation (i.e. general damages can be awarded only where the severity of the non-economic loss is at least 15% of the most extreme case) could not survive a constitutional challenge as it would fail to meet any test of what would be “fair and reasonable”. Similar concerns may arise in the case of a serious harm test.

¹²¹ *Fowler v Marks and Spencer (Irl) Ltd* (Circuit Court No. 2018/02998) and *McCarthy and Walsh v Harbourmaster Bar and Restaurant Trading Limited & ors* (Circuit Court No. 2018/06901) respectively. See also *Diop v Transdev Dublin Light Rail and STT Risk Management* [2019] IEHC 849 (High Court: a request to produce a valid Luas ticket was held not to be defamatory but the plaintiff was defamed arising from other statements) and *Sunner v Dealz Retailing Ireland Ltd and ors* (Circuit Court No. 2017/04762) (not defamatory to ask a customer if she had paid for a toy rattle that she had given to her child; the toy was subsequently found on another shelf in the shop).

Commission where both plaintiff and defendant benefit from low-cost, accessible procedures, including free mediation services, and an emphasis on practical redress which will prevent recurrence of the problem, such as adoption of codes of practice developed in consultation with relevant groups. Such a forum appears, in general, much better suited than litigation to resolve grievances effectively, and address any systemic issues.

The “retail defamation” cases instanced by ISME typically revolve around spoken communication between a staff member of a provider of goods and services, and a customer or other member of the public, and involve only a short spoken exchange, in the presence of a relatively small number of people, during a limited time period. Typically the person has been asked to confirm whether they have paid for an item before leaving the premises, has been told that cash they have proffered for payment may be counterfeit, or there is a refusal of admission to the premises. Any of these may arise entirely innocently, or from an honest oversight, by the customer, and good staff training and codes of practice on the retailers’ side should assist in minimising the number of complaints.

At the same time, consideration could be given to introducing proportionate and specific measures for the “retail defamation” context, which would be targeted to reducing claims that constitute an abuse of process. Such cases are already normally taken in the Circuit Court and are therefore identified as falling in a more modest bracket as regards any damages.

Arguments in favour

- Defamation resulting from a short verbal exchange, published to a relatively small number of people, should generally have significantly less defamatory effect than publication of the same comments in written, broadcast, online or digital form.
- This should facilitate the achievement of a fair balancing of the constitutional right to a good name and to an individual’s property rights.
- Imposition of a serious harm test, for cases which cannot be resolved by agreement, should act as a disincentive to the taking of trivial cases – saving time and costs for retailers, courts, and plaintiffs.

Arguments against

- There may be Constitutional issues, as introduction of such a serious harm test could restrict the right of access to the courts and a person’s ability to defend his/her good name; such measures will need to be carefully thought out and proportionate.

Recommendations

Provided that there are no constitutional constraints, the following option is recommended:

- Option 2: Consider introducing a serious harm test, limited to cases where the alleged defamation consists of limited publication in a non-permanent form during the provision of goods and services).

The following option is not recommended:

- Option 1: Introduce a serious harm test generally.

2.4 Defamation of a Class of Persons

2.4.1 Current Legal Position

Section 10 of the Act provides that where a person publishes a defamatory statement concerning a class of persons, a member of that class shall have a cause of action against that person if by reason of the number of persons who are members of that class, or by virtue of the circumstances in which the statement is published, the statement could reasonably be understood to refer, in particular, to the member concerned.

2.4.2 Main issues raised in course of review

One submission¹²² to the review suggested that section 10 needs clarification and a limit set on the “number of persons”. It also suggested that awards offered to the members of a class should be divided between them.

Another submission¹²³ noted that section 10 means that a defamatory statement regarding a group must contain some element that is targeted at an individual member of that group and that the number of individuals in the class must be so confined that they are identifiable. It concludes that this would appear to exclude members of a social class or group from the protection of the Act e.g. statements that are racist in nature against a large group may injure the reputation of the group in general within society, but they would have no effective remedy. It goes on to set out details of a number of international instruments under which the State is under an obligation to combat hate speech, racism, xenophobia and intolerance.¹²⁴

2.4.3 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- limit the number of persons that can be in a class or group in order for an individual member to be able to take a defamation action;
- allow a class or group of persons to take an action.

Option 1: Limit the number of persons that can be in a class or group in order for an individual member to be able to take a defamation action

Arguments in favour

- There are no obvious arguments in favour of this proposal.

¹²² David Reynolds.

¹²³ FLAC.

¹²⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Council Framework Decision 2008/913/JHA of 28 November 2008; and European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

Arguments against

- Section 10 gives effect to a recommendation in the Law Reform Commission *Report on the Civil Law of Defamation*.
- If it is possible to identify an individual from a defamatory statement in relation to a class of persons, the individual should be able to take an action to vindicate his/her reputation.
- While the size of a group is an important factor, it is only one.
- Any size threshold would be arbitrary; the facts of the case rather than the size of the group should determine whether or not a member of a class can take a case in respect of a defamatory statement.

Option 2: Allow a class or group of persons to take an action

Arguments in favour

- This proposal would allow for the taking of a defamation action in respect of a statement that injures the reputation of a group in general, even where it does not affect the reputation of specific individuals.

Arguments against

- Section 10 is in line with the common law position (including the position in England and Wales).
- The issue of hate speech, racism, etc. is more appropriately dealt with in hate speech legislation.
- Any issue of discrimination is more appropriately dealt with under equality legislation.
- In so far as this proposal would allow for class actions, the issue of multi-party litigation was considered by the Review Group on the 'Review of the Administration of Civil Justice' which recommended as follows.

6.2.1

It would seem clear that there is an objective need to legislate for a comprehensive multi-party action ("MPA") procedure in Ireland, while acknowledging the importance of public law redress mechanisms such as regulatory oversight and intervention in resolving certain multiple claim categories.

6.2.2

The Review Group shares the preference of the Law Reform Commission for a model along the lines of the Group Litigation Order ("GLO") procedure in England and Wales which would require claimants individually to institute proceedings in pursuit of their claims and join an MPA register. While noting the perceived benefits of the US style class action model, the Review Group does not consider it either realistic or legally safe to adopt such a model in this jurisdiction given lack of familiarity with it here and possible

*constitutional difficulties presented by the “opt out” approach in binding passive claimants to proceedings they have not instituted.*¹²⁵

Option 3: Do nothing

Arguments in favour

- The arguments against options 1 and 2 would apply.

Arguments against

- The arguments in favour of options 1 and 2 would apply.

Recommendations

It is recommended:

- that section 10 of the Defamation Act 2009 should not be amended; and
- that any question in relation to multi-party or class actions should be considered in the context of implementation of the Report on the Review of the Administration of Civil Justice.

2.5 Position of bodies corporate

2.5.1 Current Legal Position

Section 12 of the Defamation Act expressly provides that a body corporate (such as a company) is entitled to sue (and to be sued) for defamation in the same way as a human person:

“The provisions of this Act apply to a body corporate as they apply to a natural person, and a body corporate may bring a defamation action under this Act in respect of a statement concerning it that it claims is defamatory, whether or not it has incurred or is likely to incur financial loss as a result of publication of that statement.”

Before the 2009 Act, a company (as distinct from its members or board members) could not sue in Irish law for defamation.

Section 12 also expressly provides that a body corporate may bring proceedings over a defamatory statement, *without* having to show that it has incurred financial loss, or is likely to do so, due to the publication of the statement.

Maher considers that the provision:

*“reflects the finding in the House of Lords in *Jameel v Wall St Journal*¹²⁶ that a trading company, which itself conducted no business but had a trading reputation within the jurisdiction, was entitled to recover general damages for libel without pleading or*

¹²⁵ *Review of the Administration of Civil Justice: Review Group Report* (Chapter 8); http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

¹²⁶ *Jameel v Wall St Journal* [2006] UKHL 44, [2007] 1 AC 359.

*proving special damage, if the publication had a tendency to damage it in its way of business.”*¹²⁷

2.5.2 Main issues raised in course of review

A number of submissions to the review argued that bodies corporate should be required to prove special damages/serious financial loss before taking a defamation action.¹²⁸ One of these submissions suggested that companies should not be entitled to take actions in defamation (or at the very least they should be required to prove that the publication caused or was likely to cause serious, direct financial loss).¹²⁹ Among the arguments put forward by the submissions were:

- the application of the Act to bodies corporate in the same way as it applies to natural persons seems to be at odds with relevant case-law of the European Court of Human Rights; there is a need for “*protection for freedom of expression and public interest commentary on commercial matters, given that commercial reputations were generally deemed to lack the moral dimension inherent in personal reputations*”;¹³⁰
- allowing a body corporate to take a defamation case in the same way as an individual makes little sense - how could a body corporate demonstrate that its reputation was damaged, if it suffered no financial loss or was not likely to do so;¹³¹
- the current provisions facilitate a business which simply objects to negative coverage to claim that it has been defamed in order to restrict or silence that coverage;¹³²
- companies have no feelings to be offended and cannot suffer embarrassment or distress;¹³³
- companies already have a wide range of legal means to protect their brands. In terms of intellectual property, companies can, and do use the law of trademarks, passing off and copyright to prevent damaging attacks on their brands and products. They have legal and other protections against misleading comparative advertising. They can sue for malicious falsehood, and directors and employees can sue for defamation in their own names;¹³⁴
- where a customer of a business experiences bad customer service, or has otherwise been significantly let down by that business, the individual should be able to express his/her genuine opinions without fear of his/her legitimate criticism being suppressed by a meritless claim or threat of a claim by the business.¹³⁵

¹²⁷ Maher, *The Law of Defamation*, 2nd edn., para 1.33.

¹²⁸ Business Journalists’ Association, Law Society (anonymous solicitor(s)), Professor Tarlach McGonagle, NewsBrands, H. O’Donnell.

¹²⁹ NewsBrands.

¹³⁰ T McGonagle.

¹³¹ Business Journalists Association.

¹³² Business Journalists Association, NewsBrands.

¹³³ NewsBrands.

¹³⁴ NewsBrands.

¹³⁵ Google.

On the other hand, it was indicated that a business's online presence and reputation can be an important aspect of its commercial potential. A business whose reputation is impacted by the deliberate publication of defamatory comments should be able to bring a defamation claim to prevent further damage.¹³⁶

One submission suggested that whether a body corporate should be entitled to bring a defamation action without proof of damage should be reconsidered.¹³⁷

One submission agreed with the current law arguing that it would be an almost insurmountable hurdle in many cases for a company to prove causation between a defamatory statement and a subsequent loss of income, which could arguably be due to other factors, market driven and economic, as well as to the defamatory statement.¹³⁸

2.5.3 Comparative perspectives

In **England and Wales**, the Defamation Act 2013¹³⁹ provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. In the case of a body that trades for profit, the serious harm requirement means that a statement must have caused or be likely to cause the body serious financial loss.

In **Scotland**, the Defamation and Malicious Publication (Scotland) Act 2021 includes a similar provision.¹⁴⁰

In **Northern Ireland**, the report on *Reform of Defamation Law in Northern Ireland*,¹⁴¹ recommends the introduction of a similar requirement.

In **Australia**, the Model Defamation Amendment Provisions 2020, which were approved by the Council of Attorneys-General on 27 July 2020 and must be incorporated into the laws of each state and territory, provide for the introduction of a serious harm test which will require a plaintiff to prove that the publication "*has caused, or is likely to cause, serious harm to the reputation of the person*". Section 9 provides that a corporation has no cause of action for defamation unless it is an excluded corporation at the time of the publication; subsection (2) of section 9 provides that:

"A corporation is an excluded corporation if:

- (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or*
- (b) it has fewer than 10 employees and is not an associated entity of another corporation,*

¹³⁶ Google.

¹³⁷ Eoin O'Dell.

¹³⁸ Law Society (anonymous solicitor(s)).

¹³⁹ Section 1(2).

¹⁴⁰ Section 1(3).

¹⁴¹ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, Dr Andrew Scott, June 2016.

and the corporation is not a public body.”

Section 10A(2) provides that harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss. An individual associated with a corporation can take defamation proceedings in relation to a defamatory matter about him/her (even if the material also defames the corporation).¹⁴²

In **New Zealand**, the Defamation Act 1992 provides that proceedings for defamation shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings has caused, or is likely to cause, pecuniary loss to the body corporate.

In **Ontario**, the report on *Defamation Law in the Internet Age*¹⁴³ points out that in Canada, at common law, a plaintiff who establishes defamation is presumed to have suffered reputational harm; the plaintiff is not required to prove damage, although the defendant may offer evidence to rebut the presumption of damage. General damages are awarded to vindicate the plaintiff's reputation. It notes that in Ontario, defamation law generally treats corporate plaintiffs in the same way as individuals and recommends that the current Ontario law should not be changed. It explains the rationale for this recommendation as follows:

*“This recommendation is primarily driven by access to justice considerations. For many small business owners, the reputation of their business is inextricably intertwined with their own reputation. Removing or restricting their right to sue in defamation may unduly hamper their ability to seek a remedy for reputational harm”.*¹⁴⁴

It also notes that the issue of a corporation's standing to sue in defamation law has become more important in the era of online reviews.¹⁴⁵

2.5.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss;
- provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm; in the case of a body that trades for profit, this means serious financial loss;
- do nothing.

¹⁴² Section 9(5).

¹⁴³ *Defamation Law in the Internet Age, Final Report, Law Commission of Ontario*, March 2020.

¹⁴⁴ *ibid* at p. 66.

¹⁴⁵ *ibid* at p. 68.

Option 1: Provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss

Arguments in favour

- A body corporate cannot suffer hurt, distress or injury to feelings.
- While a body corporate has a right to defend itself against defamatory allegations, it could be argued that it is difficult to see how a body corporate could show that its reputation was damaged if it suffered no financial loss or was unlikely to do so.
- The ECtHR has repeatedly recognised the public interest in commercial practices and the concomitant interest in being able to scrutinise such actions, *inter alia* through (critical) media reporting.¹⁴⁶
- It would be very difficult for a body corporate to show that it suffered financial loss as a result of a defamatory statement (e.g. a financial loss as a result of individuals or bodies deciding not to trade or associate themselves with it). However, allowing a body corporate to take an action for defamation where it can show that a defamatory statement is likely to cause financial loss should help to overcome this difficulty.
- This approach is adopted in a number of other common law countries e.g. England and Wales and Scotland.

Arguments against

- Corporate reputation is a very important asset of a business and should be protected.
- In the case of small corporate bodies, the reputation of the individual owners is inextricably linked to the reputation of the business.
- The Act provides for a wide range of defences in sections 16 to 27 to protect freedom of expression while guarding the reputations of individuals and bodies corporate. It can be argued that the Act strikes the correct balance between the right to freedom of expression and the right to reputation and good name.
- The present legal position sought to recognise the full importance – commercial and non-commercial – of a body corporate’s reputation, and to protect that reputation against defamatory statements, even in situations where it might be difficult to prove or measure resulting financial loss.¹⁴⁷
- It might be very difficult to prove a causal link between a defamatory statement and loss of earnings/value of a business or the extent of the damage caused to the reputation of a business. This might be particularly the case where a body corporate had only recently started up, or had just entered a new market.

¹⁴⁶ Tarlach McGonagle.

¹⁴⁷ Defamation (Amendment) Bill 2014: Seanad, Second Stage:
<https://www.oireachtas.ie/en/debates/debate/seanad/2014-12-03/9/>.

In the case of a small entities (such as SMEs), a financial loss may result in it going out of business before it is in a position to prove such loss in order to take a defamation action.

- A defamatory publication could make it very difficult to recruit or retain staff, or cause distrust in relations with core partners such as the body corporate's banks, customers, or trade unions – it could be very difficult to show the financial implications of such adverse consequences for a body corporate.
- The fact that a business cannot suffer hurt, distress or injury to feelings is an issue that can be taken into account in determining the level of general damages.
- Both the Law Reform Commission *Report on the Civil Law of Defamation*¹⁴⁸ and the *Report of the Legal Advisory Group on Defamation*¹⁴⁹ recommended that there should be a statutory provision that corporate bodies have a cause of action in defamation irrespective of whether financial loss is consequent, or likely to be consequent, upon the publication.
- Not all corporate bodies operate for profit, so this proposal would result in different treatment for different types of bodies corporate which may not be justified.
- The legal implications of confining any such provision to bodies corporate that operate for profit would need to be considered.
- The ECtHR has held that “*in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good*”.¹⁵⁰

Option 2: Provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm; in the case of a body that trades for profit, this means serious financial loss

Arguments in favour

- A serious harm test could involve financial or reputational harm so it would mean that all bodies corporate are treated equally.
- It would be logical to apply higher standards to bodies corporate than to individuals.
- Bodies corporate already have a number of legal means to protect their brand/reputation.
- The constitutional issues in relation to the application of a serious harm test in the case of individuals may not apply.

Arguments against

¹⁴⁸ *Report on Civil Law of Defamation, Law Reform Commission, 1991.*

¹⁴⁹ *Report of the Legal Advisory Group on Defamation, March 2003.*

¹⁵⁰ Tarlach McGonagle quoting from, *Steel and Morris v UK* [2005] ECHR (App no. 68416/01) 19 July 2011

- The concept of serious harm to a plaintiff's reputation is difficult to define and may give rise to mini-trials at a preliminary stage, thus increasing the complexity and costs of proceedings.
- Given the diffuse and often intangible nature of harm to reputation, it could be difficult in practice for plaintiffs to prove serious harm.
- The serious harm test would remove a core question relating to the alleged defamatory statement from the consideration of the jury which has long been embedded in the Irish legal system in defamation case.
- A serious harm test may not have the intended impact of significantly reducing the volume of claims being taken.
- In the case of bodies corporate trading for profit, the arguments against a financial loss requirement set out at option 1 would apply.

Option 3: Do nothing

Arguments in favour

- The arguments against options 1 and 2 set out above would apply.

Arguments against

- The arguments in favour of options 1 and 2 set out above would apply.

Recommendations

The following option is recommended:

- Consider Option 2: Provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm; in the case of a body that trades for profit, this means serious financial loss; consider whether smaller entities such as SMEs should be exempted from this requirement;

The following options are not recommended:

- Option 1: Provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss; and
- Option 3: Do nothing.

2.6 Position of Public Bodies

2.6.1 Current Legal Position

The Act does not include specific provisions in relation to public bodies. The application of the Act to bodies corporate is set out above. As many public bodies are also corporate bodies, they are therefore entitled under section 12 to issue defamation proceedings based on reputational damage, even if that body would not suffer financial loss.

2.6.2 Main issues raised in course of review

A number of submissions by private individuals recommended that entities performing government or regulatory functions should not be allowed to sue in defamation.¹⁵¹ One submission indicated that the law needs to clarify whether State bodies should be able to take defamation actions.¹⁵²

Private Members' Bill – Defamation (Amendment) Bill 2014

In 2014 a Private Members' Bill, the Defamation (Amendment) Bill 2014, was brought forward by Senator Crown. It proposed to amend the Defamation Act 2009, to restrain a public body from bringing an action for defamation in respect of statements which may injure its reputation, by providing that only nominal damages of €1 may be awarded in such proceedings.¹⁵³ The stated intention of the Bill was to prevent public bodies from using the resources of the State to influence comment by the press and public.

The Government did not oppose the Bill at the time but expressed reservations about its content. It also stated that there may be a case in principle for reviewing the extent to which a public body, which is a corporate body, should be entitled to bring a defamation action under section 12 of the Act, and for assessing to what extent such an action remains relevant and appropriate. Moreover, it stated that any such review should take careful account of the many different types of public bodies which are corporate bodies.

2.6.3 Comparative perspectives

In **England and Wales**, the capacity of public bodies to sue for defamation is governed by the 1993 decision of the House of Lords in *Derbyshire County Council v Times Newspapers*¹⁵⁴. That decision held that neither a local authority or a Government Department, nor the Crown itself, has a right to sue for defamation in relation to the exercise of its “*governmental and administrative functions*”:

*“[It] would be a serious interference with the free expression of opinion hitherto enjoyed ... if the wealth of the State, derived from the State’s subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.”*¹⁵⁵

However, this does not prevent an officer, or an individual member, of a government body suing personally for defamation, if the defamatory statement can be interpreted as damaging their individual reputation¹⁵⁶. Gatley adds that a public body that does not exercise

¹⁵¹Anonymous1, Lee Crowley, K. Fitzpatrick, Anonymous2, T. O’Conaill, H. O’Driscoll, D. Reynolds.

¹⁵² Law Society (anonymous solicitor(s))

¹⁵³Defamation (Amendment) Bill 2014 (Bill 63 of 2014), <https://www.oireachtas.ie/en/bills/bill/2014/63/>. The Bill lapsed with the dissolution of the Dáil and Seanad on 28 April 2016.

¹⁵⁴ *Derbyshire County Council v Times Newspapers* [1993] AC 534.

¹⁵⁵ *Derbyshire*, above, at p. 549, citing a South African judgment from 1946. See Gatley, on Libel and Slander, 12th edn., para 8.20.

¹⁵⁶ *Derbyshire*, above. See Gatley, above, para 8.20, at footnotes 138-139.

governmental or administrative functions (such as a university funded by public money) may remain entitled to sue for defamation¹⁵⁷.

In **Scotland**, section 2(1) of the Defamation and Malicious Publication (Scotland) Act 2021 contains a prohibition on public authorities¹⁵⁸ bringing defamation proceedings. It also specifies that a person is a “public authority” if the person’s functions include functions of a public nature.¹⁵⁹ Section 2(5) clarifies that the section does not prevent an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder or employee).

In **Northern Ireland**, during the Northern Ireland Law Commission consultation, there was some consideration of introducing a bar on defamation claims by “*emanations of the state, or corporate bodies delivering services with public money*”. However, it was considered that such situations may also be “*adequately addressed through the clause 1 requirement that serious harm be demonstrated if any such claim is to be successful*”.¹⁶⁰

In **Australia**, public bodies were precluded under common law from suing for defamation, with Australian courts following the *Derbyshire* judgment. The uniform defamation laws now include statutory provisions to this effect¹⁶¹.

Similarly, **Canadian** law “*precludes a government body from suing for defamation*”¹⁶².

In **New Zealand**, the 1992 Defamation Act does not include express provisions regarding public sector bodies.

2.6.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide for a limit on the amount of damages that can be awarded to a public sector/state body;
- provide for a limit on the amount of damages that can be awarded to a public authority;
- provide that a public authority is not entitled to bring a defamation action;
- do nothing.

¹⁵⁷ Gatley, above, para 8.20, at footnote 126, citing *Duke v University of Salford* 2013 EWHC 196 QB, where the High Court held that although the university was funded by public money, it was not to be ‘*equated with central or local government*’ and therefore was not covered by the *Derbyshire* ruling.

¹⁵⁸ A public authority is defined as: (a) any institution of central government, including in particular the Scottish Ministers and any non-natural person owned or controlled by them, (b) any institution of local government, including in particular each local authority and any non-natural person that such an authority owns or controls, (c) a court or tribunal, (d) any person or office not falling within paragraphs (a) to (c) whose functions include functions of a public nature (unless excluded by regulations made under section 2(6)).

¹⁵⁹ Defamation and Malicious Publication (Scotland) Act 2021, <https://www.legislation.gov.uk/asp/2021/10/enacted>

¹⁶⁰ Scott, Andrew (2016) *Reform of defamation law in Northern Ireland*. Department of Finance, Belfast. (4.03-4.04)

¹⁶¹ Gatley, para 8.20, footnote 137, citing the example of s. 9 Defamation Act 2005 (New South Wales).

¹⁶² Gatley, on Libel and Slander, 12th edn., para 8.20, footnote 137.

Option 1: Provide for a limit on the amount of damages that can be awarded to a public sector/state body

Arguments in favour

- Setting a limit on the amount of damages that can be awarded to a public sector/state body would facilitate the media in holding such bodies to account without the fear of being sued for large awards of damages.
- Allowing such bodies to sue for defamation while limiting the amount of damages that could be awarded would ensure that public sector/state bodies can vindicate their reputation.
- This option would be in line with the Private Members Defamation (Amendment) Bill 2014.

Arguments against

- Setting a limit on the amount of damages that can be awarded to a public sector/state body would need careful consideration, in particular, as regards its constitutionality.
- There are a broad range of public sector/state bodies so determining which bodies should be subject to a limit on the amount of damages that can be awarded would be difficult.
- Setting a limit on the amount of damages that can be awarded to a commercial state body would result in a difference in treatment between such bodies and private sector competitors which could create legal difficulties and would give rise to questions of fairness.
- It could undermine the effect of damages in helping to ensure that a publisher makes sure to verify the truth and veracity of the content, thoroughly checks the sources, and generally takes every available precaution prior to publication.
- In practice, defamation proceedings by public sector/state bodies are very rare, and it can hardly be argued that the press or the public in Ireland are reluctant to enter into robust criticism and debate regarding the actions and policies of public sector/state bodies.¹⁶³

Option 2: Provide for a limit on the amount of damages that can be awarded to a public authority

Arguments in favour

- The arguments in favour of setting a limit on the amount of damages that can be awarded to a public sector/state body would apply.
- A public authority cannot suffer financial loss.

¹⁶³ Defamation (Amendment) Bill 2014: Seanad Second Stage,
<https://www.oireachtas.ie/en/debates/debate/seanad/2014-12-03/9/>

- Limiting the amount of damages that can be awarded could put greater focus on other remedies, such as a correction order or an order prohibiting publication or further publication of a defamatory statement, which may be more appropriate in the case of public sector/state bodies.

Arguments against

- Setting a limit on the amount of damages that can be awarded to a public authority would need careful consideration, in particular, as regards its constitutionality.
- Setting a limit on the amount of damages could undermine the effect of damages in helping to ensure that a publisher makes sure to verify the truth and veracity of the content, thoroughly checks the sources, and generally takes every available precaution prior to publication.
- In practice, defamation proceedings by public sector/state bodies are very rare, and it can hardly be argued that the press or the public in Ireland are reluctant to enter into robust criticism and debate regarding the actions and policies of public sector/state bodies.¹⁶⁴

Option 3: Provide that a public authority is not entitled to bring a defamation action

Arguments in favour

- It would facilitate public scrutiny of such bodies without the fear of being sued.
- Public authorities should not use State resources to issue defamation proceedings.

Arguments against

- A defamatory statement can affect the reputation of, and undermine the confidence of the public in, a public authority, so such a body should be able to take an action under the Defamation Act.
- Irresponsible or scandalous comments about a public authority could undermine public trust in such a body which would be contrary to the public interest. It is particularly important, that the public's confidence in such bodies is not undermined by defamatory statements.
- There are already a number of defences available under the Act (e.g. fair and reasonable publication on a matter of public interest (section 26)) that should provide sufficient defences for the media in respect of investigative journalism into public authorities. It can be argued that the Act strikes the correct balance between the right to freedom of expression and the right to a reputation or a good name.

¹⁶⁴ Defamation (Amendment) Bill 2014: Seanad Second Stage,
<https://www.oireachtas.ie/en/debates/debate/seanad/2014-12-03/9/>

- In practice, defamation proceedings by public bodies are very rare, and it can hardly be argued that the press or the public in Ireland are reluctant to enter into robust criticism and debate regarding the actions and policies of public bodies.¹⁶⁵

Option 4: Do nothing

Arguments in favour

- There isn't evidence that the current law creates a barrier to freedom of expression.
- The Act contains a wide range of defences to protect freedom of speech of news media while guarding the reputations of natural and legal persons.
- In practice, defamation proceedings by public bodies are very rare, and it can hardly be argued that the press or the public in Ireland are reluctant to enter into robust criticism and debate regarding the actions and policies of public bodies.¹⁶⁶
- The current provisions in the Defamation Act strike the right balance between the right of freedom of expression and the right to reputation or good name.

Arguments against

- The unique features of public authorities warrant specific regulation.

Recommendations

The following option is recommended:

- Option 3: Consider whether to provide that a public authority is not entitled to bring a defamation action.

The following options are not recommended:

- Option 1: Provide for a limit on the amount of damages that can be awarded to a public sector/state body;
- Option 2: Provide for a limit on the amount of damages that can be awarded to a public authority; and
- Option 4: Do nothing.

2.7 Defamation of the dead

2.7.1 The current legal position

Prior to the introduction of the 2009 Act, a defamation action did not survive the death of the plaintiff taking the action. Section 39 of the Act provides that “*a cause of action for defamation vested in him immediately before his death shall survive for the benefit of his estate.*”¹⁶⁷

¹⁶⁵ Defamation (Amendment) Bill 2014: Seanad Second Stage, <https://www.oireachtas.ie/en/debates/debate/seanad/2014-12-03/9/>

¹⁶⁶ Defamation (Amendment) Bill 2014: Seanad Second Stage, <https://www.oireachtas.ie/en/debates/debate/seanad/2014-12-03/9/>

¹⁶⁷ Section 39(2) provides:

However, the Act also specifies that any awards in such cases shall not include general, punitive or aggravated damages. The only awards available to the estate of the deceased person are special damages and legal costs, with any remedies available being those provided in the legislation i.e. declaratory or correction orders.¹⁶⁸

Until recently the section 39 provision had never come before Irish courts. The first example of a defamation case taken by the estate of a deceased person under the 2009 Act was instigated in the circuit court in 2019.¹⁶⁹ In that case, the plaintiff had initiated proceedings, in 2016, prior to his death. Proceedings are continuing.

The 1991 Law Reform Commission Report on *The Civil Law of Defamation*¹⁷⁰ considered the issue and recommended that:

- (1) *There should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication;*
- (2) *The right to institute such proceedings should be vested solely in the personal representative of the deceased who should, however, be under a statutory obligation to consult the immediate family of the deceased, i.e. spouse, children, parents, brothers and sisters, before the proceedings are instituted;*
- (3) *The period of limitation within which proceedings must be instituted should be 3 years from the date of death of the allegedly defamed person;*
- (4) *The only remedy available should be a declaratory order and, where appropriate, an injunction.*

The 2003 *Report of the Legal Advisory Group on Defamation* did not however endorse this recommendation and noted that “*its essential aim - to provide some mechanism whereby the*

Section 7 of the Civil Liability Act 1961 is amended by –

(a) *the insertion of the following subsection:*

“(1A) On the death of a person on or after the commencement of section 39(2)(a) of the Act of 2009, a cause of action for defamation vested in him immediately before his death shall survive for the benefit of his estate.”,
and

(b) *the insertion of the following subsection*

“(2A) Where by virtue of subsection (1A) of this section, a cause of action for defamation survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include general damages, punitive damages or aggravated damages.”

¹⁶⁸ McMahon, B. and Binchy, W., *Law of Torts*, 4th edn, (2013), [34.380].

¹⁶⁹ ‘Late Donegal councillor’s estate to continue case against Gemma O’Doherty’: <https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/late-donegal-councillor-s-estate-to-continue-case-against-gemma-o-doherty-1.3840559>;

‘Estate of deceased politician allowed continue defamation claim against journalist O’Doherty’: <https://www.independent.ie/irish-news/courts/estate-of-deceased-politician-allowed-continue-defamation-claim-against-journalist-odoherty-37959228.html>;

‘McEniffs seek recordings from O’Doherty in defamation case’: <https://www.businesspost.ie/news-focus/mceniiffs-see-recordings-from-odoherty-in-defamation-case-99efd69f>

¹⁷⁰ *Report on The Civil Law of Defamation (LRC 38-1991)*: <https://www.lawreform.ie/fileupload/Reports/rDefamation.pdf>

reputation of a deceased person can be vindicated - can largely be realised by way of an effective Press Council, subject to the proviso that the role assigned to such a Council has the appropriate breadth".¹⁷¹

Relevant ECHR Case-Law

*Tolstoy v. United Kingdom*¹⁷²

The case centred on a pamphlet written in the 1980s by the applicant, alleging that a fellow college staff member had engaged in improper mistreatment of prisoners in Yugoslavia during the Second World War. The person accused took a libel case and was awarded £1.5m in damages, the highest award ever given at the time in that jurisdiction. The applicant appealed to the ECtHR alleging a violation of his right to freedom of expression as contained in Article 10 of the Convention¹⁷³, and in particular, Part 2 which provides:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..."

He argued that the damages awarded against him could not be considered to have been "prescribed by law", and that the size of the award and the breadth of the injunction had been disproportionate to the aim of protecting the persons "reputation or rights" and had thus not been "necessary in a democratic society".

The Court held that the award was "prescribed by law" within the meaning of Article 10 of the Convention; but also held that the award, in regard to its size taken in conjunction with the state of national law at the relevant time was not "necessary in a democratic society" and thus constituted a violation of his right to freedom of expression as guaranteed by Article 10.

In its judgment, it noted that the European Court of Human Rights has recently summarised the major principles of its case-law on the "necessity" test in Article 10 of the Convention as follows:

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned.

¹⁷¹ 2003 Report of the Legal Advisory Group on Defamation, 15:

<http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>

¹⁷² Tolstoy v United Kingdom [1995] 20 EHRR 442:

<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-45632&filename=001-45632.pdf&TID=thkbhmlzk>

¹⁷³ "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises": https://www.echr.coe.int/documents/convention_eng.pdf

The ECtHR ruling is seen as illustrating that that even where there is an underlying cause of action, a disproportionate award can still be a breach of Article 10's protection of freedom of expression. The context of the case, involving freedom of expression in relation to a work of historical enquiry, is also pertinent.

Putistin v. Ukraine ¹⁷⁴

The case concerned an article written about the legendary “Death Match” between Ukrainian footballers and members of the German Luftwaffe in 1942 in Kyiv. The applicant alleged that the article discredited his father, who had played in the game, as it suggested that he had been a collaborator. He claimed that, by rejecting his requests for the article to be rectified, the Ukrainian courts had failed to protect his and his family’s reputation.¹⁷⁵

The Court examined the complaint under Article 8 (right to respect for private and family life).¹⁷⁶ It accepted that courts might sometimes be required to protect the reputation of the deceased and thus came within the scope of Article 8. It also accepted that the reputation of a deceased member of a person’s family might affect one’s private life and identity, provided that there was a sufficiently close link between them.

Though a quotation in the article had suggested that some members of the Ukrainian team had collaborated with the Gestapo, none of the pictures or words referred to the applicant’s father. The level of impact on the applicant had thus been quite remote, and as a result, the Court found that the applicant had not been directly affected by the publication. Moreover, the domestic courts had been obliged to have regard to the right of the newspaper and journalistic freedom of expression, and to balance those against the rights of the applicant. The article had informed the public of a proposed film on an historical subject. It had been neither provocative nor sensationalist. As the applicant’s Article 8 rights had been affected only marginally and in an indirect manner, it found that the domestic courts had struck an appropriate balance between the competing rights.¹⁷⁷

*Zhugashvili v. Russia (dec.)*¹⁷⁸

In this case the applicant, the grandson of the former Soviet leader, Joseph Stalin sued the *Novaya Gazeta* newspaper for defamation after it published an article accusing leaders of the Soviet Politburo, including Stalin, of being “bound by much blood” in the order to execute Polish prisoners of war at Katyń in 1940. He also sued the newspaper when it subsequently published a further article giving the background to the defamation proceedings.

The ECtHR reaffirmed the principle that publications concerning the reputation of a deceased member of a person’s family might, in certain circumstances, affect that person’s private life

¹⁷⁴ *Putistin v. Ukraine* [2013] ECHR (App no. 16882/03).

¹⁷⁵ *Ukrainian courts were justified in not ordering rectification of article about “Death match” in 1942 between Ukrainian football team and German Luftwaffe*, ECHR 342 (2013) Press Release, [file:///C:/Users/ohagantx/Downloads/003-4575874-5531100%20\(2\).pdf](file:///C:/Users/ohagantx/Downloads/003-4575874-5531100%20(2).pdf)

¹⁷⁶ (Article 8, ECHR) 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.* 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others;*

https://www.echr.coe.int/documents/convention_eng.pdf

¹⁷⁷ Information Note on the Court’s case-law No. 168:

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-9073%22%7D>

¹⁷⁸ *Zhugashvili v. Russia (dec.)* - [41123/10](#) Decision 9.12.2014 [Section I]

and identity and thus come within the scope of Article 8 of the ECHR. However, it distinguished between defamation of a private individual and legitimate criticism of public figures who, by taking up leadership roles, expose themselves to outside scrutiny. It held that the Katyń tragedy and the related historical figures' alleged roles and responsibilities inevitably remained open to public scrutiny and criticism, as they presented a matter of general interest for society. Given that such cases required the right to respect for private life to be balanced against the right to freedom of expression, the Court reiterated that it was an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth.

Independent historical research in Poland

Earlier this year, a Polish libel case made headlines when a court ordered two prominent Holocaust scholars to apologise to a woman who claimed her deceased uncle had been slandered in a two-volume historical work.¹⁷⁹ The court ruled that the editors of the book apologise for saying that her uncle had contributed to the death of Jewish people during the Nazi occupation. The judge involved expressed the view that the ruling should not have a cooling effect on academic research, and in the courts opinion, the payment of compensation, would have constituted such a factor. As a result, it ruled out such a payment.

The case had been followed closely by critics and academics who were concerned that the trial may undermine freedom of academic research. It came against a backdrop of a 2018 attempt to pass a law criminalising the act of falsely blaming Poland for Germany's Holocaust crimes. The criminal penalties were eventually dropped in favour of civil penalties after the legislation was heavily criticised internationally.¹⁸⁰

It has been argued that the case covered similar ground to the proposed law by attempting to establish offence to national dignity as grounds for suing over any such claims in the future. The case is not final, as one of the authors is planning to appeal. But many scholars believe it will set an important precedent for freedom of Holocaust research in Poland.

2.7.2 Main issues raised in course of review

Only two submissions raised the issue of section 39. Both advocated its removal. Among the reasons cited were: the lack of general, punitive or aggravated damages, and the difficulties in establishing special damages in the absence of the deceased and inability to cross examine; a lack of balance between the right to freedom of expression and that to a good name; a chilling effect on free expression after death; and the lack of an equivalent provision in UK legislation.¹⁸¹

2.7.3 Comparative perspectives

In **England and Wales**, the Defamation Act 2013 does not contain any provision regarding defamation of the dead.

¹⁷⁹ 'Holocaust scholars ordered to apologize in Polish libel case': <https://apnews.com/article/poland-europe-warsaw-13f643d34b511cce0f2bcf2f933d4698> ; 'Polish court orders historians to apologise over Holocaust book': <https://www.reuters.com/article/us-poland-holocaust-idUSKBN2A91M7>

¹⁸⁰ 'Future of Holocaust research in Poland hinges on libel case': <https://apnews.com/article/world-news-world-war-ii-trials-poland-germany-f49788cd4ec3e3d161beaa75ba0df7da>

¹⁸¹ Newsbrands, C. Morris.

In **Scotland**, the Defamation and Malicious Publication (Scotland) Act 2021 does not contain any provision in relation to defamation of the dead.

In **Northern Ireland**, the 2016 *Recommendations to the Department of Finance for Reform of Defamation Law in Northern Ireland* makes no reference to defamation of the dead.¹⁸²

In 2014, following the introduction of the 2013 Act in England and Wales, the Northern Ireland Assembly Committee for Finance and Personnel produced a briefing paper in consideration of a proposed Private Member's Bill in relation to defamation.¹⁸³ It noted that no provision was made in legislation in England and Wales, or the Republic of Ireland, regarding defamation of deceased persons. The main arguments against such legislation were: that reputation is personal; that harm cannot be shown after death; that the deceased cannot give evidence in court; and that such legislation may inhibit commentary on historical figures. It also noted that although there had been no change to the law in any of the neighbouring jurisdictions, if the family of a deceased person feels aggrieved it was suggested these issues could be dealt with through codes of practice in relation to the media – a view similar to that of the 2003 *Report of the Legal Advisory Group on Defamation*.

In **Australia**, section 10 of the Model Defamation Provisions provides that a person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to the publication of defamatory matter about a deceased person (whether published before or after his/her death). The Model Defamation Amendment Provisions 2020 insert a new subsection in section 10 to allow a court to determine the question of costs in respect of defamation proceedings that end because of the death of a party if it is in the interests of justice to do so.¹⁸⁴

In **Canada**, the Ontario report on *Defamation Law in the Internet Age* does not make any recommendations in relation to defamation of the dead.

In **New Zealand**, the 1992 Defamation Act does not expressly provide for defamation of the dead.

2.7.4 Option for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following option was identified:

- repeal section 39 of the Act (which provides for survival of a defamation on the death of the plaintiff).

Arguments in favour

- Traditional view that the dead cannot be defamed and that an action ends with the death of a person.

¹⁸² Scott, Andrew (2016) *Reform of defamation law in Northern Ireland*. Department of Finance, Belfast.

¹⁸³ 'Defamation and the Dead', Research and Information Service, Briefing Paper 62/14 30 May 2014 NIAR 254-14, available at:

http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/finance_personnel/6214.pdf

¹⁸⁴ Model Defamation Amendment Provisions 2020 prepared by the Parliamentary Counsel's Committee and approved by the Council of Attorneys-General on 27 July 2020.

- A lack of general, punitive or aggravated damages, and difficulties in establishing special damages in the absence of the deceased.
- Inability to cross examine the deceased.

Arguments against

- Section 39 does not involve defamation of the dead, either recently or historical, but rather the continuation of an existing cause of action after the death of a plaintiff for the benefit of their estate.¹⁸⁵
- Awards available to the estate of the deceased person are limited to special damages and legal costs. Section 39 means that defamation is treated in the same way as other torts e.g. personal injuries.
- ECHR case-law has accepted the possibility that courts may sometimes be required to protect the reputation of the deceased, within the scope of Article 8 of the ECHR.
- ECHR case-law has accepted that the reputation of a deceased member of a person's family might affect one's private life and identity, provided that there was a sufficiently close link between them.
- To date, there has been only one instance of a case taken by the estate of a deceased person under section 39 of the 2009 Act, which implies that it will remain an uncommon avenue in the future.
- The subject of defamation of the dead did not attract much attention in submissions and does not appear to be a priority issue.

Recommendation

The following option is not recommended:

- Repeal section 39 of the Act (which provides for survival of a defamation on the death of the plaintiff).

¹⁸⁵ A personal representative of a deceased person may continue proceedings commenced by the deceased, or may initiate proceedings within the limitation period set out in the 2009 Act (i.e. one year extendable to not more than two years), provided the defamatory statement concerning the person was published before his/her death. (Maher, John, *The Law of Defamation*, 2nd edn. at p. 376). In *Joseph Hewitt as Legal Personal Representative of the Estate of Dolores Hewitt (Deceased) v The Health Service Executive* ([2014] IEHC 300), a personal injuries case, the High Court stated that section 7(1) of the Civil Liability Act 1961 (on which section (1A) of that Act as inserted by section 39(2) of the 2009 Act is based) “enables the personal representative of a deceased to continue an action already commenced by a deceased prior to his or her death. In that case, the personal representative will apply for an order substituting the personal representative as plaintiff in place of the deceased in the action already commenced. Section 7 also allows for the commencement by the personal representative of an action vested in the deceased at the date of death.” While this aspect of the High Court decision was not appealed, the Court of Appeal (in an appeal against the issue of the time limit for the initiation of an action by the personal representative of the deceased) confirmed the High Court’ interpretation of section 7 (*Joseph Hewitt as Legal Personal Representative of the Estate of Dolores Hewitt (Deceased) v The Health Service Executive* ([2016] IECA 194).

Chapter 3: Defences

3.1 Truth

As the relevance of this defence depends on the maintenance of the “presumption of falsity”, the following text in relation to the defence of truth should be read in conjunction with the text on the presumption of falsity in chapter 2.

3.1.1 Current legal position

Section 16 of the Act provides that it is a defence (the defence of truth) to a defamation action for the defendant to prove that the statement in respect of which the action was brought “*is true in all material respects*”. Subsection (2) of that section provides that where the statement contains 2 or more allegations, the defence of truth “*shall not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining allegations*”.

3.1.2 Main issues raised in course of review

See text in relation to presumption of falsity, Chapter 2.

3.1.3 Symposium on Reform of Defamation Law

In his presentation to the Symposium on Reform of Defamation Law, Professor Neville Cox pointed to the difference in the wording of the 2009 Act and the England and Wales legislation. Specifically, he pointed out:¹⁸⁶

*“... it is worth noting that there is a difference between the approach in the 2009 Act and in the UK 2013 Act to the defence of truth generally. Under s. 16 of the 2009 Act, in order to avail of the defence of truth the defendant must prove that the statement is true ‘in all material respects’. Under s 2 of the 2013 Act, the defence will apply if the defendant can prove that the statement is substantially true. Whether this difference in wording will have much impact in practice is uncertain. Nevertheless it does suggest a different focus in so far as the defence is concerned, and thus might warrant legislative attention.”*¹⁸⁷

¹⁸⁶ Professor Neville Cox, *Defamation Law and the 2009 Act*, Presentation to Symposium on Reform of Defamation Law, 14 November 2019

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

¹⁸⁷ Professor Neville Cox, *Defamation Law and the 2009 Act*, Presentation to Symposium on Reform of Defamation Law, 14 November 2019

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

3.1.4 Comparative Perspectives

In **England and Wales**, section 2 the Defamation Act 2013¹⁸⁸ abolished the pre-existing common law defence of justification and replaced it with the statutory defence of truth i.e. where the defendant shows that the imputation conveyed by the statement complained of is substantially true. Where the statement conveys two or more imputations, the defence does not fail if one or more of the imputations is not shown to be substantially true if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

In **Scotland**, section 5 of the Defamation and Malicious Publication (Scotland) Act 2021 replaces the current common law and statutory defence of *veritas* (truth) with a statutory defence of truth: it provides that it is a defence to a defamation proceedings for the defendant to show that the imputation conveyed by the statement complained of is true or substantially true.¹⁸⁹

In **Northern Ireland**, the common law recognises the defence of justification (truth) which has been refined by statutory amendments¹⁹⁰ e.g. section 5 of the Defamation (Northern Ireland) Act 1955 provides that where a statement contains two or more charges against a plaintiff, a defence of justification will not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. The report on *Reform of Defamation Law in Northern Ireland*¹⁹¹ recommends that a provision similar to section 2 of the England and Wales Act should be introduced in Northern Ireland.¹⁹²

¹⁸⁸ Defamation Act 2013, section 2 (Truth)

(1) *It is a defence to an action for defamation to show that the imputation conveyed by the statement complained of is substantially true.*

(2) *Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.*

(3) *If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.*

The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

¹⁸⁹ *Defence of truth*

(1) *It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or substantially true.*

(2) *Where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, the defence under subsection (1) does not fail if –*

(a) *not all of the imputations have been shown to be true or substantially true, and*

(b) *having regard to the imputations that have been shown to be true or substantially true, publication of the remaining imputations has not caused serious harm to the reputation of the pursuer.*

¹⁹⁰ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, Dr Andrew Scott, June 2016 at para. 2.09.

¹⁹¹ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, Dr Andrew Scott, June 2016.

¹⁹² The report also recommends the withdrawal of the “single meaning rule” coupled with the introduction of a bar to the bringing of claims where a publisher has made a correction or retraction promptly and prominently which would, according to the report, have a significant bearing on future litigation involving the defence of justification.

In **Australia**, section 25 of the Model Defamation Provisions provides that it is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter are substantially true. Section 26 (as amended) provides for a defence of contextual truth, which deals with a situation where there are a number of defamatory imputations in a statement but the plaintiff chooses to proceed with one or more but not all of them. In that case a defendant may have a defence of contextual truth if he/she proves that (a) the statement carried one or more imputations that are substantially true (contextual imputations); and (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

In **Ontario**, the common law includes a defence of justification in accordance with which the burden of rebutting the presumption of falsity and proving the substantial truth of the “sting” of the statement as a matter of fact falls on the defendant. This defence is supplemented by section 22 of the Libel and Slander Act which provides that the defence of justification may succeed against a defamatory allegation even if it does not succeed against other defamatory allegations, where the remaining allegations do not, on their own, materially injure the reputation of the plaintiff. The Law Commission of Ontario’s report on *Defamation Law in the Internet Age* recommends that a provision similar to section 22 be included in Ontario’s proposed new Defamation Act.¹⁹³

In **New Zealand**, section 8 of the Defamation Act 1992 provides for the defence of truth. The defence will be successful if the defendant proves that imputations contained in the allegedly defamatory material were true or materially true, or where the defendant proves that the publication taken as a whole was in substance true or was in substance materially true.

3.1.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- require the plaintiff to prove that the words complained of are untrue;
- amend section 16 to allow for the defence of truth where the defendant proves that the statement is true or substantially true;
- provide that pleading the defence of truth should not give rise to the award of aggravated damages;
- do nothing.

Option 1: Require the plaintiff to prove that the words complained of are untrue

See Chapter 2 – Presumption of Falsity

Option 2: Amend section 16 to allow for the defence of truth where the defendant proves that the statement is true or substantially true

Arguments in favour

- This would appear to make it easier for the defendant to prove the defence of truth.

¹⁹³ *Defamation Law in the Internet Age*, Law Commission of Ontario, Final Report, March 2020.

- This is the approach adopted in other common law jurisdictions.

Arguments against

- The precise implications in practice of this proposal are not clear.

Option 3: Provide that pleading the defence of truth should not give rise to the award of aggravated damages

Arguments in favour

- A defendant should be able to vigorously defend his/her position without risking having aggravated damages awarded against him/her.

Arguments against

- The conduct of the defence may result in aggravation of the original defamation.
- Whether or not the conduct of the defence has resulted in aggravation of the damage caused to the plaintiff's reputation should be left to the court to determine.

Option 4: Do nothing

Arguments in favour

- The arguments set out in Chapter 2 against the abolition of the presumption of falsity and against option 2 above support the retention of the existing section 16.
- Section 8 of the Act provides that where a party in a defamation action (other than an application for a declaratory order) serves pleadings containing assertions or allegations of fact he/she shall swear an affidavit verifying those assertions or allegations. The other party, unless the court otherwise directs, is entitled to cross-examine the party who swore the affidavit in relation to any statement in the affidavit. It is an offence for a person to make a statement in an affidavit that is false or misleading in any material respect which he/she knows to be false or misleading. This provision was introduced as a result of a recommendation of the Legal Advisory Group on Defamation¹⁹⁴ which pointed out that the consequences of such a provision would be that a plaintiff could be examined in court in relation to the contents of the affidavit. This proposal was suggested as an alternative to removing the presumption of falsity.

Arguments against

- The arguments in favour of the abolition of the presumption of falsity set out in Chapter 2 and in favour of option 2 above apply.

¹⁹⁴ *Report of the Legal Advisory Group on Defamation (March 2003)*, p.11.

Recommendation

It is recommended that the defence of truth as set out in section 16 of the Act should not be amended.

3.2 Absolute Privilege

3.2.1 Current legal position

Section 17 of the Act provides for the defence of absolute privilege. Subsection (1) provides that it is a defence to a defamation action for the defendant to prove that the statement in respect of which the action is brought would, if it had been made immediately before the commencement of section 17, have been considered under the law as having been made on an occasion of absolute privilege. Subsection (2) sets out an extensive, but non-exhaustive, list of statements which attract absolute privilege under the Act. Broadly, subsection (2) provides for absolute privilege in (i) the executive and government context; (ii) the legislative and parliamentary context (including the European Parliament); and (iii) the judicial and quasi-judicial context.

Absolute privilege is a complete defence and is not defeated by malice.

In *Michael Reilly v Iconic Newspaper Limited*,¹⁹⁵ citing *Cox and McCullough*, Reynolds J. reaffirms that the question of whether the occasion upon which the publication was made was one of privilege is a question of law to be determined by the judge. However, if there are questions of fact upon which the question of law depended, then they are, *prima facie*, matters for the jury to determine.

3.2.2 Issue raised in course of review

In accordance with section 17(2) absolute privilege applies to fair and accurate reports of public proceedings (including decisions) of courts in the State, in Northern Ireland and in certain international courts e.g. the Court of Justice of the European Union. Absolute privilege also applies to fair and accurate reports of proceedings to which a relevant enactment referred to in section 40 of the Civil Liability and Courts Act 2004 applies. The Parole Act 2019 extends the scope of absolute privilege to certain statements and decisions made by the Parole Board in the carrying out of its functions. It was suggested that the defence of absolute privilege should be extended to reports of international courts.¹⁹⁶ (Qualified privilege currently applies to such reports.)¹⁹⁷

3.2.3 Law Reform Commission Report: Privilege for reports of court proceedings¹⁹⁸

In its 2019 Report on *Privilege for reports of court proceedings under the Defamation Act 2009*, the Law Reform Commission (LRC) recommended that the Act should be amended to

¹⁹⁵ [2021] IEHC 490

¹⁹⁶ RTE

¹⁹⁷ Section 18(3) and Part 1 of Schedule 1 of the Act, provide that qualified privilege applies (without explanation or contradiction) to a fair and accurate report of public proceedings (including decisions) of courts (including a court-martial) established under the law of any state or place other than the State or Northern Ireland.

¹⁹⁸ Law Reform Commission Report: *Privilege for Reports of Court Proceedings under the Defamation Act 2009*, (LRC 121 – 2019).

provide that, in determining whether a report of court proceedings is “fair and accurate”, all of the circumstances of the case should be considered, including the following non-exhaustive list of circumstances:

- an abridged court report will be privileged provided that it gives a correct and just impression of the proceedings;
- if the report as a whole is accurate, a slight inaccuracy or omission is not material;
- if a report contains a substantial inaccuracy it will not be privileged;
- it is not sufficient to report correctly part of the proceedings if, by leaving out other parts, a false impression is created;
- a report assuming a verdict, before any verdict has been delivered, is not privileged.¹⁹⁹

The Commission explained that this suggested amendment is intended to clarify that a report of court proceedings would meet the “fair and accurate” test in the 2009 Act even where it includes a simple oversight, omission or error. It recommended that, in order to avoid any risk that the proposal could lead to a lack of flexibility, the amendment should provide for a non-exhaustive list of principles so that a court could consider such principles in the context of all of the circumstances of the case.

3.2.4 Comparative Perspectives

In **England and Wales**, section 14 of the Defamation Act 1996 (as amended by section 7 of the Defamation Act 2013) provides that a fair and accurate report of proceedings in public before a court, if published contemporaneously with the proceedings, is absolutely privileged. Section 14 originally extended to courts in the UK and specified international courts e.g. the European Court of Human Rights. Section 7(1) of the Defamation Act 2013 extends the scope of the defence to cover proceedings in any court established under the law of a county or territory outside the UK and to any international court or tribunal established by the Security Council of the United Nations or by international agreement. A court includes any tribunal or body exercising the judicial power of the State. The 2013 amendments resulted in a greater overlap with the defence of qualified privilege in section 15 and Part 1 of Schedule 1 of the 1996 Act²⁰⁰ and common law qualified privilege. However, absolute privilege includes requirements of contemporaneous publication and fairness and accuracy.²⁰¹

In **Scotland**, section 9 of the Defamation and Malicious (Publications) Act 2021 provides for absolute privilege for the contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court; this section applies *inter alia* to courts established under the law of a country or territory outside the UK.

In **Northern Ireland**, the report on *Reform of Defamation Law in Northern Ireland* recommends adoption of the approach set out in section 7 of the 2013 England and Wales.

¹⁹⁹ *ibid* at p. 28.

²⁰⁰ Section 15 and Part 1 of the Schedule to the Defamation Act 1996 provides for qualified privilege for fair and accurate reports of proceedings of courts anywhere in the world, unless publication is shown to be made with malice.

²⁰¹ Gatley on Libel and Slander, Sweet and Maxwell, 12th edn. 2013 at para. 13.36.

3.2.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- extend the territorial scope of absolute privilege under section 17 to cover fair and accurate reports of public proceedings in certain international courts and in the courts of certain specified other States;
- amend the Act as suggested in the Law Reform Commission Report to clarify what is protected under section 17 as a “fair and accurate” report of court proceedings in Ireland.

Option 1: Extend the territorial scope of section 17

Arguments in favour

- The defence of absolute privilege is based on public policy considerations, as opposed to other defences which tend to focus more on freedom of expression as an important factor.²⁰² It is an important aspect of public policy that those involved in the administration of justice should be able to speak their minds without fear of legal challenge. For this reason the defence of absolute privilege also applies to “fair and accurate” reporting of such statements. These arguments would apply equally to fair and accurate reports of public court proceedings in states other than the State or Northern Ireland.
- This would bring Irish law broadly into line with the law in England and Wales and Scotland and the proposed changes to Northern Ireland legislation.²⁰³

Arguments against

- As noted by the Supreme Court in *Irish Times Ltd v. Ireland*,²⁰⁴ it is not possible for all members of the public to be present in court, so that in order to comply with Article 34.1 of the Constitution, the public “*are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public*”. No similar argument exists in respect of court proceedings in other countries.
- The defence of qualified privilege as set out in section 18(3) and Part 1 of Schedule 1 is sufficient.
- The corresponding provision in the England and Wales legislation applies to the contemporaneous publication, whereas there is no such limitation in section 17(2) of 2009 Act; it is therefore not possible to draw a direct comparison with the situation in England and Wales.

²⁰² Cox, N. and McCullough, E., *Defamation Law and Practice* at para. 7-01.

²⁰³ UK law applies to contemporaneous reporting while there is no such limitation in the 2009 Act.

²⁰⁴ [1998] 1 IR 359, at 383.

Option 2: Amend the Act as suggested in the Law Reform Commission Report

Arguments in favour

- The LRC made a number of convincing arguments in relation to this proposal as follows:
 - The suggested principles or criteria clearly indicate that a report of court proceedings would meet the “fair and accurate” test in the Act even where it includes a simple oversight, omission or error.
 - Inserting the principles into the Act would support the view that a person making such a report would not be exposed to the risk of being sued in a defamation action.
 - It would assist in underpinning high quality court reporting and therefore continue to serve the important public interest of informing the public of the work of the courts in the administration of justice under Article 34.1 of the Constitution.

Arguments against

- There are no obvious arguments against this proposal.

Recommendations

The following options are recommended:

- Option 1: Extend the territorial scope of absolute privilege under section 17 to cover fair and accurate reports of public proceedings in certain international courts and in the courts of certain specified other States; and
- Option 2: Amend the Act as suggested in the Law Reform Commission Report to clarify what is protected under section 17 as a “fair and accurate” report of court proceedings in Ireland.

3.3 Qualified Privilege

3.3.1 Current Legal Position

Section 18 (and the associated Schedule 1) of the Act provides for the defence of qualified privilege.

Subsection (1) provides for the continuation of the common law defence of qualified privilege. In most cases, a statement that would benefit from the common law defence will also benefit from the statutory defence.²⁰⁵

Subsection (2) provides that, without prejudice to the generality of subsection (1), it is a defence for the defendant to prove (i) that the statement was published to a person or persons who had a duty to receive, or interest in receiving, the information contained in the statement, or the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest; and (ii) the defendant had a corresponding duty to communicate, or interest in

²⁰⁵ Cox N. and McCullough E., *Defamation Law and Practice* at para. 8-04.

communicating, the information to such person or persons. In accordance, with subsection (7) the duty or interest can be a legal, moral or social duty or interest.

Subsection (3) and Part 1 of Schedule 1 set out a list of statements, reports and determinations that benefit from qualified privilege. Subsection (5) provides that nothing in subsection (3) shall be construed as protecting the publication of a statement that is prohibited by law, or of any statement that is not of public concern and the publication of which is not for the public benefit or limiting or abridging any privilege subsisting apart from subsection (3).

Subsection (4) and Part 2 of Schedule 1 set out a list of statements and reports that benefit from qualified privilege subject to explanation or contradiction i.e. the publisher will have no defence if it is proved that he/she was requested by the plaintiff to publish, in the same medium of communication in which he/she published the statement concerned, a reasonable statement by way of explanation or contradiction and has refused or failed to do so or has done so in a manner that is not adequate or reasonable having regard to all the circumstances.

Section 19 provides that the defence of qualified privilege is destroyed if the plaintiff proves that the defendant acted with malice. It also provides that the defence will not fail where the defendant erroneously believed that the recipient of the statement was a person with a duty or interest in receiving the information concerned.

3.3.2 Main issues raised in course of review

Schedule 1, as enacted, confers qualified privilege on specified documents emanating from Member States of the European Union. A number of submissions to the review proposed that the Act should be amended to ensure that the above provisions apply to the UK and Northern Ireland post-Brexit.²⁰⁶ These recommendations were given effect in the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 20). These amendments ensure the continuation in Ireland of the defence of “qualified privilege” in respect of fair and accurate public interest reporting by Irish-based newspapers and broadcasters of certain statements, meetings and press conferences held in the UK, after the end of the Brexit transition period on 31st December 2020.

A number of submissions to the review suggested that there should be no geographical restrictions on the scope of qualified privilege or that there should be no geographical restrictions on qualified privilege in so far as it relates to press releases and press conferences.²⁰⁷

A number of submissions recommended that qualified privilege should be extended to cover court reports containing a factual error genuinely and honestly made; unless there is proof of malice.²⁰⁸ The former Attorney General’s request to the Law Reform Commission in relation to this issue²⁰⁹ was referred to in a number of those submissions.

²⁰⁶ Law Society (anonymous solicitor(s)), Local Ireland, NewsBrands.

²⁰⁷ Irish Times, NewsBrands, RTE.

²⁰⁸ Independent News and Media, Irish Times, Local Ireland, NewsBrands, NUJ, Eoin O’Dell.

²⁰⁹ Request by the then Attorney General on 18 December 2015 to the Law Reform Commission “to examine the appropriateness of enshrining in our laws a provision that no report of court proceedings should be actionable in defamation in the absence of proof of malice, and further to institute such proceedings the

One submission recommended that a qualified privilege for peer-reviewed statements in scientific and academic journals, along the lines set out in section 6 of the England and Wales Defamation Act 2013, should be introduced.²¹⁰

One submission suggested that qualified privilege should apply to responses to public consultations undertaken by State agencies and departments.²¹¹

One submission suggested that a plaintiff seeking to defeat qualified privilege should swear an affidavit verifying alleged malice.²¹²

In the course of the drafting of the amendments to Schedule 1 of the Act for inclusion in the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, an issue with the drafting of paragraph (1) of Part 2 of Schedule 1 was identified. Section 18 of the Act provides for the defence of qualified privilege. Subsection (4) of section 18 provides that qualified privilege, subject to explanation or contradiction, applies to statements listed in Part 2 of Schedule 1. Paragraph (1) of Part 2 of Schedule 1 (as enacted) states as follows:

A fair and accurate report of the proceedings, findings or decisions of an association, or a committee or governing body of an association, whether incorporated or not in the State or in a Member State of the European Union, relating to a member of the association or to a person subject, by contract or otherwise, to control by the association.

This provision was amended by Part 20 of the 2020 Act by the substitution of “in the State, in a Member State or in the United Kingdom” for “in the State or in a Member State of the European Union”.

It is not clear whether the reference to “in the State or in a Member State of the European Union” (now “in the State, in a Member State or in the United Kingdom”) refers to (i) an association whether or not it is incorporated or (ii) an association whether it is or is not incorporated in the State or in a Member State [or the UK].

This provision replaces paragraph 1 of Part 2 of Schedule 1 of the Defamation Act 1961 which provides:

A fair and accurate report of the findings or decisions of any of the following associations, whether formed in the State or Northern Ireland,

It is clear therefore that the paragraph 1 of Part 2 of Schedule 1 of the 2009 Act is intended to apply to associations (whether incorporated or not) established in the State, a Member State or the UK.

3.3.3 Comparative Perspectives

proposed plaintiff should first have to seek leave of the court and demonstrate on affidavit the *mala fides* alleged.

²¹⁰ Eoin O’Dell

²¹¹ H. O’Driscoll.

²¹² Eoin O’Dell

In the **UK**,²¹³ section 15 of the Defamation Act 1996 confers qualified privilege on the publication of any statement set out in Schedule 1 of the Act unless publication is shown to be made with malice. Part I of Schedule 1 lists statements which attract qualified privilege without explanation or contradiction, e.g. a fair and accurate report of proceedings in public of a legislature or a court²¹⁴ anywhere in the world. Part II (as amended by section 7 of the 2013 Act) lists statements that attract qualified privilege subject to explanation or contradiction, e.g. a fair and accurate copy of, extract from or summary of a notice published by a legislature or government anywhere in the world or an authority anywhere in the world performing governmental (including police) functions; a fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, etc.

In **England and Wales**, the Defamation Act 2013 provides for the expansion of the defence of qualified privilege by introducing a new defence of peer-reviewed statements in scientific or academic journals (section 6). In order for such a defence to apply the statement must (i) relate to a scientific or academic matter; and (ii) have been subject to an independent review in relation to its scientific or academic merit before it was published. (This review must have been carried out by the editor of the journal and at least one person with expertise in the scientific or academic matter concerned.) Any assessments made by the reviewers are also privileged provided that such assessments are published in the same journal and were written in the course of the review, as are fair and accurate copies, extracts from or summaries of such statements. A publication is not privileged if it is shown that it was made with malice. The 2013 Act also inserts a new paragraph 14A into schedule 1 of the 1996 Act to extend qualified privilege to a fair and accurate (i) report of proceedings of a scientific or academic conference held anywhere in the world, or (ii) copy or, extract from or summary of matter published by such a conference.

In **Scotland**, the Defamation and Malicious Publications (Scotland) Act 2021 (section 11 and the Schedule) re-enact section 15 and schedule 1 of the Defamation Act 1996 (as amended); it extends the territorial scope of the defence of qualified privilege to bring Scottish law into line with the law in England and Wales. It also provides for a defence, similar to section 6 of the 2013 Act, in respect of publication in a scientific or academic journal of a statement relating to a scientific or academic matter (section 10).

In **Northern Ireland**, the *Report on Reform of Defamation Law in Northern Ireland*²¹⁵ recommends the introduction of provisions equivalent to sections 6 and 7 of the 2013 Act. However, while recommending the introduction of a defence similar to section 6, the Report notes that the Northern Ireland Law Commission *Consultation Paper on Defamation Law in Northern Ireland*²¹⁶ pointed to a number of difficulties with this provision. In particular, the Consultation Paper points out that there is a measure of uncertainty created by the language used in section 6 as “scientific or academic matter” or “expertise” are not defined. It also indicated that the defence “may not allow for an appropriate balance to be struck between the rights and interests protected under Article 8 ECHR and Article 10 ECHR” as only proof of malice can defeat the privilege. Moreover, it suggests that section 6 can be criticised as “having done both too little and too much”. It points out that it can be argued that it does too little as the privilege applies only to peer reviewed publications that meet specified conditions; it is not

²¹³This provision extends to Scotland and Northern Ireland (as well as England and Wales.)

²¹⁴ Where the report of proceedings in public is contemporaneous, absolute privilege applies (section 14 of the Defamation Act 1996 (as amended by section 7 of the Defamation Act 2013)).

²¹⁵ *Report on Reform of Defamation Law in Northern Ireland*, Recommendations to the Department of Finance.

²¹⁶ NILC 19 (2014)

a general protection for academic speech such as statements made at conferences, in newspapers or in broadcasts. On the other hand it points out that it can be argued that it goes too far in that it is “by no means obvious why scientific speech should be considered worthy of greater protection than is accorded to other forms of important speech on matters of public interest”. It suggests that the defence may be little more than a “sticking plaster approach” to overcome the difficulties of availing of the primary defamation defences namely honest comment/honest opinion or justification. Despite these concerns it recommended the introduction of a defence similar to section 6.

In **Australia**, the Model Defamation Provisions (section 30) provides for the defence of qualified privilege where the defendant proves that (i) the recipient had an interest or an apparent interest in having the information; (ii) the matter was published to the recipient in the course of giving the recipient information on that subject matter; and (iii) the conduct of the defendant is reasonable in publishing the information. The provision lists a number of factors, based on the *Reynolds* decision (see below), that the court may take into account in determining whether the conduct of the defendant was reasonable. The defence can be defeated, for example, if the plaintiff proves that publication was motivated by malice. The Background Paper on the Model Defamation Amendment Provisions 2020²¹⁷ notes that this defence has not been successfully pleaded by a media defendant since the introduction of the Model Defamation Provisions. The Model Defamation Amendment Provisions 2020 provide for the introduction of a new public interest defence (see below under Fair and Reasonable Publication on Matter of Public Interest); some technical amendments have also been made to the original section 30.

The Model Defamation Provisions also provide that it is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in a public document (including a fair copy, summary or extract of/from such a document) (section 28). This defence applies to public documents of any country. Section 29 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of proceedings of public concern. Proceedings of public concern include, for example, any proceedings in public of a parliamentary body, any proceedings in public of a court or arbitral tribunal of any country, any proceedings in public of any inquiry held under the law of any country or under the authority of the government of any country, etc.

The Model Defamation Amendment Provisions 2020 provide for a new defence in respect of scientific and academic peer reviews similar to section 6 of the England and Wales Defamation Act 2013.

In **New Zealand**, the defence of qualified privilege, subject to explanation or contradiction, applies to *inter alia* a fair and accurate report of proceedings of a court outside New Zealand or of the results of those proceedings.²¹⁸

3.3.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

²¹⁷ Background paper, *Model Defamation Amendment Provisions 2020 (Consultation Draft)*, December 2019, at p.20, <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>

²¹⁸ Defamation Act 1992, section 18 and Part 2 of Schedule 1.

- extend the territorial scope of qualified privilege under paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1, to protect fair and accurate reports of press releases and other documents published by courts, Government Departments, local authorities, and police commissioners, of certain countries other than Ireland, other EU Member States and the United Kingdom; and of proceedings of an association, a public meeting, a company general meeting or a meeting of a local authority or an equivalent body to the Health Service Executive, in certain countries other than Ireland, other EU Member States and the United Kingdom;
- extend qualified privilege to cover court reports that fall below the “fair and accurate” standard;
- provide for a defence of peer-reviewed statement in scientific or academic journals;
- specify that qualified privilege applies to responses to public consultations;
- amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the UK (or in certain countries to which the territorial scope is extended under the recommendation made above).

Option 1: Remove the territorial restrictions on the scope of the defence

Arguments in favour

- Limiting the territorial scope of qualified privilege as set out in paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1²¹⁹ seems to make little sense in the internet age.
- Removing the territorial scope of the provision would bring the law into line with other common law jurisdictions.

Arguments against

- Extension of the territorial scope of qualified privilege in this way may add to the complexity of the law.

Option 2: Extend qualified privilege to cover court reports that fall below the “fair and accurate” standard

The Law Reform Commission, in its *Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009*,²²⁰ considered whether a new qualified privilege defence should be introduced.

It listed arguments in favour and against such a proposal as follows:

Arguments in favour

- The potential chilling effect on the media under the current system in accordance with which inaccuracies can expose the publisher of a report of court proceedings to liability for defamation.
- Other challenges facing the media e.g. for many media organisations, particularly local media, court reporting is becoming increasingly unviable. The risk of being sued for

²¹⁹ See footnote 27 which sets out these provisions.

²²⁰ LRC 121-2009.

defamation in the event of an honest mistake occurring are very high from a financial perspective, even if the defendant would be likely to succeed at trial.

Arguments against

- The risk of decline in the quality and standards of court reports as such a defence could (i) lead to a decline in standards of court reporting; (ii) significantly increase the risk of increased dissemination of incorrect information to the public about the administration of justice; (iii) leave individuals who are the subject of inaccurate and unfair reporting without an effective remedy to protect their reputations; (iv) reduce the incentive for publishers to rectify mistakes (the current system under section 17 of the Act acts as an incentive to promptly correct mistakes); (v) reduce the burden to ensure that reports are fair and accurate.
- Such a defence would result in a failure to provide for an appropriate balance between competing constitutional rights i.e. the right to a good name and the right to freedom of expression. It would constitute a disproportionate restriction on the right to a good name under Article 40.3.2° of the Constitution. The current law, which requires accuracy in court reporting, constitutes an appropriate balance between the competing rights engaged.
- The offer of amends procedure facilitates a cost-limiting process for the resolution of cases where a mistake is made.

The Law Reform Commission concluded that the arguments against the introduction of a new qualified privilege defence for court reports that fall below the “fair and accurate” standard are compelling. It therefore recommended that such a defence should not be introduced.

Option 3: Provide for a new defence of peer-reviewed statement in scientific or academic journals

Arguments in favour

- Scientific and academic speech is important and merits protection.
- It would bring Irish law in line with the law in the England and Wales, Scotland and Australia.

Arguments against

- It is not clear why such statements should receive special protection.
- There are already sufficient defences available under the 2009 Act, in particular the defence of honest opinion.
- The privilege would only apply to publications in academic journals; it would not apply to publications at conferences,²²¹ in newspapers, etc.

²²¹ There is already some protection for statements made at international conferences under paragraph 9 of Part 1 of Schedule 1 which provides qualified privilege in respect of “[a] fair and accurate report of any proceedings in public of any international conference to which the Government sends a representative or observer or at which governments of states (other than the State) are represented.”

Option 4: Specify that qualified privilege applies to responses to public consultations

Arguments in favour

- It would ensure that individuals making submissions to public consultations are protected by qualified privilege.

Arguments against

- The Act, in particular section 18(2),²²² already provides a sufficient defence.
- There is a danger that a person who is defamed in a response to a public consultation would be left without a means of redress.
- There is a danger that this defence could be abused.

Option 5: Amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the UK

Arguments in favour

- The law should be clear.

Arguments against

- There are no obvious arguments against this proposal

Recommendations

The following options are recommended:

- Option 1: Extend the territorial scope of qualified privilege under paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1, to protect fair and accurate reports of press releases and other documents published by courts, Government Departments, local authorities, and police commissioners, of certain countries other than Ireland, other EU Member States and the United Kingdom; and of proceedings of an association, a public meeting, a company general meeting or a meeting of a local authority or an equivalent body to the Health Service Executive, in certain countries other than Ireland, other EU Member States and the United Kingdom; and
- Option 5: Amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the

²²² Section 18(2) provides:

Without prejudice to the generality of subsection (1), it shall, subject to section 19, be a defence to defamation action for the defendant to prove that –

- (a) the statement was published to a person or persons who –*
 - (i) had a duty to receive, or interest in receiving, the information contained in the statement, or*
 - (ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and*
- (b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.*

UK (or in certain countries to which the territorial scope is extended under the option above).

The following options are not recommended:

- Option 2: Extend qualified privilege to cover court reports that fall below the “fair and accurate” standard;
- Option 3: Provide for a new defence of peer-reviewed statement in scientific or academic journals; and
- Option 4: Specify that qualified privilege applies to responses to public consultations.

3.4 Honest Opinion

3.4.1 Current legal position

Section 20 of the Act provides for the defence of honest opinion. In broad terms, it is available where a defendant can show that -

- (i) the words were opinion and not fact; and
- (ii) the opinion was honestly held.

An opinion is honestly held if:

- (i) the defendant, at the time of publication, believed in the truth of the opinion or, if the defendant was not the author of the opinion, believed that the author believed it to be true;
- (ii) the opinion was based on allegations of fact (a) specified in the statement containing the opinion; (b) referred to in the statement, that were known or might reasonably be expected to have been known by the person to whom the statement was published; or (c) to which the defence of absolute or qualified privilege would apply; and
- (iii) the opinion was on a matter of public interest.²²³

Where an opinion is based on allegations of facts (i) specified in the statement, or (ii) referred to in the statement, that were known or might reasonably be expected to have been known, by the person to whom the statement was published, the defence of honest opinion will fail unless either (a) the defendant proves the truth of the allegations, or (b) where the defendant does not prove the truth of all the allegations, the opinion is honestly held based on the allegations of fact which have been proved to be true.

²²³ Section 20(2) provides:

Subject to subsection (3), an opinion is honestly held, for the purposes of this section, if –

- (a) at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,*
- (b) (i) the opinion was based on allegations of fact –*
 - (I) specified in the statement containing the opinion, or*
 - (II) referred to in that statement, that were known, or might reasonably be expected to be known, by the persons to whom the statement was published,**or*
 - (ii) the opinion was based on allegations of fact to which –*
 - (I) the defence of absolute privilege, or*
 - (II) the defence of qualified privilege,**would apply if a defamation action were brought in respect of such allegations,**and*
- (c) the opinion related to a matter of public interest.*

Where an opinion is based on allegations of fact to which the defence of absolute or qualified privilege would apply, the defence will fail unless (i) the defendant proves the truth of the allegations, or (ii) where the defendant does not prove the truth of the allegations, (a) the opinion could not reasonably be understood as implying that those allegations were true, and (b) at the time of the publication of the opinion, the defendant did not know or could not reasonably have been expected to know that those allegations were untrue.

Section 21 sets out a mandatory, but non-exhaustive, list of factors to which a court must have regard for the purposes of determining whether a statement was one of opinion or fact as follows:

- (a) the extent to which the statement is capable of being proved;
- (b) the extent to which the statement was made in circumstances in which it was likely to have been reasonably understood as a statement of opinion rather than a statement consisting of an allegation of fact; and
- (c) the words used in the statement and the extent to which the statement was subject to qualification or disclaimer or was accompanied by cautionary words.

The statutory defence of honest opinion reformed and replaced a similar defence called “fair comment” that had developed under common law²²⁴ (however, much of the case-law developed in relation to “fair comment” is still relevant to the defence of “honest opinion”).

This defence essentially seeks to protect the right to freedom of expression, by allowing for free expression and exchange of honestly held opinions on matters of public interest, subject to the conditions set out above. It is “*relevant to critiques and reviews of matters of public interest and other matters held out for public scrutiny – for example, reviews of films, plays, books or restaurants, as well as the discussion of political, social and economic affairs.*”²²⁵

3.4.2 Main issues raised in course of review

Submissions to the review recommended that the requirement to prove that the opinion was honestly held should be removed; that the legislation should be amended to revert to the pre-2009 position where good faith on the part of the publisher is presumed, and it is a matter for the plaintiff to prove otherwise; that the provision should be amended along the lines of the fair comment defence in section 23 of the 1961 Act.²²⁶ In a submission to the review following the Symposium, it was indicated that while a belief in the underlying facts relating to the opinion may need to be proven, the truth of an opinion itself cannot be proven and therefore should not be required.²²⁷

The following arguments were put forward in favour of these recommendations:

- in comparison with fair comment (the common law defence that section 20 replaces), the burden of proof has shifted and the person relying on the defence must prove that he/she honestly held the opinion or believed that it was honestly held by the person who

²²⁴ The name of ‘fair comment’ for the former common law defence has been criticised as somewhat misleading - since the defence then, as now, depended on the honesty, rather than the fairness, of the opinion expressed.

²²⁵ Martin, *Media Law Ireland*, 2011, p. 68.

²²⁶ Business Journalists Association, Dublin City University Socio-Legal Research Centre, McCann Fitzgerald, NewsBrands, NUJ, RTE.

²²⁷ ICCL.

expressed the opinion; this makes the defence problematic, particularly in the context of live broadcasts, letters to the editor, reports on opinions of politicians, etc.;

- it requires the proving of a subjective opinion;
- an opinion is not susceptible to factual assertion as “true” or “untrue”;
- the defence is oblique and over complicated, especially for juries;²²⁸
- a reworded provision would give effect to the intent behind the section, to allow latitude for opinion honestly expressed and enhance freedom of expression.

It was also suggested that section 20(2)(b) should be amended to revert to the common law position.²²⁹ The following arguments were put forward in favour of this recommendation:

- under the common law defence of fair comment, the opinion merely had to be based on assessable relevant facts to be proven at trial;
- the requirement that facts not referred to in the statement complained of be known, or might reasonably be expected to be known, by those to whom the statement was published should have no place in laws affecting modern media e.g. the question was posed as to whether the defence must fail because the potentially millions of readers of a publication, including those outside Ireland, might not reasonably be expected to know the factual basis for otherwise honestly held views.

Moreover, it was suggested that the requirement that the opinion must relate to a matter of public interest should be removed.²³⁰ Justifications put forward for this suggestion include that there is no need for this requirement given that there is a public interest defence elsewhere in the Act; this requirement is moot given the protection afforded by the Constitution and Article 8 of the ECHR to a person’s privacy; the inclusion of the public interest requirement fails to strike the right balance between private reputations and freedom of expression.

Another contributor to the review suggested that the section should be amended to bring it in line at least with section 3 of the England and Wales Defamation Act 2013, if not with the proposals in the Northern Ireland report on reform of defamation law; it should be possible to rely not only on true underpinning facts or privileged statements as the basis for an opinion but

²²⁸ Commentators have raised a question as to whether certain elements of the statutory defence of honest opinion fall to be decided by the judge or by the jury, if the case is tried in the High Court. Maher notes that section 3(2) of the Act provides that the Act “*shall not affect the operation of the general law in relation to defamation except to the extent that it provides otherwise (either expressly or by necessity)*” and on that basis he states that “*the statute’s silence on who decides the public interest point would suggest that the common law position prevails, and that in a jury trial, the question of whether a matter is one of public interest or not remains a question for the judge*”. (Maher J., *The Law of Defamation*, 2nd edn, at p.181). Cox and McCullough take a similar view i.e. they presume that the common law approach will continue to be taken (Cox, N. and McCullough, E., *Defamation Law and Practice* (2014) at para. 6-12). However, in the first jury trial involving the honest opinion defence under the Act, the judge permitted the question to go to the jury on the basis that it was something the defendant was required to prove and had been a matter at issue in the case. (“*O’Brien wins €150,000 in damages in Mail case*”, *The Irish Times*, 15 February 2013; see Maher at p. 181, footnote 82).

²²⁹ NewsBrands.

²³⁰ Eoin O’Dell, H. O’Driscoll, NewsBrands, RTE.

also on facts that the publisher reasonably believed to be true at the time the opinion was published and the defence should extend to cover inferences of fact.²³¹

Finally, in a submission to the review following the Symposium, it was suggested that this defence does not appear to conform to Article 10 ECHR and should be amended to remove the requirement that the defendant prove the truth of the opinion.²³²

3.4.3 Comparative Perspectives

In **England and Wales**, the Defamation Act 2013 (section 3), provides for the defence of honest opinion. In broad terms it is available where the statement complained of (i) is a statement of opinion; (ii) the statement indicated, whether in general or specific terms, the basis of the opinion; (iii) an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published, or on the basis of anything asserted to be a fact in a privileged statement²³³ published before the statement complained of. The defence is defeated if the plaintiff shows that (i) the defendant did not hold the opinion or, (ii) where the statement was published by the defendant but made by another person, the defendant knew, or ought to have known, that the author did not hold the opinion. The section made a number of important changes to the common law defence of fair comment, which it replaced, specifically: (i) it does not limit the defence to opinions on matters of public interest; (ii) it expands the types of privileged statement on which an honest opinion can be based; and (iii) it allows a defendant to rely on any fact that existed at the time of publication, whether or not known to the defendant.²³⁴

In **Scotland**, the Defamation and Malicious Publications (Scotland) Act 2021 (section 7) provides for the defence of honest opinion. The defence applies where (i) the statement complained of was a statement of opinion; (ii) the statement indicated, either in general or specific terms, the evidence on which the opinion was based; (iii) an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence. Evidence means: (a) any fact which existed at the time the statement was published, (b) anything asserted to be a fact in a privileged statement made available before, or on the same occasion as, the statement complained of, or (c) anything that the defendant reasonably believed to be a fact at the time the statement was published. A statement is a privileged statement if the person responsible for its publication would have one or more of the following defences under the relevant sections of the Act: (a) the defence of publication on a matter of public interest, (b) the defence of absolute privilege or (c) the defence of qualified privilege.

A statement of opinion includes a statement which draws an inference of fact. There is no requirement for the opinion to be on a matter of public interest. The defence fails if the plaintiff shows that (i) the defendant did not genuinely hold the opinion conveyed by the statement, or (ii) where the statement was published by the defendant but made by another person the defendant knew, or ought to have known, that the author of the statement did not genuinely

²³¹ Eoin O'Dell.

²³² ICCL.

²³³ A statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it: publication on matter of public interest (section 4 of 2013 Act), peer-reviewed statement in scientific or academic journal (section 6 of 2013 Act), reports of court proceedings protected by absolute privilege (section 14 of the 1996 Act), reports protected by qualified privilege (section 6 of 2013 Act).

²³⁴ Northern Ireland Law Commission, Consultation Paper, *Defamation Law in Northern Ireland* (NILC 19 (2014)) at pp. 39-48.

hold the opinion. The Policy Memorandum on the Bill (as initiated) explains that the technical complexity of applying the common law defence of fair comment (which section 7 replaces) means that it is less effective and less frequently invoked than it might otherwise be in protecting freedom of expression. The Bill therefore provides for the reform of the common law.

In **Northern Ireland**, the report on the *Reform of Defamation Law in Northern Ireland*, proposes the introduction of an “*augmented version of section 3*” of the England and Wales Defamation Act. The proposed honest opinion defence would apply where a statement is (i) a statement of opinion; (ii) indicates, in general or specific terms, the basis of the opinion; (iii) an honest person could have held the opinion based on (a) any fact which existed at the time the statement was published, (b) anything asserted to be a fact in a privileged statement published before or at the same time as the statement complained of, (c) any fact that the defendant reasonably believed to be true at the time the statement complained of was published. A statement of opinion can include an inference of fact. The defence would be defeated if the claimant shows that the defendant did not hold the opinion, or where the statement was made by another person, the defendant knew or ought to have known, that the author did not hold the opinion.²³⁵ The proposed defence is not limited to opinions on matters of public interest.

In **Australia**, the Model Defamation Provisions (section 31) provide for a defence of honest opinion where (i) the matter is an expression of opinion; (ii) the opinion relates to a matter of public interest; and (iii) the opinion is based on “proper material” i.e. material that is substantially true, was published on an occasion of absolute or qualified privilege, or was published on an occasion that attracted the defence of publication of public documents or fair report of proceedings of public concern. While it is not specifically set out in the Model Provisions, it is a requirement that the opinion sets out the material on which it is based. The defence is defeated if the plaintiff proves that the opinion was not honestly held by the defendant, or the defendant did not believe that it was honestly held by the author (where the author was an employee or agent), or the defendant had reasonable grounds to believe that it was not honestly held by the author (where the author was not an employee or agent) at the time the matter was published.

The Model Defamation Amendment Provisions 2020 amends section 31 to provide that an opinion is based on “proper material” if (a) the material on which it is based is (i) set out in the publication in specific or general terms, (ii) notorious, (iii) accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage), or (iv) otherwise apparent from the context in which the matter is published; and (b) the material is (i) substantially true, (ii) published on an occasion of absolute or qualified privilege, or (iii) was published on an occasion that attracted the protection of the defence of publication of public documents or fair report of proceedings of public concern.

In **New Zealand**, the Defamation Act 1992 (sections 9 – 12) provides for the defence of honest opinion. The defendant must prove that the opinion was (i) his/her genuine opinion; (ii) in the case of an employee or agent of the defendant, the defendant believed that it was the genuine opinion of the author; or (iii) in other cases, the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author. The defence is not defeated by malice. Where a matter consists partly of statements of fact and partly of opinion, the defence

²³⁵ Section 3 of the Draft Defamation (Northern Ireland) Bill at Appendix 1 of the report on *Reform of Defamation Law in Northern Ireland*.

will not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to (a) the facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or (b) any other facts that were generally known at the time of the publication and are proved to be true.

In **Ontario**, the common law defence of fair comment is supplemented by statute (sections 23 and 24 of the Libel and Slander Act). In order for the defence to succeed the defendant must prove that the comment (i) is on a matter of public interest; (ii) is based on fact; (iii) is recognisable as comment; and (iv) meets the objective test – could any person honestly express the opinion on the proven facts. There must be some nexus between proven facts and the opinion. The defence does not require substantial proof of the facts. The defence is defeated by malice. The Libel and Slander Act (section 23) provides that a statement of mixed fact and opinion may be fair comment even where not every fact is proven to be true as long as the opinion is fair comment having regard to the facts that have been proved. The Act (section 24) also provides that a defendant may rely on the defence of fair comment in relation to an opinion held by another person even where neither of them held the opinion as long as a person could honestly hold the opinion. In a 2008 case (*WIC Radio v Simpson*²³⁶), the Canadian Supreme Court held that the honest belief criteria need not refer to the subjective belief of the speaker. The Law Commission of Ontario, in its report on *Defamation Law in the Internet Age*, recommends the replacement of the current law with a new defence of opinion where the defendant proves that the defamatory publication is on a matter of public interest, is based on fact and is recognisable as opinion. This recommendation has the effect of removing the objective requirement of honest belief. The Commission's rationale for this proposal is that the requirement is superfluous and that its removal would provide better protection for online reviews and other forms of commentary which are in the public interest, based on fact, and made without malice. Moreover, the Commission states that removal of this requirement would not substantially broaden the defence.²³⁷

3.4.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- remove the requirement on the defendant to prove that the opinion was believed to be true;
- remove the requirement that facts referred to in the statement be known, or might reasonably be expected to be known, by the persons to whom the statement was published;
- remove the requirement that the statement must relate to a matter of public interest;
- provide for an honest opinion defence along the lines of section 3 of the England and Wales Defamation Act 2013;
- provide for an honest opinion defence along the lines proposed in the report on the *Reform of Defamation Law in Northern Ireland*.

²³⁶ [2008] 2 SCR 420.

²³⁷ *Defamation Law in the Internet Age*, Law Commission of Ontario, Final Report, March 2020, at pp.. 29-31.

Option 1: Remove the requirement on the defendant to prove that the opinion was believed to be true

Arguments in favour

- The opinion will still have to be “honestly held”, so it will be open to the plaintiff to argue that an opinion was not honestly held by the defendant.²³⁸
- It is contradictory to require a person to believe an opinion to be “true” – the essence of an opinion is that it is subjective, and is not susceptible to objective proof. Where the defendant is not the author of the opinion (e.g. where comments are made by guests on live radio or television or in “letters to the editor”), it is particularly problematic for the defendant to prove that the opinion was honestly held. (*See defence of innocent publication*).
- While an opinion is not something that can be proven to be true or false, “*it was always the case at common law that there had to be some kind of belief on the part of the publisher in the truth of the comment or opinion at issue, because, in the absence of such belief, it was assumed that the publisher acted with malice*”.²³⁹ At common law it was for the plaintiff to prove malice (i.e. lack of honest belief in the opinion/comment) whereas under section 20 it is for the defendant to prove that the opinion was honestly held.²⁴⁰

Removing the requirement on the defendant to prove the truth of the opinion and placing the burden of proving malice on the plaintiff would revert to the common law position.

- Such a requirement risks contravening the ECHR right to freedom of expression: the ECtHR has explicitly held that it is contrary to the right to freedom of expression to require a person to prove the truth of their opinion.²⁴¹

Arguments against

- The current provision is based on a recommendation in the Law Reform Commission *Report on the Civil Law of Defamation* which recommended the replacement of the

²³⁸ In *Cullen v Sheehy and Wicklow County Council* [2017] IEHC 459, the High Court held that a press release was defamatory, and did not meet the requirements of the ‘honest opinion’ defence. The court found that the press release did not express an ‘honestly held’ opinion, as it inaccurately presented some of the findings of a report of an independent review of the compulsory purchase of a piece of land by Wicklow County Council and made claims about a number of county councillors when the report had not made any such findings.

²³⁹ Cox N. and McCullough E., *Defamation Law and Practice* at para. 6-50.

²⁴⁰ *Ibid* at para. 6-52 (based on Gately at 12.36 *et seq.*)

²⁴¹ “*Starting in its seminal Lingens v Austria judgment, the Court has distinguished between facts and opinions, holding that the requirement that the defendant prove the truth of an allegedly defamatory opinion infringes his/her right to impart ideas, as well as the public’s right to receive ideas, under Article 10 of the Convention. The Court held that: ‘ ... careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof As regards value-judgments, this requirement to prove truth is impossible of fulfilment and it infringes freedom of opinion itself.’* (*Lingens v Austria*, para 46).”; McGonagle and others, *Freedom of expression and defamation*, Council of Europe (2016), p.27.

common law defence of fair comment with a defence of comment based on fact²⁴². The rationale for the proposal was that there should be some inhibition on the expression of comments which are both defamatory and malicious and that this would best be achieved by adopting the criterion of whether the opinion was the genuine opinion of the author. The Commission concluded that the burden of proving that the opinion was genuinely held should be on the defendant on the basis that a defendant who pleads comment should be prepared to testify as to his/her honest belief, and that it is preferable that a statutory provision should be drafted in a positive rather than a negative form.

Option 2: Remove the requirement that facts referred to in the statement be known, or might reasonably be expected to be known, by the persons to whom the statement was published

Arguments in favour

- At common law, it was sufficient if the factual information on which the opinion was based was so obvious and accessible to the recipient of the publication that it did not need to be stated, usually (but not only) where the opinion clearly pointed to the external facts on which it claimed to be based or where it referred to events that were so well known that a recipient of a statement could reasonably be expected to be aware of them.²⁴³ This common law rule may be retained in section 20(2)(b)(i)(II) of the Act. However, the statutory rule may (depending on how it is interpreted) be less favourable to publishers than the common law. In the case of well-known facts the Act requires that they be referred to in the statement. That requirement did not apply at common law. On the other hand, in the case of a very prominent news story it may be that any opinion in such context would of necessity refer by implication to the factual story on which it was based so it is a matter of interpretation for the courts as to whether this is sufficient to satisfy section 20(2)(b)(i)(II).²⁴⁴
- Where an opinion reaches a mass audience, it is unrealistic to expect that everyone hearing the opinion will be aware of the facts on which it is based.²⁴⁵
- The current provision is overly complex.

Arguments against

- It can be argued that in the internet age, the need to provide a reader with some understanding of the factual basis for a comment is particularly important in light of the amount of commentary to be found online, often on matters on which the reader knows very little.²⁴⁶
- An opinion has the potential to damage a person in the estimation of the community. Where an opinion is based on fact, the person to whom the opinion is published can separate the opinion from the facts on which it is based and form his/her own view as to whether or not he/she agrees with the opinion. On the other hand, the expression of an

²⁴² *Report on the Civil Law of Defamation* (December 1991) at para. 6.12.

²⁴³ Cox N. and McCullough E., *Defamation Law and Practice* at para. 6-35.

²⁴⁴ Cox N. and McCullough E., *Defamation Law and Practice* at paras. 6-35 and 6-36.

²⁴⁵ McMahon B and Binchy W, *Law of Torts*, Bloomsbury Professional, 4th edn. at paras. 34.288.

²⁴⁶ Maher, J., *The Law of Defamation* (2nd edn.) at p. 192.

opinion without any factual basis will conjure up in the mind of the person to whom the opinion is published the possibility that the person about whom the opinion is expressed has been involved in something which warrants the opinion which may lower him/her in the eyes of the community.²⁴⁷

- The requirement that the opinion must be based on facts set out in the statement containing the opinion, or facts referred to in the statement, that were known, or might reasonably be expected to be known, by the persons to whom the statement was published means that the possibility of reasonable readers/listeners being misled by the opinion does not arise to the same extent.

Option 3: Remove the requirement that the statement must relate to a matter of public interest

Arguments in favour

- The requirement that the opinion must be on a matter of public interest is not necessary given the protection afforded by the Constitution and Article 8 ECHR to a person's privacy.
- Section 26 of the Act already provides a defence of fair and reasonable publication on a matter of public interest. In order for the honest opinion defence to have added value, the public interest requirement should be removed.
- The requirement that a statement of opinion must be on a matter of public interest no longer applies in England and Wales or Scotland. *Gatley on Libel and Slander* states: “*Fundamentally, the basis of excluding liability in respect of opinions is their recognisability as individual viewpoints only. Whether those viewpoints relate to matters of public interest is arguably neither here nor there.*”²⁴⁸

Arguments against

- The “public interest” test is fundamental to the defence; it provides protection for the free expression of honest opinions on matters on which the public has a legitimate interest or with which it is legitimately concerned. “*The foundation of of the defence is a concern to ensure freedom of expression in relation to what are regarded as important public issues.*”²⁴⁹
- Matters that are deemed to be in the public interest are quite broad, so including this requirement doesn't unnecessarily restrict the scope of the defence.
- The maintenance of this requirement protects matters which would normally be deemed to be part of an individual's private life.
- This option raises potential legal difficulties: would such a change strike an appropriate balance between the rights to freedom of expression and to good name/privacy, absent

²⁴⁷ McMahon B and Binchy W, *Law of Torts*, Bloomsbury Professional, 4th edn., at para. 34.269.

²⁴⁸ *Gatley on Libel and Slander*, 12th edn, at para. 12.35.

²⁴⁹ Maher, J., *The Law of Defamation*, (2018), para. 6.01

the justification provided by the “public interest” requirement? In the case-law of the ECtHR, the defence of honest opinion “ ..will generally relate only to comment on matters of public interest and not private matters. Comment on matters of private or family life may fall outside the scope of [the] defence and may even engage the Article 8 right to privacy [under the Convention]”²⁵⁰

- It has been argued that the public interest test is no longer necessary because of the availability of the “fair and reasonable publication” defence. However, the two defences are different. The defence of honest opinion is available to anyone and while the “fair and reasonable publication” defence is not limited to journalism, it was developed for, and is best suited to, that context (the central concept of the defence is that publication might be protected where it is the product of “responsible journalism”).
- Fair and reasonable publication is oriented to, and best suited to, public interest investigative journalism; it’s therefore oriented to facts and interpretation rather than to opinions (it focuses typically on whether a publication may be protected where it contains errors of fact or interpretation despite responsible journalism, or where the journalist cannot prove truth because they cannot reveal their sources).
- Fair and reasonable publication is a relatively new defence, which is still developing in common law jurisdictions: it seems premature, at this early stage, to abolish older defences in reliance on it.

Option 4: Provide for an honest opinion defence along the lines of section 3 of the England and Wales Defamation Act 2013

Arguments in favour

- It provides greater protection for honest opinion, in particular it is not restricted to matters of public interest and the burden of proving that the opinion was not honestly held is on the plaintiff.

Arguments against

- The 2013 Act does not achieve its stated aim of making the defence more simple and user-friendly and requires legal interpretation.²⁵¹ For example, the Explanatory Notes on the Act state that as “*an inference of fact is a form of opinion, this would be encompassed by the defence*”²⁵² whereas *Gatley on Libel and Slander* are of the view that this is an arguable point.²⁵³
- A high degree of legal technicality has grown around the various components of section 3.²⁵⁴

²⁵⁰ McGonagle & others, *Freedom of expression and defamation*, Council of Europe (2016), p. 45.

²⁵¹ Northern Ireland Law Commission Consultation Paper: *Defamation Law in Northern Ireland* – NILC 19 (2014) at p. 46.

²⁵² Defamation Act 2013, Explanatory Notes at para. 21, <https://www.legislation.gov.uk/ukpga/2013/26/notes>

²⁵³ Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance, Dr Andrew Scott, June 2016 based on *Gatley on Libel and Slander*, 12th edn. at para 12.14.

²⁵⁴ Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance, Dr Andrew Scott, June 2016 at para. 2.20.

Option 5: Provide for an honest opinion defence along the lines proposed in the report on the Reform of Defamation Law in Northern Ireland

Arguments in favour

- The proposed defence addresses a number of perceived weaknesses in the defence of honest opinion set out in section 3 of the England and Wales Defamation Act 2013 e.g. it proposes to extend the scope of the defence to opinion based on facts that the defendant reasonably believed to be true at the time of publication of the opinion;²⁵⁵ this would do much to alleviate the predicament of social media commentators who commonly rely on facts published by someone else.
- This is the approach adopted in section 7 of the Defamation and Malicious Publications (Scotland) Act 2021.

Arguments against

- Extending the defence to opinions based on facts that the defendant reasonably believed to be true at the time of publication may fail to adequately protect an individual's reputation.

Recommendations

The following option is recommended:

- Option 1: Remove the requirement on the defendant to prove that the opinion was believed to be true.

The following options are not recommended:

- Option 2: Remove the requirement that facts referred to in the statement be known, or might reasonably be expected to be known, by the persons to whom the statement was published;
- Option 3: Remove the requirement that the statement must relate to a matter of public interest;
- Option 4: Provide for an honest opinion defence along the lines of section 3 of the England and Wales Defamation Act 2013; and
- Option 5: Provide for an honest opinion defence along the lines proposed in the report on the *Reform of Defamation Law in Northern Ireland*.

3.5 Offer to make amends

3.5.1 Current Legal Position

Sections 22 and 23 of the 2009 Act introduced a new statutory defence of an “offer to make amends”²⁵⁶ which is designed to facilitate early expeditious and more economic resolution of defamation actions. Section 22 provides that a person who has published a statement that is

²⁵⁵ *Ibid* at para. 2.34

²⁵⁶Section 21 of the Defamation Act 1961 had contained a defence called offer of amends, but it was limited to cases of innocent and unintentional publication and did not include the possibility of paying damages to the plaintiff; any award made by a court was limited to payment of costs and expenses. Section 21 was rarely used.

alleged to be defamatory of another person may make an offer to make amends i.e. an offer to make a suitable correction or sufficient apology, to publish that correction or apology, and to pay compensation or damages (if any), and such costs, as may be agreed by the parties or as may be determined. Section 23(2) of the Act provides that it shall be a defence to a defamation action for a defendant to prove that he/she made an offer to make amends and that it was not accepted, unless the plaintiff proves that the defendant knew or ought reasonably to have known that the statement referred to the plaintiff or was likely to be understood as referring to the plaintiff, and was false and defamatory of him/her. If the defendant relies in his/her defence on an offer to make amends, he/she cannot rely on any other defence. However, a defendant who made an offer to make amends is not required to plead it as a defence in a defamation action.

In accordance with section 23(1)(c), if the parties do not agree as to the damages or costs that should be paid by the defendant, the High Court, or other court with jurisdiction, determines the damages or costs, and in making that determination the Court must take into account the adequacy of measures already taken to ensure compliance with the terms of the offer. The approach of the courts is to assess the damages the defamation would normally warrant and then to discount that sum in percentage terms having regard to the effectiveness of the defendant's action in mitigation.²⁵⁷ An offer to make amends has resulted in damages being reduced by 40% in *Christie v. TV3*²⁵⁸ (the Court of Appeal stated that the discount would have been higher if the apology issued by the defendant had been more complete and fulsome), 20% in *Ward & Anor v The Donegal Times Limited*²⁵⁹ (the High Court indicated that the late apology by the defendants and the publication of further articles after making the offers of amends qualified for a reduced level of mitigation) and 10% in *Higgins v. The Irish Aviation Authority*²⁶⁰ (the Court of Appeal indicated that the delay in making the offer of amends (almost two years) and the high-handed approach to negotiations in refusing to meet the plaintiff for discussions after he rejected the defendant's offer of compensation meant that the jury's discount of 10% should not be interfered with).

It was believed by many commentators that the assessment of damages by the High Court meant a judge sitting alone. However, in *Higgins v. The Irish Aviation Authority* and *White v. Sunday Newspapers Ltd*²⁶¹ (which were heard together), the Supreme Court held that "the court" as used in section 23(1)(c) means a jury. The Court went on to hold that the plaintiffs were entitled to have the damages to which they are entitled assessed by a jury, subject, to appropriate directions as to the discount to be provided to the defendants having regard to the fact of the making of the offer of amends.

3.5.2 Main issues raised in course of review

Meaning of court in section 23(1)(c)

The vast majority of submissions to the review that commented on the offer of amends procedure recommended that section 23 of the Act should be amended to provide that "court"

²⁵⁷ *Ward & Anor v. The Donegal Times Limited* [2016] IEHC 711; *Christie v. TV3 Television Networks Limited* [2017] IECA 128.

²⁵⁸ [2017] IECA 128.

²⁵⁹ [2017] IECA 128.

²⁶⁰ [2020] IECA 277.

²⁶¹ [2018] IESC 29 [2018] 3 IR 374.

means a judge sitting alone.²⁶² They indicated that the *Higgins* and *White* cases²⁶³ essentially undermine the effectiveness and attractiveness of the offer of amends procedure, particularly for the defendant, and that it is doubtful whether defendants will as readily consider making an offer of amends as they would previously have done. They pointed out that the clarification that a plaintiff retains the right to a jury trial, leaves a defendant open to all the costs of a jury trial. This point was re-iterated in a submission to the review following the Symposium.²⁶⁴

Other proposals for amendments

A number of submissions²⁶⁵ raised issues in relation to the interaction between the offer of amends procedure under section 22 and the lodgement of money in settlement of the action under section 29. Where an offer of amends has been made and accepted, but the parties do not reach agreement as to the level of damages that should be paid, it appears that the defendant loses the right to make a lodgement under section 29 of the 2009 Act. Section 29(1) of the Act explicitly provides that a lodgement is made at the time of the filing of a defence. However, in accordance with section 22(3) an offer to make amends cannot be made after the delivery of the defence. The submissions have therefore recommended that section 29 should be amended, to explicitly provide that a lodgement can be made by a defendant if an offer of amends is accepted but the parties do not reach agreement as to the level of damages that should be paid by the defendant.

Section 23(2) provides that it is a defence in a defamation action for a person to prove that he/she made an offer of amends under section 22 and that it was not accepted, unless the plaintiff proves that the defendant knew, or ought reasonable to have known, at the time of publication that the statement at issue referred to the plaintiff, or was likely to be understood as referring to the plaintiff, and it was false and defamatory of the plaintiff. Some submissions suggested that the Act should provide that the plaintiff should have to prove that the defendant acted recklessly to defeat the offer of amends as a defence.²⁶⁶ They acknowledged that the wording of section 23(2) is unclear, but stated that it could be interpreted as requiring only proof of negligence and that a test of negligence is a low hurdle for a plaintiff to get over to defeat the defendant's defence under section 23. Moreover, they indicated that it seems contrary to the spirit of the measure that there should be a test of negligence only: if that is the test, it makes the procedure less attractive. Finally they indicated that a plaintiff is not prejudiced by accepting an offer to make amends, irrespective of how the defamation arose, in the absence of malice.

It was also suggested that the Act should provide expressly for a discount procedure.²⁶⁷ In a submission to the review following the Symposium it was suggested that there should be express guidance by way of a practice direction as regards the measurement of the appropriate discount to be applied.²⁶⁸

²⁶²The Bar Council of Ireland, William Fry, Irish Times, Law Society (anonymous solicitor(s)), Local Ireland, McCann Fitzgerald, MGM Ltd, Oireachtas Committee on Justice and Equality, NUJ, News Brands, Ronan Daly Jermyn, RTE.

²⁶³ *Higgins v The Irish Aviation Authority White v Sunday Newspapers Ltd* [2018] IESC 29 [2018] 3 IR 374.

²⁶⁴ McCann Fitzgerald.

²⁶⁵ Department of Communications, Climate Action and the Environment, MGM Ltd., RTE.

²⁶⁶ The Bar Council of Ireland, MGM Ltd., NewsBrands,

²⁶⁷ McCann Fitzgerald, MGM Ltd.

²⁶⁸ McCann Fitzgerald.

One submission suggested that section 23(1)(c) should be amended to allow for the determination of damages by an alternative disputes resolution process without reference to the court, or to provide for a stay pending ADR determination of any proceedings that had been issued.²⁶⁹

3.5.3 Symposium on review of defamation law

In his presentation to the Symposium on Reform of Defamation Law, Professor Neville Cox noted that the English model, on which the Irish offer of amends procedure was based, was aimed at incentivising use of the procedure as an alternative to full-blown litigation.²⁷⁰ Under the English provision damages are determined by a judge sitting alone where they cannot be agreed between the parties. Professor Cox pointed out that “*the biggest incentive for a defendant to make such an offer in many cases, will be so that it can avoid a situation where the quantum of damages to be awarded is to be determined by a jury*”²⁷¹. He noted that as a result of the *Higgins* judgment, “the defence of offer of amends is very considerably less attractive than its English counterpart from a defendant’s perspective”²⁷². On the other hand, Professor Cox went on to say:

*“It is not necessarily a bad thing that defendants should not have a mechanism available to them that, in effect, coerces plaintiffs away from a full hearing of their cause of action, but it does beg the question of why the defence was included in the statute if it was not intended to be useful.”*²⁷³

3.5.4 Comparative Perspectives

It is widely acknowledged that the offer of amends procedure is based on the procedure in **England and Wales**²⁷⁴ which is set out in sections 2 to 4 of the Defamation Act 1996. There are a number of differences between the Irish and UK provisions. In particular, section 3(10) specifically provides that proceedings under that section shall be heard and determined without a jury. Section 4(2) provides that the fact that an offer of amends was made is a defence to defamation proceedings. Section 4(3) provides however that there is no defence if the defendant “knew or had reason to believe that the statement” complained of (a) referred to the plaintiff or was likely to be understood as referring to him/her, and (b) was both false and defamatory of the plaintiff; but it is presumed until the contrary is shown that the defendant did not know and had no reason to believe that was the case.

*Gatley on Libel and Slander*²⁷⁵ notes that “the expression “had reason to believe” in s. 4(3) is equivalent to the recklessness or conscious indifference which amounts to malice for the purposes of qualified privilege”. They point out that in England and Wales the current

²⁶⁹ D Daly.

²⁷⁰ Professor Neville Cox, Defamation Law and the 2009 Defamation Act, presentation to Symposium on Reform of Defamation Law, 14 November 2019 at http://www.justice.ie/en/JELR/A%20Scott_Presentation_Defamation.ppt/Files/A%20Scott_Presentation_Defamation.ppt .

²⁷¹ *ibid.*

²⁷² *ibid.*

²⁷³ *ibid.*

²⁷⁴ The offer of amends procedure set out in sections 2 to 4 apply to England, Northern Ireland, Scotland and Wales.

²⁷⁵ *Gatley on Libel and Slander* at para. 19.6.

formulation (knew or was reckless) was brought in to replace an earlier provision (section 4 in the 1952 Defamation Act), which was widely accepted to be ineffective – indeed it appears to have been almost unused – both because it didn’t allow for an award of damages, and because “Under section 4 of the 1952 Act, the defendant was required to show that he had taken all reasonable care in relation to the publication.” (i.e. had not been negligent). And they say that taking a contrary view (that the offer is not a defence in cases of negligent defamation) would make the defence of an offer of amends as ineffective as the 1952 provision. They quote a passage from *Milne v. Express Newspapers*²⁷⁶ which says: (Eady J, para 37-41)

“It has to be remembered that if this defence is relied on, no other defence may be pleaded If the jury were persuaded that greater care could or should have been taken, in any given case, then the defence would fail and the defendant would be left naked on the issue of liability. It would not have been possible to plead, for example, justification or fair comment. If claimants were able to challenge a section 4 defence routinely, in the absence of bad faith, the whole offer of amends regime would be rendered ineffective ... The main purpose of the statutory [offer of amends] regime is to provide an exit route for journalists who have made a mistake and are willing to put their hands up and make amends.”

In **Scotland**, the Defamation and Malicious Publication (Scotland) Act 2021 (sections 13 to 18) replaces sections 2 to 4 of the Defamation Act 1996 in so far as they apply to Scotland, subject to a limited number of amendments.²⁷⁷

In **Australia**, sections 13 – 19 of the Model Defamation Provisions set out provisions in relation to offers to make amends. These provisions may be used before, or as an alternative to, litigation. An offer of amends must be made within specified time limits; it cannot be made if a defence has been served to an action for defamation. An offer to make amends must include, *inter alia*, an offer to publish a correction, and an offer to pay the costs of the plaintiff. An offer may include *inter alia* an offer to publish an apology, and an offer to pay compensation. The amount of compensation may be proposed by the defendant, agreed between the parties, determined by an arbitration process or determined by a court. An offer of amends may be withdrawn before it is accepted and a publisher who does so may make a renewed offer. The making of an offer of amends is a defence to an action for defamation if specified requirements are met, including that the offer was reasonable (which will be determined by a court on the basis of criteria set out in the Provisions). In accordance with the Model Defamation Amendment Provisions 2020, the question of whether such a defence is established is a matter for the judge (in jurisdictions where jury trials exist). Evidence of any statement of admission made in connection with the making or acceptance of an offer of amends is not admissible in any legal proceedings, other than proceedings in connection with the offer of amends.

Section 40 of the Model Defamation Provisions requires a court (unless the interests of justice require otherwise) to order costs against an unsuccessful party to proceedings for defamation to be assessed on an indemnity basis if the court is satisfied that the party unreasonably failed to make or accept a settlement offer made by the other party to the proceedings. A settlement offer is defined as any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings commenced), that was a reasonable offer at the time it was made. The section also

²⁷⁶ [2004] EWCA Civ 664, [2005] 1 All ER 1021.

²⁷⁷ Explanatory Notes Defamation and Malicious Publication (Scotland) Bill (as initiated), <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/explanatory-notes-defamation-and-malicious-publication-scotland-bill.pdf>

provides that in awarding costs, the court may have regard to (i) the way in which the parties to the proceedings conducted their cases, and (ii) any other matters that the court considers relevant.

3.5.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- amend section 23 to provide that the reference to the High Court (for the purposes of the assessment of damages under section 23(1)(c)) means a judge sitting without a jury;
- set out the discount procedure in section 23;
- allow for determination of damages by an alternative disputes resolution process without reference to the court, or provide for a stay pending ADR determination of any proceedings that had been issued;
- amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence;
- extend the scope of section 29 to cases where the defendant made an offer of amends.

Option 1: Amend section 23 to provide that the reference to the High Court (for the purposes of the assessment of damages under section 23(1)(c)) means a judge sitting without a jury

Arguments in favour

- This proposal would be in line with the objective of the procedure which is, as observed by Dunne J. in *Higgins*²⁷⁸, “to facilitate early expeditious and more economic speedy resolution of defamation actions” and, if possible, to avoid the necessity of court proceedings.
- The current offer of amends scheme in the High Court is, from the viewpoint of many defendants, “a high risk proposition with little prospect of reward. There is no reason to suppose a jury will look kindly on a defendant who has already conceded that the plaintiff has been defamed, but now wants a courtroom dispute over damages.”²⁷⁹
- Amending section 23 to remove the role of juries in High Court actions would make the offer of amends scheme more attractive for defendants.
- It is doubtful whether any defendant will use the offer of amends provisions following the decision in *Higgins*.²⁸⁰

Arguments against

- The issue of damages in a defamation case is a question of fact which is traditionally a matter for a jury in a High Court action.

Option 2: Set out the discount procedure in section 23

²⁷⁸ *Higgins v The Irish Aviation Authority White v Sunday Newspapers Ltd* [2018] IESC 29 [2018] 3 IR 374.

²⁷⁹ Maher, J., *The Law of Defamation* (2nd edn.) at p. 360.

²⁸⁰ A& L Goodbody, Time to say goodbye: Why Ireland should remove juries from defamation cases, 10 July 2020, <https://www.algoodbody.com/insights-publications/time-to-say-goodbye-why-ireland-should-remove-juries-from-defamation-cases>

Arguments in favour

- Express provision for a discount procedure would achieve consistency and clarity as regards the operation of the procedure.
- It would provide clear guidance to parties who engage in the offer of amends procedure.

Arguments against

- Any amendment to explicitly provide for a discount procedure would merely codify developing case-law as the current practice is to determine the amount of damages that should be awarded and to apply a discount to that amount to take account of the offer of amends made by the defendant.
- Should the law be amended to allow for judge-only decisions, there will be more certainty in relation to the level of discounts.
- The introduction of procedure and criteria could have the effect of introducing inflexibilities into the law.
- This issue could be dealt with in a practice direction rather than in legislation.

Option 3: Allow for determination of damages by an alternative disputes resolution process without reference to the court, or provide for a stay pending ADR determination of any proceedings that had been issued, where the parties so agree

Arguments in favour

- There are many advantages associated with ADR – it gives the parties an opportunity to meet face to face; it removes guesswork by giving parties a realistic view of what the other party wants; it focuses on a solution rather than taking the procedural steps required to bring a case to court; and it can take place early without the need to incur the costs of a court action.
- Inclusion of a specific provision in relation to arbitration in the Act would mean that the amount of damages that should be awarded would be determined by an independent third party and might encourage the parties to avail of that option rather than going to court.

Arguments against

- The offer of amends procedure is a form of mediation.
- The Mediation Act 2017 already imposes an obligation on solicitors (and barristers, subject to the making of Regulations by the Minister for Justice) to advise any person contemplating the taking of legal action to consider mediation as a means of resolving the dispute before embarking on such proceedings.

Option 4: Amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence

Arguments in favour

- The use of the offer to make amends procedure should be incentivised as it resolves disputes more quickly, saves court time and delays.
- If a defendant in a defamation action pleads the defence of an offer of amends, no other defence may be pleaded, if in the action it was found that greater care could or should have been taken, in any given case, the defence would fail and the defendant would not be able to plead, for example, truth or honest opinion. The application of a test of negligence may make the defence less attractive to defendants.
- If the defendant has accepted responsibility at an early stage, he/she should be entitled to avail of the defence of an offer to make amends, unless the original publication was reckless.

Arguments against

- The procedure should be available to defendants who make a genuine mistake; it should not be available to those who act negligently.

Option 5: Extend the scope of section 29 (Lodgement of money in settlement of action) to cases where the defendant made an offer of amends

See Chapter 6 – Lodgement of money in settlement of action.

Recommendations

The following options are recommended:

- Option 1: Amend section 23 to provide that the reference to the High Court (for the purposes of the assessment of damages under section 23(1)(c)) means a judge sitting without a jury (this recommendation will not be relevant if the recommendation to abolish juries is accepted); and
- Option 4: Amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence.

The following options are not recommended:

- Option 2: Set out the discount procedure in section 23; and
- Option 3: Allow for determination of damages by an alternative disputes resolution process without reference to the court, or provide for a stay pending ADR determination of any proceedings that had been issued, where the parties so agree.

3.6 Fair and reasonable publication on a matter of public interest

3.6.1 Current legal position

Section 26 of the Act provides for a defence of fair and reasonable publication on a matter of public interest. This defence applies where the defendant can prove that the allegedly

defamatory statement was published (i) in good faith; (ii) 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; (iii) in all the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient; and (iv) in all the circumstances of the case, it was fair and reasonable to publish the statement.²⁸¹

Subsection (2) sets out an indicative list of issues that the court must take into account (where relevant) in determining the fairness and reasonableness of the publication e.g. the extent to which the statement concerned refers to the performance by the person of his/her public functions; the seriousness of the allegations made in the statement; the extent to which the statement drew a distinction between suspicions, allegation and facts; the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff, etc.

For the purposes of this section “court” means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury.²⁸²

Subsection (3) provides that the failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant to elicit the plaintiff’s version of events, shall not constitute or imply consent to publication of the statement or entitle the court to draw any inferences.

Subsection (4) provides that for the purposes of section 26 a defamation action does not include an application for a declaratory order.

The Explanatory Memorandum on the Act states that section 26 introduces a significant new defamation defence into Irish law. It goes on to state:

*The ... defence is essentially designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place. The defence is subject to the criterion of fairness and reasonableness and a range of matters - which are non-exhaustive - are specified which a court shall take into account in determining whether or not the publication of a statement is fair and reasonable in the circumstances.*²⁸³

Section 26 “*is designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place*” and “*facilitate responsible journalism.*”²⁸⁴ In *Meegan v. Times Newspapers Ltd*,²⁸⁵ Hogan J described this defence as “*a novel provision which, ..., has yet to be successfully invoked in any reported defamation case*”. He went on to state:

The section is clearly designed to provide a defence for publishers who show that they acted bona fide and that the publication was fair and reasonable having regard, in particular, to the matters set out in s.26(2) of the 2009 Act. Section 26 may be regarded as an endeavour by the Oireachtas to move away in some respects from the strict liability nature of the common law tort of libel and to introduce – in, admittedly, some specific

²⁸¹ Section 26(1)

²⁸² Section 26(4).

²⁸³ Explanatory Memorandum to Defamation Act 2009;

<https://www.justice.ie/en/JELR/Explanatory%20Memo%20to%20Defamation%20Bill.pdf/Files/Explanatory%20Memo%20to%20Defamation%20Bill.pdf>.

²⁸⁴ Minister for Justice and Equality, Defamation Bill 2006, Dáil Second Stage, 8 May 2008.

²⁸⁵ [2016] IECA 327. (This case related to discovery.)

*and limited respects – a negligence based standard in actions for defamation under the 2009 Act. This is reflected, in particular, in s. 26(2)(i) which requires the court to have regard to the endeavours made by the publisher to verify the contents of the article in assessing the defence of fair and reasonable publication.*²⁸⁶

In its classic form, the defence is oriented to reporting of *facts*, and does not cover publication of *opinions*. Those fall to be protected (or not) under the defence of honest opinion, which is similarly subject to the condition that the statement must be on a matter of public interest.²⁸⁷

If a journalist makes allegations (as distinct from neutrally reporting allegations made by others) he/she should have “*complied with the ordinary journalistic obligation to verify a factual allegation*”, and must have:

*“relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of [the] allegation, given that the more serious the allegation, the more solid the factual basis has to be.”*²⁸⁸

The European Court of Human Rights, in particular, has consistently underlined that journalists who publish on subjects of genuine public importance play a vital role in safeguarding democracy, and must be permitted to carry out that task effectively, in a way that respects the confidentiality of their sources:

“ .. a constant thread running through the Court’s case-law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest

*Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog””*²⁸⁹

However, the ECtHR has equally insisted that this depends on the journalist acting responsibly:

“... protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it “duties and responsibilities”, which also apply to the media, even with respect to matters of serious public concern.

Moreover, these “duties and responsibilities” are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the “rights of others”. Thus, special

²⁸⁶ *ibid* at para. 10.

²⁸⁷ The House of Lords in *Reynolds v Times Newspapers* [1999 UKHL 45] expressly stated that for this reason, the defence of reasonable publication in the public interest did *not* apply to statements of opinion. The Defamation Act 2013 (England and Wales), which replaced the *Reynolds* common-law defence with a new statutory defence, therefore surprised some legal commentators by providing that the statutory defence would also apply to statements of opinion. The leading textbook, *Gatley on Libel and Slander*, is critical of that approach, noting that it will “*produce some overlap with .. ‘honest opinion’ ... As a matter of principle, the position stated in the House of Lords is preferable ... although for some, this distinction is no more than a ‘technicality’.*” (at para 15.19.)

²⁸⁸ *Pedersen v Denmark*, ECtHR (Grand Chamber), Applic’n 49017/99, judgment 17/12/2004, para 78.

²⁸⁹ *Pedersen v Denmark*, ECtHR, para 71, citing also *Thorgeirson v. Iceland*, ECtHR, 25 June 1992, § 63, and *Bladet Tromsø v. Norway*, ECtHR no. [21980/93](#), § 62.

*grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist, depends in particular on the nature and degree of the defamation in question, and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations ...”*²⁹⁰

3.6.2 Main issues raised in course of review

The consensus among the majority²⁹¹ of those who commented on section 26 was that this defence is overly complex, lacks clarity and sets too high a hurdle for the defence to be successfully pleaded. It was argued that it fails to achieve the objective of the section as explained in the Explanatory Memorandum to the Act which states that this section is “*essentially designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place*”. It does not provide an adequate level of protection for freedom of expression on matters of public interest. The lack of such a defence means that important and serious journalism on matters of public interest remains open to challenge. The defence does not protect a defendant from liability for publication of a potentially defamatory statement where the defendant’s conduct in publishing the material was fair and reasonable and related to a matter of public interest.

It was stated that this defence has its genesis in Ireland’s obligations under Article 10 ECHR, as applied under the common law and the Constitution. Article 10 applies not only to the defences available to a publisher involved in litigation but to the publication itself. A publisher must be able to know, with a reasonable degree of certainty, at the time of publication whether the defence will apply and is likely to succeed otherwise the publisher is unlikely to publish the material. One submission²⁹² to the review following the Symposium suggested that section 26 may not meet the standard required under Article 10 ECHR.

Contributors to the review made the following suggestions for reform:

➤ *Section is overcomplicated*

The application of an entirely separate test of fairness and reasonableness (as well as public interest) makes the section over complicated. Some of the concepts are so vague that it is impossible to assess them objectively. The defence should be available unless no reasonable person could have honestly come to the conclusion that publication was fair and reasonable. Particular concern was expressed in relation to the onerous check-list in subsection (2) of section 26.

➤ *Reportage privilege and fair and impartial reporting in public interest*

Privilege should be accorded to reportage and/or responsible journalism on the basis that it is in the public interest that the Press should be able to impartially report both sides of a story that is in the public domain, and it is undesirable that it should take one side or the other. It is very doubtful whether section 26 provides a defence for reportage. Those reporting about matters of public interest should not be exposed to legal action if they act responsibly, verifying potentially defamatory material. However, verifying such material is not always possible; the

²⁹⁰ *Pedersen v Denmark*, ECtHR, para 78.

²⁹¹ Bar Council, Business Journalists Association, Anonymous1, Crowley, Department of Communications, Climate Action and the Environment, DIT, K. Fitzpatrick, Anonymous2, Irish Times, Joint Oireachtas Committee on Justice and Equality, Local Ireland, McCann Fitzgerald, NewsBrands, NUJ, T. O’Conail, E. O’Dell, H. O’Driscoll, D. Reynolds, Ronan Daly Jermyn, RTE, ICCL (following Defamation Symposium).

²⁹² Irish Council for Civil Liberties.

protection of the right to free speech exceptionally requires a proper functioning defence on matters of public interest where a publisher or journalist cannot avail of the normal defences available in defamation proceedings.

The defence should allow fair and impartial reporting of material, whose accuracy the plaintiff disputes, where the defendant believes that publication is in the public interest.

➤ *Section 4 of England and Wales Defamation Act 2013*

Section 4 of the England and Wales Defamation Act 2013 (see below) is a far more flexible provision; it allows the courts to interpret the defence by reference to existing case-law without putting on a statutory footing the narrow checklist of relevant factors set out in the *Reynolds*²⁹³ case. The defence is available where the defendant is able to prove that the “*statement complained of was, or formed part of, a statement on a matter of public interest*” and that “*the defendant reasonably believed that publishing the statement was in the public interest*”. One submission to the review following the Symposium indicated that adoption of the approach in England and Wales would mean providing for the defence of publication on a matter of public interest without having to prove that publication was “*fair and reasonable in all of the circumstances*”.²⁹⁴

➤ *Role of judge and jury*

It would be more appropriate for a judge to consider whether the defence is made out and direct the jury accordingly because of the complex nature of this defence.²⁹⁵ One submission to the review following the Symposium reiterated its previous recommendation that the weighing of factors under section 26 should expressly be reserved to the trial judge, given the complexity of the issues under consideration.²⁹⁶

➤ *Social media and online sites*

This section should be amended to provide a legal incentive for social media sites and online sites of broadcasters which are not currently covered by the Broadcasting Act to sign up to the Press Council and its code of conduct.²⁹⁷

➤ *Role of Press Council*

One submission²⁹⁸ to the review following the Symposium suggested that section 26 should be amended to include a provision whereby judges would take into account, in their consideration of defamation actions, whether or not plaintiffs availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings. It was suggested that if the purpose of defamation proceedings is to correct an injustice and re-establish reputations this may be, depending on circumstances, available through the Press Ombudsman and the Press Council. If plaintiffs have not taken this route this could be a factor in the determination of awards or in the instruction of juries by judges.

²⁹³ *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127.

²⁹⁴ ICCL.

²⁹⁵ McCann Fitzgerald, MGM.

²⁹⁶ McCann Fitzgerald.

²⁹⁷ Irish Times.

²⁹⁸ Press Ombudsman.

3.6.3 Comparative Perspectives

In **England and Wales**, section 4 of the Defamation Act 2013²⁹⁹ provides that it is a defence to an action for defamation for the defendant to show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he/she reasonably believed that publishing the statement was in the public interest (subsection (1)). In determining whether section 4 applies, the court must have regard to all the circumstances of the case (subsection (2)). In particular, 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 (subsection (3)). The court must also make allowance for editorial judgment (subsection (4)). The defence may be relied on irrespective of whether the statement complained of is a statement of fact or a statement of opinion (subsection (5)). The common law defence known as the *Reynolds* defence is abolished (subsection (6)).

The Explanatory Notes on this provision state that this is a new defence based on the common law defence established in *Reynolds v. Times Newspapers*³⁰⁰ and that it is intended to reflect the principles established in that case and in subsequent cases. It explains that subsection (1) contains a subjective element (what the defendant believed was in the public interest at the time of publication) and an objective element (whether the belief was a reasonable one for the defendant to hold in all the circumstances). The defence applies if the statement complained of “was, or formed part of, a statement on a matter of public interest” to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article, etc. in which it is contained in order to decide if overall it is on a matter of public interest. Subsection (3) provides for the common law defence of “reportage” i.e. neutral reporting of attributed allegations rather than their adoption by the newspaper. In such cases the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture.

²⁹⁹ Section 4 (publication on matter of public interest) provides:

- (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.*
- (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.*

³⁰⁰ [2001] 2 AC 127.

In **Scotland**, the law recognises the defence of publication in the public interest based on *Reynolds*; for example the *Reynolds* defence was adopted in *Adams v. Guardian Newspapers Ltd*³⁰¹ and *Lyons v. Chief Constable of Strathclyde*³⁰². The question of whether a statutory public interest defence should be introduced was considered by the Scottish Law Commission, which recommended the introduction of such a statutory defence.³⁰³

Section 6 of the Defamation and Malicious Publication (Scotland) Act 2021 replicates section 4 of the Defamation Act 2013 in England and Wales.³⁰⁴ The rationale for this provision is set out in the Policy Memorandum on the Bill (as initiated) which states that in “*the wider public interest there are occasions when people should be able to speak and write freely to a particular audience, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed*”.³⁰⁵

In **Northern Ireland**, the report on *Reform of Defamation Law in Northern Ireland*³⁰⁶ recommends the introduction of a provision equivalent to section 4 of the England and Wales Defamation Act 2013.

In **Australia**, section 30 of the Model Defamation Provisions (2005), which provides for a defence of qualified privilege, lists a number of factors that the court may take into account in determining whether the defendant acted reasonably. These factors largely reflect the factors set out in *Reynolds*.

It appears that, as of December 2019, this defence has not been successfully argued by a media defendant.³⁰⁷ This has led to the introduction of a new defence of publication of matter of public interest, similar to section 4 of the England and Wales Defamation Act.

Section 29A of the Model Defamation Amendment Provisions 2020 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter concerns an issue of public interest, and the defendant reasonably believed that the publication was in the public interest. In determining whether the defence is established, a court must take into account all of the circumstances of the case.

It sets out a non-exhaustive list of issues that may be taken into account by the court in determining if the defence has been established— (a) the seriousness of any defamatory imputation, (b) the extent to which a distinction was made between suspicions, allegations and proven facts, (c) the extent to which the statement related to the performance by the plaintiff of his/her public functions or activities, (d) whether it was in the public interest in the circumstances for the matter to be published expeditiously, (e) the sources of the information, including the integrity of the sources, (f) if a source is confidential, whether there is good reason

³⁰¹ [2003] SC 425.

³⁰² [2013] CSIH 46.

³⁰³ Scottish Law Commission, *Report on Defamation* (SCOT LAW COM No 248), December 2017.

³⁰⁴ The abolition of the Reynolds defence is provided for in section 8.

³⁰⁵ Defamation and Malicious Publication (Scotland) Bill Policy Memorandum, at p.20:

<https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf>

³⁰⁶ Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance, Dr Andrew Scott, Department of Law, London School of Economics and Political Science, June 2016.

³⁰⁷ Background Paper: *Model Defamation Amendment Provisions 2020 (Consultation Draft)*, December 2019, at p. 20.

for the person’s identity to be kept confidential, (g) whether the matter published contained the substance of the plaintiff’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the plaintiff, (h) any other steps taken to verify the information, and (i) the importance of freedom of expression in the discussion of issues of public interest. For the purposes of this section, the court means the jury in jurisdictions where jury trials exist.

In **Canada**, the Supreme Court in *Grant v. Torstar*³⁰⁸ adopted a defence allowing publishers “to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest”. According to the court this was necessary to respect freedom of expression and support the public exchange of information while retaining protection of reputation.

This defence is explained in the Law Commission of Ontario’s report on *Defamation Law in the Internet Age*³⁰⁹ as follows:

*“When truth cannot be proven, the responsible communication defence requires the defendant to prove that the publication was on a matter of public interest and the defendant acted responsibly in trying to verify the accuracy of the statement. Responsible conduct by the defendant is determined by reference to a list of factors. the defence is not limited to media publishers but is generally available to “anyone who publishes material of public interest in any media”.*³¹⁰

The factors relevant to determining whether or not the conduct of the defendant was responsible include: (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff’s side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth (reportage); and (h) any other relevant circumstances.³¹¹

The Law Commission of Ontario concludes that the “*responsible communication defence represents a successful balancing between reputation and expression in the context of public interest communications and is flexible enough that it should be available to all public interest publishers*”.³¹² They note that the factors applied in *Grant* were designed for news reporting and that the “*criteria relevant to assessing responsible conduct will necessarily vary depending on the nature of the publisher, the medium of communication and the circumstances of publication*”. They conclude that these criteria “are best developed by courts on a case-by-case basis”.³¹³

In **New Zealand** the common law defence of “*responsible communication on a matter of public interest*” was established by the Court of Appeal in *Durie v. Gardiner*³¹⁴. This defence is made out if the publication is in the public interest and is responsible. The court determines whether

³⁰⁸ 2009 SCC 61.

³⁰⁹ *Defamation Law in the Internet Age, Final Report*, March, 2020.

³¹⁰ *Defamation Law in the Internet Age, Final Report*, March, 2020 at p.31.

³¹¹ *Grant v Torstar*, paras 110-126.

³¹² *Defamation Law in the Internet Age, Final Report*, March, 2020 at p.32.

³¹³ *ibid.*

³¹⁴ [2018] NZCA 278.

the communication is responsible having regard to all the relevant circumstances of the publication.

The “responsible journalism” approach has also been adopted in a number of **ECtHR** cases in which it has been emphasised that the exercise of freedom of expression comes with responsibilities and duties and that journalists benefiting from Article 10 ECHR must act in good faith in order to provide reliable and accurate information in accordance with the ethics of journalism.³¹⁵

3.6.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada;
- amend section 26 to provide that weighing of factors under section 26 should expressly be reserved to the trial judge;
- require account to be taken of whether or not plaintiffs availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings
- do nothing.

Option 1: Amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada

Arguments in favour

- Section 26 appears to be stricter than the common law prior to the enactment of the Act e.g. prior to the introduction of the 2009 Act, once a matter was considered a matter of public interest it generally followed that it could be publicly discussed; imposing a requirement that the matter must also be for the public benefit and in good faith appears to impose additional requirements. The sixth consideration in *Reynolds* was “*the urgency of the matter*” (the court noted that “*news is often a perishable commodity*”), this factor is incorporated in the 2009 Act as “*the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication*” which may be more difficult to prove.
- There are a number of elements in the defence that are unclear e.g. it is not clear how a court must decide whether the public benefit requirement has been satisfied; the parameters of the requirement on the defendant to show that the manner and extent of publication did not exceed that which was reasonably sufficient are not clear.
- Despite the fact that this defence is “*capable of protecting a responsible publication, even where the allegations published are untrue*”,³¹⁶ commentators note that it is narrowly drawn, cumbersome and very difficult to satisfy³¹⁷ and it rarely goes to trial.

³¹⁵ Maher J, *The Law of Defamation*, (Round Hall, 2nd edn., 2018) at p. 283 (*Cumpana v Romania* (2005) 41 E.H.R.R. 200 at para. 102; *Pedersen v Denmark* (2006) 42 EHRR 24.)

³¹⁶ Maher J, *The Law of Defamation*, 2nd edn. at p268

³¹⁷ Eoin O’Dell, *Business Post OpEd, Blog: The critical balance – protecting your name vs freedom of expression*, Andrea Martin, partner, MediaLawyer Solicitors, Dublin, 13 November 2017; <https://www.irishlegal.com/article/blog-the-critical-balance-protecting-your-name-vs-free-expression>

- The responsible journalism defence has been reflected in a number of ECtHR cases, which emphasise the extent to which freedom of expression comes with responsibilities and duties and that those who benefit from Article 10 ECHR are required to act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.³¹⁸
- In *Kehoe v. RTE*,³¹⁹ the plaintiff claimed to have been defamed during a political discussion on live radio, in which he was described as interfering with normal democratic processes. RTE stated in evidence that once allegations had been made by one contributor during a live debate, it was considered better to allow another contributor to argue in defence of the plaintiff's reputation rather than to cut off the discussion immediately. The jury found in favour of the plaintiff and awarded damages of €10,000, but found that RTE was only 35% responsible for the defamation and former Labour T.D. Mr Joe Costello (who made the original statement) was 65% responsible. Maher notes that “(d)uring the hearing, it became clear that a number of the ‘responsible journalism’ steps of s.26, such as obtaining and verifying the plaintiff’s version of events, were simply impracticable during such a live programme”. He went on to express the view that this case demonstrates that section 26 is designed for a situation where there is time for preparation before publication (e.g. investigative journalism or news reporting) but is less suitable for live broadcasts and live online exchanges.³²⁰
- The defence seems to lack both the adaptability of the common law defence, and the flexibility of section 4 of the England and Wales Defamation Act, “a flexibility particularly required in the context of today’s fast-developing media landscape”.³²¹

Arguments in favour of the England and Wales and Scotland approach

- Section 4 of the England and Wales Defamation Act 2013 provides for a “very broad defence of publication on a matter of public interest”³²² e.g. section 4(3) provides for “a ‘reportage’ privilege which may be available where the views or statements of each side in a dispute are sought and reported in a balanced fashion, even if steps are not taken to verify the validity of the versions put forward by each side”.³²³
- Section 4 specifically requires the court to make allowance for “editorial judgment” which acknowledges that the courts may “know less than journalists and media executives about the exigencies of attracting and holding the interest of their audience”.³²⁴

³¹⁸ Maher J, *The Law of Defamation*, 2nd edn. at p. 283 based on in particular *Campana v Romania* (2005) 41 EHRR 200 and *Pedersen v Denmark* (2006) 42 EHRR 24.

³¹⁹ [2018] IEHC 340.

³²⁰ Maher J, *The Law of Defamation*, 2nd edn. at p. 294.

³²¹ Maher J., *The Law of Defamation*, 2nd edn. at p.305.

³²² Professor Neville Cox, *The Future of the Reynolds Defence in Irish Defamation Law following the Defamation Act 2009*, *The Irish Jurist* 2014. 51(1), 28-58

³²³ Maher J., *The Law of Defamation*, 2nd edn. at p. 266.

³²⁴ Maher J., *The Law of Defamation*, 2nd edn. at p. 290.

Arguments in favour of responsible journalism approach based on either the New Zealand or Canadian approach

- It would be simpler than the England and Wales and Scotland approach.
- It could give more guidance to the court as it could specify factors to be taken into account in determining whether or not a publication was responsible.
- It could provide a more flexible approach.

Arguments against

- Section 26 has not been the subject of an appellate court decision, so the scope offered by this defence is not yet clear.
- Under section 26, there is no requirement to prove the truth of what was published or that the defendant believed it was true; any proposal to expand the scope of this defence would require careful consideration in view of the constitutional requirement to protect a person's good name.

Arguments against the England and Wales and Scotland approach

- On one interpretation of the “reportage” defence (i.e. the accurate and impartial account of a dispute involving the plaintiff), it could encourage journalists to avoid seeking to independently verify the allegations they intend to publish, for fear that the additional knowledge will force them to adopt one position rather than another.³²⁵

Option 2: Amend section 26 to provide that weighing of factors under section 26 should expressly be reserved to the trial judge

This option will depend on whether it is decided to retain juries in High Court actions.

Arguments in favour

- This is a complex defence, involving issues such as public interest and public benefit, which would best be determined by a judge.
- It may be very difficult for a judge to direct a jury on the criteria listed in section 26 and, in particular, on the policy arguments that underpin the defence.³²⁶

Arguments against

- These are issues of fact which are traditionally matters to be determined by a jury in a jury action.
- It could be very difficult to separate these issues from other issues of fact.

³²⁵ Maher J., *The Law of Defamation*, 2nd edn. at p. 297.

³²⁶ Cox N. and McCullough E, *Defamation Law and Practice* at para. 9-107.

Option 3: Require account to be taken of whether or not a plaintiff availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings

Arguments in favour

- This would encourage individuals to avail of the services of the Press Ombudsman and Press Council and may reduce recourse to the courts.

Arguments against

- This would merely add an additional step, resulting in additional delay and costs, in cases where an individual who believes that his/her reputation has been damaged as a result of a defamatory statement wishes to seek damages.
- This proposal would apply only to publishers of periodicals; it would not apply to broadcast media.

Option 4: Do nothing

Arguments in favour

- Section 26 has not been the subject of an appellate court decision so the scope offered by this section is not yet clear.

Arguments against

- Section 26 has been little used; the provision seems “*to lack both the adaptability of a common law defence, and the flexibility of the statutory version enacted in England*”.³²⁷

Recommendations

The following option is recommended:

- Option 1: Amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada.

The following options are not recommended:

- Option 2: Amend section 26 to provide that weighing of factors under section 26 should expressly be reserved to the trial judge (this option will not be relevant if the recommendation to abolish juries is accepted);
- Option 3: Require account to be taken of whether or not a plaintiff availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings; and
- Option 4: Do nothing.

3.7 Innocent Publication

3.7.1 Current legal position

Section 27 of the Act provides for the defence of innocent publication where the defendant proves that he/she was not the author, editor or publisher of the statement complained of, he/she

³²⁷ Maher J., *The Law of Defamation*, 2nd edn. at p 305.

took reasonable care in relation to its publication and he/she did not know, and had no reason to believe, that what he/she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.³²⁸ The terms “author”, “editor” or “publisher” are not defined but the section describes a series of functions and activities that are outside the scope of what is an author, editor or publisher.³²⁹ It also sets out factors the court must have regard to when determining whether a person took reasonable care, or had reason to believe that what he/she did caused or contributed to the publication of a defamatory statement.³³⁰ (See also chapter 7 on the relevance of this defence in the context of online publication.)

The defence does not apply to the broadcast of a live television or radio programme where a contributor makes a defamatory statement. In *Nicky Kehoe v. Radio Teilifís Éireann*,³³¹ the plaintiff (a former member of the IRA) sued RTE for remarks made by Mr Joe Costello, on a current affairs programme, suggesting that Sinn Féin members of Dublin City Council were controlled by a member of the IRA army council. Another contributor immediately said that Mr Costello was referring to Mr Kehoe and went on to defend Mr Kehoe.

In the High Court, RTE contended that if the impugned statements were to be found to be defamatory, they were made by Mr Costello during what he knew to be a live broadcast. It followed that as the statements were published simultaneously by the defendant to the same listeners, the Court should find Mr Costello to be a concurrent wrongdoer under the Civil Liability Act 1961. The plaintiff’s evidence was that although he considered Mr Costello to be at fault as the author of the impugned statements, he did not institute proceedings against him because he considered it was the defendant who had published or “*had let the statements out*”. The High Court accepted RTE’s argument that the relevant provisions of the Civil Liabilities Act 1961³³² apply to defamation proceedings and that should the jury find that the statement

³²⁸ Section 27(1) provides:

It shall be a defence (to be known as the ‘defence of innocent publication’) to a defamation action for the defendant to prove that –

- (a) he or she was not the author, editor or publisher of the statement to which the action relates,*
- (b) he or she took reasonable care in relation to its publication, and he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.*

³²⁹ Section 27(2) provides:

A person shall not, for the purposes of this section, be considered to be an author, editor or publisher of a statement if –

- (a) in relation to printed material containing the statement, he or she was responsible for the printing, production, distribution or selling only of the printed material,*
- (b) in relation to a film or sound recording containing the statement, he or she was responsible for the processing, copying, distribution, exhibition or selling only of the film or sound recording,*
- (c) in relation to any electronic medium on which the statement is recorded or stored, he or she was responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment, system or service or means of which the statement would be capable of being retrieved, copied, distributed or made available.*

³³⁰ Section 27(3) provides:

The court shall, for the purposes of determining whether a person took reasonable care, or had reason to believe that what he or she did caused or contributed to the publication of a defamatory statement, have regard to –

- (a) the extent of the person’s responsibility for the content of the statement or the decision to publish it,*
- (b) the nature or circumstances of the publication, and*
- (c) the previous conduct or character of the person.*

³³¹ [2018] IEHC 340.

³³² Sections 2, 11, 12, 14, 34 and 35.

by Mr Costello was defamatory he would be a concurrent wrongdoer and could have been joined as a concurrent defendant in the proceedings. It also held that where a plaintiff permits his claim against any concurrent wrongdoer to become statute barred, the effect of section 35(1)(i) of the Civil Liabilities Act 1961 is to deem the liability of the statute barred defendant a form of contributory negligence which may be pleaded against the plaintiff in reduction of the award of damages. It went on to say that the “*Plaintiff permitted his claim against Joe Costello, a concurrent wrongdoer, to become statute barred. It follows that the Defendant is entitled to rely on the plea pursuant to s. 35 (1) (i) by way of defence to the Plaintiff’s claim*”.

The jury was therefore asked, in the event of deciding that the plaintiff should be awarded damages, to determine what percentage, if any, of the damages RTE should be held liable for. The jury went on to reject RTE’s defence under section 26 of the Defamation Act 2019 and awarded the plaintiff €10,000 in damages, but found that Mr Costello was 65% liable for what had occurred (this is subject to appeal).^{333 334}

3.7.2 Main issues raised in course of review

The majority of submissions in relation to innocent publication relate to online publication which is dealt with in chapter 7. One submission recommended that a defence of innocent publication in the context of live broadcast should be available to broadcasters. It noted that the Legal Advisory Working Group on Defamation recommended that a defence for live broadcasting be introduced and stated that in the absence of such a defence, broadcasters who have taken all reasonable measures to avoid defamatory statements being made live on air are exposed for liability for statements by contributors.³³⁵ Another submission stated that broadcasters should not be held responsible for comments made by interviewees in live discussions, particularly where the host takes steps to restrain the person from the comments and/or makes an effort to provide a contra viewpoint. It argued that the current law excessively limits public debate on matters of public interest and negligence should have to be proven.³³⁶

3.7.3 Comparative Perspectives

In **England, Wales and Northern Ireland** section 1 of the Defamation Act 1996 provides that in defamation proceedings, a person has a defence if he/she shows: (a) that he/she was not the author, editor or publisher of the statement complained of, (b) he/she took reasonable care in relation to the publication, and (c) he/she did not know, and had no reason to believe, that what he/she did caused or contributed to the publication of a defamatory statement. The section defines “author”, “editor” and “publisher” and sets out situations where a person is not considered an author, editor or publisher. With regard to broadcasting, the section provides that a person shall not be considered the author, editor or publisher of a statement if he/she is only involved as the broadcaster of a live programme containing the statement in circumstances in

³³³ Irish Times, 26 February 2018, <https://www.irishtimes.com/news/crime-and-law/courts/high-court/ex-ira-member-nicky-kehoe-wins-3-500-in-rt%C3%A9-defamation-case-1.3406026>.

³³⁴ Joe Costello is suing RTE, the State and the Attorney General claiming that he was denied fair procedures and natural and constitutional justice as he had no opportunity to defend himself in this case. He is also claiming that his political credibility and reputation were damaged. <https://www.independent.ie/regionals/herald/news/ex-minister-costello-suing-rte-and-state-in-wake-of-kehoe-defamation-action-39022770.html>.

³³⁵ NUJ.

³³⁶ H. O’Donnell

which he/she has no effective control over the maker of the statement. The section also sets out factors the court must have regard to when determining whether a person took reasonable care, or had reason to believe that what he/she did caused or contributed to the publication of a defamatory statement.

In **Scotland**, section 3 of the Defamation and Malicious Publication (Scotland) Act 2021³³⁷ “provides a simple, and unqualified, removal of the court’s jurisdiction in relation to secondary publishers, other than in respect of the author, editor or publisher of a statement, or in certain other circumstances to be specified in regulations”.³³⁸ With regard to broadcasters, section 3(4) provides that a person is not to be considered an author, editor or publisher of a statement or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it, if the person’s involvement with the statement is only broadcasting a live programme containing the statement in circumstances in which the person has no effective control over the maker of the statement.³³⁹ The Act also provides for the making of regulations to specify categories of persons to be treated as authors, editors or publishers, who would not otherwise be classified as such, nor as employees or agents of such persons. The regulations may also specify a defence available to any person who did not know and could not reasonably be expected to know that the material contained a defamatory statement.

In **Australia**, the Model Defamation Provisions³⁴⁰ provide for the defence of innocent dissemination i.e. if the defendant proves that (a) he/she published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, (b) he/she neither knew, nor ought reasonably to have known, that the matter was defamatory, and (c) his/her lack of knowledge was not due to any negligence on his/her part. A person is a subordinate distributor of defamatory matter if he/she (a) was not the first or primary distributor of the matter, (b) was not the author or originator of the matter, and (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published. In so far as live broadcasts are concerned, a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter.

3.7.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control, provided that the broadcaster takes reasonable precautions in advance of the live broadcast, and reasonable care during the broadcast;
- do nothing.

³³⁷ <https://www.legislation.gov.uk/asp/2021/10/enacted>

³³⁸ Defamation and Malicious Publication (Scotland) Bill, Policy Memorandum, at p. 22.

<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf> .

³³⁹ Unlike the 1996 Defamation Act (which applied to Scotland but is repealed by the Act), there is no requirement for the defendant to show that he/she took reasonable care, nor that a reasonable lack of knowledge caused or contributed to the publication of the statement.

³⁴⁰ Section 32.

Option 1: Provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control provided that the broadcaster takes reasonable precautions in advance of the live broadcast and reasonable care during the broadcast

Arguments in favour

- This option would provide protection for broadcasters in respect of defamatory statements made during live broadcasts by an individual who is not an employee of the broadcaster or acting under its effective control, while imposing an obligation on broadcasters to take reasonable care to ensure that defamatory material is not published during live broadcasts; it could be argued that it strikes an appropriate balance between the responsibility of broadcasters and the right to a good name for an individual.
- Provided a broadcaster takes reasonable care, both before and during a live broadcast, to prevent the making of defamatory statements in live broadcasts and to address any such statement expeditiously (e.g. by providing guidelines to guests before appearing on the live broadcast and taking appropriate steps to stop a contributor from making a potentially defamatory statement or to counter any such statement immediately/as soon as possible), a broadcaster should not be held liable for statements made by a third party which are completely outside the control of the broadcaster.
- The *Report of the Legal Advisory Group on Defamation* recommended the adoption of the approach set out in the UK Defamation Act 1996,³⁴¹ subject to the imposition of a

³⁴¹ ***Section 1 (Responsibility for publication) of Defamation Act 1996***

(1) *In defamation proceedings a person has a defence if he shows that—*

- (a) *he was not the author, editor or publisher of the statement complained of,*
- (b) *he took reasonable care in relation to its publication, and*
- (c) *he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.*

(2) *For this purpose “author”, “editor” and “publisher” have the following meanings, which are further explained in subsection (3)—*

- “author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;*
- “editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and*
- “publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.*

(3) *A person shall not be considered the author, editor or publisher of a statement if he is only involved—*

- ...
- (d) *as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;*
-

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) *Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.*

duty on a broadcaster “when a potentially defamatory statement has been made, to seek, as soon as practicable to minimise the impact of what has happened”. It expressed the view that “a provision of this kind is appropriate, given the practical difficulties which can attach to live broadcasts” and noted that “there is a clear parallel to be drawn between internet publications on the one hand, and live broadcasts on the other”.³⁴²

- It is in the public interest to have live broadcasts.
- Contributors to live programmes should be responsible for what they say.
- This would be broadly in line with the approach adopted in comparative jurisdictions.
- The National Union of Journalists’ submission requested such a change.

Arguments against

- In *Kehoe v. RTE*,³⁴³ it was found that the broadcaster and live contributor were concurrent wrongdoers; it could be argued that this strikes an appropriate balance between the responsibilities of the broadcaster and the contributor and at the same time provides protection for the right to a good name for individuals.
- It could be argued that providing an exemption for publishers of live broadcasts would fail to provide sufficient protection for individuals.
- It may make it difficult for individuals to obtain redress where they are defamed on live broadcasts.
- Broadcasters have not requested this amendment.

Option 2: Do nothing

Arguments in favour

- The arguments against option 1 would apply.

Arguments against

- The arguments in favour of option 1 would apply.

Recommendations

The following option is recommended:

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to—

- (a) the extent of his responsibility for the content of the statement or the decision to publish it,
- (b) the nature or circumstances of the publication, and
- (c) the previous conduct or character of the author, editor or publisher.

³⁴² Report of Legal Advisory Group on Defamation, March 2003 at pp.24-25.

³⁴³ [2018] IEHC 340.

- Option 1: Provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control, provided that the broadcaster takes reasonable precautions in advance of the live broadcast, and reasonable care during the broadcast.

The following option is not recommended:

- Option 2: Do nothing.

3.8 Proposed new defence: satiric or comedic utterance

3.8.1 Main issues raised in course of review

One submission to the review suggested that a new defence of satire or comedic utterance should be introduced.³⁴⁴ It noted that satire deals with real and living persons and argues that publishers and broadcasters are constrained by defamation law to edit satire. It also argues that the current law requires a comedian to have journalistically established a fact before they can write jokes about those facts. It noted that in the UK, in *Burchill v. Berkoff*,³⁴⁵ one judge in the Court of Appeal stated that “*chaff and banter are not defamatory, and even serious imputations are not actionable if no one would take them to be meant seriously*”. The submission noted that it is possible that comedians and satirists would find the Irish courts amenable to a defence such as this, but argues that the lack of such a defence being codified means it is unpredictable and that the threat of litigation looms.

3.8.2 Comparative Perspectives

There is no specific statutory defence for satire or comedy under defamation law in England and Wales, Northern Ireland, Scotland, Australia or New Zealand.

The European Court of Human Rights’ Guide on Article 10 of the European Convention on Human Rights notes:

The Court has observed on several occasions that satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care (Welsh and Silva Canha v. Portugal [2013] ECHR 826 (App no. 16812/11); Eon v. France [2013] ECHR (App no. 26118/10); Alves Da Silva v Portugal [2009] ECHR (App no. 41665/07); Vereinigung Bildender Künstler v. Austria, [2007] ECHR (App no. 68354/01); Tuşalp v Turkey [2012] ECHR (App no. 41617/08); Ziemiński v. Poland (no. 2) [2016] ECHR (App no. 1799/07) .³⁴⁶

The Guide also notes:

³⁴⁴ Crowley Millar Solicitors.

³⁴⁵ [1996] 4 All ER 1008, [1997] EMLR 139.

³⁴⁶ European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights*, 1st edn – 31 March 2020, at para. 179, https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf.

The Court ... distinguishes between statements of fact and value judgments in cases involving satire. With regard to a satirical article concerning an Austrian skier who allegedly expressed satisfaction at an injury sustained by one of his rivals, the Court concluded that the comment in question amounted to a value judgment, expressed in the form of a joke, and remains within the limits of acceptable satirical comment in a democratic society (Nikowitz and Verlagsgruppe News GmbH v. Austria).³⁴⁷

Therefore the ECHR provides a high level of protection for satire but protection is not unlimited e.g. in a dissenting opinion in *Ziemiński v. Poland (no. 2)*,³⁴⁸ it was stated that

“the fact of being satire cannot represent such a privilege that it can, in itself, absolve the author of any responsibility for the words and phrases employed in the publication. The fact of being satire is not absolute. There are satire that can be tolerated and satire that simply cannot be tolerated. This applies equally to a joke, a comedy, a grotesque, a lampoon, a parody, a caricature, an internet meme... the list can be extended. True, the limits of admissibility of language (and images) in these genres are very broad, even exceptionally broad, but they are by no means non-existent.”

Similarly in a partly dissenting opinion in *Dickinson v. Turkey*,³⁴⁹ it was stated that

“(i)t is clear that the Convention does not protect gratuitous insults (see Palomo Sanchez and Others v Spain [2011] IRLR 934 (App No 28955/06, 28957/06, 28959/06 and 28964/06); Janowski v Poland ECHR 1999-I (2); Lešnik v Slovakia [2003] ECHR 124 (App no 35640/97) ; Vitrenko and Others v. Ukraine [2008] ECHR (App. no. 23510/02) ; Annen v Germany (No 6) [2018] ECHR (App no. 3779/11); Prunea v Romania [2019] ECHR (App no. 47881/11) . Moreover, as an artist, the applicant does not escape the possibility that his rights might be restricted, as provided in Article 10 § 2. Anyone who avails himself of freedom of expression assumes, in the words of that paragraph, “duties and responsibilities”, the extent of which depends on the situation and the process used”.

3.8.3 Option for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following option was identified:

- provide for a statutory defence of satiric or comedic utterance.

Arguments in favour

- The possibility of a defamation action should not act as a censor on comedians and satirists.

Arguments against

- If the statement is understood as being a satiric or comedic utterance, it should not injure a person’s reputation and should therefore not amount to defamation.

³⁴⁷ *ibid* at para. 196

³⁴⁸ Joint dissenting opinion by Judges WOJTYCZEK AND KÜRIS [2016] ECHR 607 (05 July 2016)

³⁴⁹ [2021] ECHR (App no. 25200/11). Partly concurring and partly dissenting opinion of Judge Yuksel.

- It would be difficult to define satiric and comedic utterances; too broad a definition could mean that a person who has been defamed would have no redress, while too narrow a definition could limit the scope of the defence of satire and comedy.
- There is a danger that such a defence could result in a failure to adequately protect an individual's right to a good name as there is a danger that such a defence could be abused.
- None of the other comparative jurisdictions examined for the purposes of this review have such a statutory defence.

Recommendation

The following option is recommended:

- It is recommended that the 2009 Act should not be amended to provide for a statutory defence of satiric or comedic utterance.

Chapter 4: Court jurisdiction and procedures

4.1 Court jurisdiction

4.1.1 Current Legal Position

In general, defamation actions may be initiated in either the Circuit Court or High Court. The District Court does not have jurisdiction to deal with defamation cases.³⁵⁰

There are some differences between the jurisdictions of the High Court and Circuit Court:

- the maximum damages that can be awarded by the Circuit Court is €75,000 (whereas there is no limit on the amount of damages that may be awarded by the High Court);
- Circuit Court actions are heard by a judge sitting alone (whereas High Court actions are heard by a jury, but the entitlement to a jury may be waived if the parties agree);
- section 28(1) of the Act provides that a person who claims to be the subject of a statement that he/she alleges is defamatory may apply to the Circuit Court for an order that the statement is false and defamatory of him/her (declaratory order);
- a number of sections provide for action to be initiated in the High Court unless proceedings have already been brought i.e. section 23 (offer to make amends) and section 33 (order prohibiting publication of a defamatory statement); and
- the plaintiff may decide whether a Circuit Court case is to be heard by the judge of the circuit where the tort is alleged to have been committed, or by the judge of the circuit where the defendant, or one of the defendants, resides or carries on business (section 41).

4.1.2 Court Statistics

Under section 41 of the 2009 Act, the jurisdiction of the Circuit Court in defamation cases was increased to allow an award of up to €50,000.³⁵¹ Part 3 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 further increased this monetary limit to €75,000. This measure was intended to reduce legal costs by allowing more defamation actions to be taken outside of the High Court.

Three trends are noticeable in the Courts Service statistics for defamation cases over the period 2014-2020:

Overall numbers

The overall number of defamation cases initiated in the courts each year is small, relative to other areas of litigation such as personal injuries (with which defamation is often compared). This is an important consideration, in that the number of defamation cases does not seem sufficiently large to merit setting up a specialised court or quasi-judicial body.

³⁵⁰ Section 77 of the Courts of Justice Act 1942 (inserted by section 4(a) of the Courts Act 1991) as amended by section 7(1) of the 2009 Act.

³⁵¹ Section 41 inserts a new number 7A in the Third Schedule of the Courts (Supplemental Provisions) Act 1961, to include a defamation action where the amount of the claim does not exceed €50,000.

Court Service statistics indicate that over the seven years 2014-2020, the total number of cases where either Circuit Court or High Court defamation proceedings were issued, is 1,885 – an average of 269 cases per year in total.

In comparison, the total number of personal injuries cases initiated in the Courts over the four years 2017-2020 was 84,257 – a (very consistent) average of 21,064 cases per year.³⁵²

Increasing numbers in Circuit Court

Court Service statistics indicate a steady increase in the number of defamation actions initiated in the Circuit Court since 2014. Over the seven year period 2014-2020, the total number of cases is 707 (an average of 101 per year). There is a steady overall progression, from 25 cases in 2014, to 161 in 2020. (It has been suggested that the increased frequency of online defamation may account for this increase.)

High Court numbers remain fairly stable

Conversely, the number of actions initiated in the High Court has remained more or less at the same general level as 2014, although the numbers fluctuate from year to year with no clear trend. The total number of High Court cases initiated in the seven-year period 2014-2020 was 1,178 - an average of 168 cases per year. There were 182 cases initiated in 2014, and 156 initiated in 2020.

Very low resolution rate

The most noticeable feature is the apparently low resolution rate. According to the Courts Service figures, the number of cases before the courts that are resolved each year (either by the Court itself, or by negotiations between the parties outside court) remains a very small proportion of the numbers of new cases where court proceedings are issued. The most striking example is 2018, where the High Court decided 7 defamation cases, and saw 14 more settle – but received 186 new defamation cases.

It is also noticeable that High Court cases appear three times as likely to settle, as to be decided by the court.

³⁵² Personal injuries figures taken from the Courts Service Annual Reports, available at: <https://www.courts.ie/annual-report>. The annual figures are as follows: 2017: total 22,417 cases (High Court 8,909; Circuit Court 12,497; District Court – 1,011). 2018: total 22,049 cases (High Court: 8,889; Circuit Court 12,193; District Court 967). 2019: total 21,981 cases (High Court 7,987; Circuit Court 12,878; District Court 1,116). 2020: total 17,810 cases (High Court 6,682; Circuit Court 10,083; District Court 1,045).

Defamation - Circuit Court Cases³⁵³

Year	Incoming	Resolved	
		By Court	Out of Court
2014	25	8	1
2015	48	4	4
2016	75	1	6
2017	135	0	6
2018	112	8	12
2019	151	37	3
2020	161	2	8
Totals	707	60 (8%)	40 (6%)

Defamation - High Court Cases³⁵⁴

Year	Incoming	Resolved	
		By Court	Out of Court
2014	182	9	75
2015	212	10	24
2016	133	13	31
2017	152	7	9
2018	186	7	14
2019	157	12	34
2020	156	16	9
Totals	1,178	74 (6%)	196 (17%)

³⁵³ *Courts Service Annual Report 2014*, p.43, available at: <https://www.courts.ie/acc/alfresco/a4d65572-956f-4a95-9ec9-922cd5643220/Courts%20Service%20Annual%20Report%202014.pdf/pdf#view=fitH>; *Courts Service Annual Report 2015*, p. 40, available at: <https://www.courts.ie/acc/alfresco/fad543b7-103e-4efb-aa33-1840de87ff9d/Courts%20Service%20Annual%20Report%202015.pdf/pdf#view=fitH>; *Courts Service Annual Report 2016*, p. 45: <https://www.courts.ie/acc/alfresco/6ca3d890-65b0-4974-87ff-271c68ad7c18/Courts%20Service%20Annual%20Report%202016.pdf/pdf#view=fitH>; *Courts Service Annual Report 2017*, p. 52, available at: <https://www.courts.ie/acc/alfresco/4ef7111f-52fe-4ee5-a2c4-adc7e1d7db7a/Courts%20Service%20Annual%20Report%202017.pdf/pdf#view=fitH>; *Courts Service Annual Report 2018*, p.54, available at: <https://www.courts.ie/acc/alfresco/d3167a7a-2b47-4fc2-b654-6e657df2a01d/Courts%20Service%20Annual%20Report%202018.pdf/pdf#view=fitH>; *Courts Service Annual Report 2019*, p. 53, available at: <https://www.courts.ie/acc/alfresco/9bd89c8a-3187-44c3-a2e9-ff0855e69cb5/CourtsServiceAnnualReport2019.pdf/pdf#view=fitH>. Percentages in the table here are rounded to the nearest whole number. *Courts Service Annual Report 2020*, p. 48, available at: https://www.courts.ie/acc/alfresco/b47652ff-7a00-4d1f-b36d-73857505f860/Courts_Service_Annual_Report_2020.pdf/pdf#view=fitH.

³⁵⁴ Courts Service Defamation Statistics - High Court 2014-2020, see note above.

4.1.3 Main issues raised in course of review

A number of submissions expressed the view that the extension of the Circuit Court's jurisdiction and increase in cases taken in that court, had been positive and useful for addressing the efficiency and costs of certain types of defamation actions, particularly those seeking vindication of reputation as opposed to damages.³⁵⁵ There was some caution expressed as to the risks involved in seeking declaratory orders at the expense of further actions or awards, as something which might be constraining greater use of this form of redress.³⁵⁶ A lack of transparency and visibility in the keeping of records of proceedings and the lack of written Circuit Court judgments were highlighted by some as areas which could be improved.³⁵⁷ In terms of possible actions, submissions variously proposed that:

- no action for defamation should lie in the High Court except by way of appeal from a decision of the Circuit Court;
- consideration should be given to hearing defamation actions in the Circuit Court where plaintiffs have indicated a limit on the damages they are expecting;
- consideration should be given to hearing defamation actions where large amounts of damages are being sought in the Commercial Court Division of the High Court;
- it should be possible to make an appeal from a decision of the Circuit Court to the High Court either on the question of defamation itself, or, on the amount of damages awarded to any plaintiff in the Circuit Court;
- any variation of a Circuit Court decision on appeal to the High Court in relation to the quantum of damages awarded in the Circuit Court should be decided by the High Court judge alone;
- a register of all defamation awards and settlements should be established;
- there should be a statutory ban on any settlement term which inhibits or restricts future publication of certain matters.

Two submissions to the review following the Symposium suggested that defamation actions should be initiated in the Circuit Courts rather than the High Court.³⁵⁸ One submission following the Symposium suggested that it should be possible to legislate for a summary disposal mechanism for claims in which publication is limited, whereby a financial limit to jurisdiction would be imposed, such that access to justice would be maintained but there would be reasonable limits to the costs that may be incurred by defendants defending such claims and to the damages payable to the plaintiff.³⁵⁹

³⁵⁵ Johnsons Solicitors, Law Society, K. Fitzpatrick, William Fry.

³⁵⁶ Johnsons, K. Fitzpatrick, William Fry.

³⁵⁷ H O'Driscoll, K. Fitzpatrick.

³⁵⁸ Press Ombudsman, Professor J Horgan.

³⁵⁹ McCann Fitzgerald.

4.1.4 Options for reform

Based on the submissions received, the following options were identified:

- require all cases to be initiated in Circuit Court;
- provide that defamation actions should be initiated in the Circuit Court where the plaintiff has indicated a limit on the damages he/she is expecting;
- introduce a summary disposal mechanism for lower-value defamation claims;
- provide for defamation actions where large amounts of damages are being sought to be dealt with in the Commercial Court Division of the High Court
- provide that it should be possible to make an appeal from the Circuit Court to the High Court either on the question of defamation itself, or, on the amount of damages and that the judge should be able to vary the amount of damages awarded;
- provide for the establishment of a register of all defamation awards and settlements;
- introduce a statutory ban on any settlement term which inhibits or restricts future publication of certain matters.

Option 1: Require all cases to be initiated in Circuit Court

Arguments in favour

- Requiring cases to be initiated in the Circuit Court would reduce the costs associated with High Court defamation cases.

Arguments against

- This proposal would give rise to constitutional issues that would require careful consideration. There is currently a limit of €75,000 on the amount of damages that may be awarded by the Circuit Court in defamation actions. Retaining that limit would impose a cap on damages; bearing in mind the level of awards in defamation actions, it is unlikely that the imposition of such a cap would satisfy the constitutional requirement under Article 40.3.2 i.e. the obligation on the State by its laws to “*protect as best it may from unjust attack and, in the event of injustice done vindicate the good name ... of every citizen*”.

On the other hand, any proposal to remove the limit on the level of damages that can be awarded by the Circuit Court could give rise to concerns that the court was being given powers beyond what is appropriate for a court of local and limited jurisdiction.

- This proposal would be inconsistent with the law in relation to other torts, e.g. personal injuries cases, which can be initiated in the Circuit Court or High Court depending on the seriousness of the injury/level of damages being sought.

Option 2: Provide that defamation actions should be initiated in the Circuit Court where the plaintiff has indicated a limit on the damages he/she is expecting

Arguments in favour

- Requiring cases where the plaintiff has indicated a limit on the damages that he/she is expecting to be initiated in the Circuit Court would reduce the costs associated with High Court defamation cases.

Arguments against

- A plaintiff already has the option to initiate defamation proceedings in the Circuit Court where he/she considers that damages not exceeding €75,000 would provide adequately compensation for the damage caused to his/her reputation should the court find that he/she had been defamed.
- The arguments against the proposal to provide that all cases should be initiated in the Circuit Court would apply.

Option 3: Introduce a court-based summary disposal mechanism for lower-value defamation claims

The scope for such a mechanism would be limited, bearing in mind the constitutional right of access to the courts and to protection of good name³⁶⁰. But this might be possible for cases where damages sought by the plaintiff fall below a specified modest maximum ceiling.

Arguments in favour

- The advantage for both parties and for the courts is that such cases could by agreement be resolved summarily so that costs are kept at reasonable and proportionate levels.

Arguments against

- Given the constitutional constraints, this would need careful thought and design.

Option 4: Provide for defamation actions where large amounts of damages are being sought to be dealt with in the Commercial Court Division of the High Court

Arguments in favour

- There are no obvious arguments in favour of this proposal.

Arguments against

- Defamation is a tort and should be treated in the same way as other tort actions e.g. personal injuries cases.
- The rationale for this proposal is not clear.

Option 5: Provide that it should be possible to make an appeal from Circuit Court to High Court either on the question of defamation itself, or, on the amount of damages and that the judge should be able to vary the amount of damages awarded

Arguments in favour

³⁶⁰ *Gilchrist & Rogers v Sunday Newspapers*, Court of Appeal, Finlay-Geoghegan J, above.

- There are no obvious arguments in favour of this proposal.

Arguments against

- This amendment is not necessary. Under Article 34.3.1° of the Constitution, the High Court has “*full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal*”.

Option 6: Provide for the establishment of a register of all defamation awards and settlements

Arguments in favour

- This proposal would lead to increased transparency in relation to defamation awards and settlements.

Arguments against

- Establishing a register of settlements would likely create legal difficulties and would depart from normal practice in other areas.
- Defamation cases decided in court are reported publicly in the media and written judgments (where issued) are published on the Court Services website.
- Defendants may be reluctant to agree to settlements as publication of the settlement might create a precedent for future settlements.
- This proposal would impose a considerable administrative burden on the body designated to establish and maintain the register.

Option 7: Introduce a statutory ban on any settlement term which inhibits or restricts future publication of certain matters

Arguments in favour

- This proposal would result in increased transparency.

Arguments against

- This proposal would seem to raise legal difficulties as it would constrain the rights of private parties when settling proceedings.

Recommendations

Provided that there are no constitutional constraints, the following option is recommended:

- Option 3: Introduce a court-based summary disposal mechanism for lower-value defamation claims

The following options are not recommended:

- Option 1: Require all cases to be initiated in Circuit Court;
- Option 2: Provide that defamation actions should be initiated in the Circuit Court where the plaintiff has indicated a limit on the damages he/she is expecting;
- Option 4: Provide for defamation actions where large amounts of damages are being sought to be dealt with in the Commercial Court Division of the High Court;
- Option 5: Provide that it should be possible to make an appeal from Circuit Court to High Court either on the question of defamation itself, or, on the amount of damages and that the judge should be able to vary the amount of damages awarded;
- Option 6: Provide for the establishment of a register of all defamation awards and settlements;
- Option 7: Introduce a statutory ban on any settlement term which inhibits or restricts future publication of certain matters.

4.2 *Jury trial*

4.2.1 Current legal position

4.2.1.1 High Court

The right to trial by jury in defamation proceedings was expressly preserved by section 48 of the Supreme Court of Judicature (Ireland) Act 1877.³⁶¹ The Courts of Justice Act 1924 (section 94), which established the court structure for the new Irish State, preserved the right to jury trial in the courts of the Irish Free State, where such right already existed in civil proceedings. The Courts Act 1988 abolished juries for most civil actions (e.g. personal injuries) but did not do so for defamation actions. Moreover, the 2009 Act expressly retained juries in High Court defamation cases.

In accordance with the Superior Court Rules (Order 36 Rule 6), a party serving notice of trial in a High Court defamation action is entitled to opt for trial without a jury unless the other party/any of the other parties object(s).³⁶²

The role of the jury in such actions is to decide questions of fact (including quantum of damages); the judge decides questions of law.

4.2.1.2 Circuit Court

The Courts Act 1971 (section 6) abolished jury trials in all civil cases in the Circuit Court. The 2009 Act retained this position, but the Circuit Court was given a new expanded jurisdiction in damages³⁶³ to enable it to deal with a larger range of defamation cases at lower cost to the parties than the High Court.

³⁶¹ *Higgins v. The Irish Aviation Authority; White v. Sunday Newspapers Limited* [2018] IESC 29 [2018] 3 IR 374. Judgment by Dunne J, para. 45

³⁶² The Superior Court Rules, provide as follows, at Order 36:

“5. All causes or matters, which the parties are not entitled as of right to have tried with a jury, shall be tried by a Judge without a jury, unless the Court shall otherwise order.

6. In all cases not within rule 5, the party serving notice of trial shall state in such notice whether he requires that the issues of fact shall be tried with or without a jury, and in case he requires the same to be tried without a jury, the same shall be so tried, unless the other party or parties, or any of them, shall within fourteen days from the service of notice of trial, or within such time as the Court may allow, signify his desire by notice in writing to have the same tried with a jury, whereupon the same shall be so tried.”

³⁶³ Up to €50,000 under the 2009 Act. This was increased to €75,000 by the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

4.2.2 Main issues raised in course of review

There was a general consensus amongst the submissions received, that the role of juries in High Court defamation cases should be reformed. The majority of submissions in relation to the role of juries recommended that High Court defamation cases should be tried by a judge sitting alone without a jury.³⁶⁴ A range of other submissions recommended that juries should be retained on an opt-in basis in a similar manner to that adopted in England and Wales under the Defamation Act 2013.³⁶⁵ Alternatively, a range of submissions recommended that juries should be retained for questions of liability, but removed from questions relating to the quantum of damages.³⁶⁶ One submission following the Symposium suggested that juries should be abolished in defamation actions or, if juries are to be retained, their role should be restricted to determining if a defamation has taken place and the determination of the award of damages should be made by the judge.³⁶⁷

One submission³⁶⁸ to the review following the Symposium recommended that jury trials should be retained for defamation claims subject to two caveats (i) active case management to reduce the scope for parties to raise and seek to have determined legal issues regarding the pleadings at the trial (requiring such issues to be raised and determined at the interlocutory stage would significantly enhance the efficiency of jury trials);³⁶⁹ and (b) uncertainty regarding damages would be significantly addressed if parties were permitted to suggest a range of appropriate damages for consideration by the jury.³⁷⁰ In order to help address problems with delays in progressing cases, it recommended the introduction of an express statutory jurisdiction to dismiss claims where there has been no proceeding within 2 years of issuing proceedings unless special circumstances exist, and a requirement that defamation plaintiffs must proceed with due expedition to deal with stagnant claims. Any such change would not disadvantage plaintiffs who proceed with claims within a reasonable timeframe, but would significantly assist defendants who have no option but to budget for and manage the risks of claims that are not progressed.³⁷¹

Professor Neville Cox, in his presentation to the Symposium on Reform of Defamation Law, noted that arguments can be put forward both in favour and against retention of juries in High Court defamation cases. The following is a summary of his main points³⁷²:

“(A) judge will have experience and intuitive understanding of the kinds of quantum of damages that tend to be awarded in civil actions generally and thus will have a

³⁶⁴ Public Relations Ireland, William Fry, Business Journalist’s Association, Independent News and Media, MGN Ltd, H O’ Driscoll, NewsBrands Ireland, Local Ireland, Google.

³⁶⁵ Department of Communications, Climate Action and Environment, Law Society of Ireland, Crowley & Millar Solicitors, Dr. Eoin O’ Dell (Trinity College), MGN Ltd., NewsBrands Ireland.

³⁶⁶ Irish Times, NewsBrands Ireland, Press Council, ICCL (following Symposium).

³⁶⁷ Press Ombudsman

³⁶⁸ McCann Fitzgerald.

³⁶⁹ See under case management.

³⁷⁰ See chapter 6 regarding damages.

³⁷¹ See under case management.

³⁷² See: Prof. Neville Cox, (Trinity College Dublin), ‘Irish defamation law: the 2009 Act and the need for reform’. (Download PDF) at http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf.

perspective of what a 'large award' should mean. A jury simply does not have this perspective ..."

Many legal practitioners point to uncertainty in relation to outcomes generated by jury trials; this uncertainty "*impacts on both sides in a defamation case and is a strong incentive to settle cases*".

Defamation is an "*unusually societal-focused*" tort; it seeks to protect and vindicate people from loss of reputation in society; it requires 12 members of society to make the key factual judgments in these cases. On the other hand, it can be argued that the same concerns arise in other civil actions: so if a judge can be trusted to determine facts in these kinds of cases, why not in defamation cases?

Professor Tarlach McGonagle pointed out that the ECtHR's message in relation to the use of juries in defamation cases is clear: "*clear and comprehensive judicial guidance to juries is a very important safeguard against arbitrary and/or disproportionate awards of damages which could have a chilling effect on freedom of expression*".

Arguments in favour of removing juries

The arguments put forward in favour of removing or restricting the role of juries in High Court defamation cases can be broadly grouped as follows:

*Costs and damages*³⁷³

The use of juries results in longer trials, and higher damages and legal costs.

The potential of incurring very high legal costs and damages can lead to the settlement of cases at an early stage, even where there is a good defence. The potential to receive high levels of damages encourages plaintiffs to seek legal advice in the first instance rather than seek alternative remedies which reduces the effectiveness of the informal resolution and redress system offered by the Press Council and Press Ombudsman. High levels of jury awards have increased the expectation for all complainants as to the level of damages; this makes it more difficult to negotiate with a plaintiff's advisers within the defendant's advisers' assessment of the value range of the claim.

A trial by jury lengthens considerably the time taken to run a case which increases costs and is wasteful of court resources. The wait to have a date set for a hearing (as civil juries are only empanelled for a portion of each court term) and adjournments due to the availability of courts with civil juries add many months, often years, to the proceedings. The need to explain legal arguments to juries can also result in longer trials. *McDonagh v. Sunday Newspapers*³⁷⁴ was cited as an example of the extremely long time periods that a defamation case can take. The article complained of in that case was published in September 1999 and the Supreme Court decision was issued in July 2017 (the parties settled the case minutes before the Court delivered its judgments). Such a long time span does not do justice to the plaintiff or the defendant. A plaintiff who is defamed should be entitled to have his/her good name vindicated as early as possible, while delays and the treat of sizeable damages and legal costs exert a chilling effect on the right to free speech.

³⁷³Department of Communications, Climate Action and Environment, Independent News & Media, Irish Times, Local Ireland, MGM Ltd, NewsBrands Ireland, Ronan Daly Jermyn.

³⁷⁴ [2017] IESC 59.

*Unpredictability and lack of transparency*³⁷⁵

A jury trial is not transparent as the jury doesn't give reasons for its determination. Trial by a judge alone allows for more reasoned decisions and awards. An appeal against a verdict is highly likely where the verdict is not explained and falls outside the expected outcome of the parties; this results in further delay, costs and uncertainty.

A jury trial is unpredictable; the unpredictability of outcomes means that publishers often cannot take the risk to publish, resulting in a "chilling effect" on the media's role as the watchdog for a democratic society. Moreover, the absence of predictability undermines faith in the system and the ability to conclude litigation, due to the incidence of appeals against jury verdicts. Jury unpredictability gives a plaintiff negotiating leverage disproportionate to the merits of the case.

The unpredictability of decisions on liability and damages and the length of the process make legal costs unnecessarily punitive and prohibitive.

The lack of transparency and an element of unpredictability could be alleviated if the award of damages was made by a judge and accompanied with a statement explaining the judicial logic for the decision.

*Complexity of defamation law*³⁷⁶

Defamation law has become technical and complex; it is difficult for jurors in certain situations to understand complex legal and technical arguments (e.g. defences of honest opinion, fair and reasonable publication, public interest). 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 without a jury. Jury decisions can act as a deterrent to defendants running important, but complex lines of defence.

Juries are not qualified to balance conflicting constitutional rights: the right to good name *vis-a-vis* the right to freedom of expression.

The abolition of jury trials would facilitate the hearing of preliminary issues on meaning; clarity about the meaning of the statement complained about might assist in the resolution of a case.

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.

Other arguments

Retention of jury trials in High Court defamation cases is inconsistent with the abolition of juries for all other High Court civil cases, except for civil assaults, and with the abolition of juries in Circuit Court actions.³⁷⁷

³⁷⁵ Department of Communications, Climate Action and Environment, Independent News and Media, Irish Times, Local Ireland, MGM Ltd, NewsBrands Ireland.

³⁷⁶ Department of Communications, Climate Action and Environment, Independent News & Media, Local Ireland, MGM Ltd, H O'Driscoll.

³⁷⁷ MGM Ltd, Eoin O'Dell.

Juries are not representative of Irish society generally as High Court defamation actions are invariably tried in Dublin so that juries are in fact selected from Irish citizens within the Dublin borough.³⁷⁸

A person's good name would be no less vindicated by a verdict of a judge than by a verdict of a jury.³⁷⁹

The primacy of juries has been removed in England and Wales (Defamation Act 2013).³⁸⁰ An opt-in jury system would be compatible with the constitutional protection of one's good name.³⁸¹

Arguments in favour of retaining juries

The following arguments were made in favour of the retention of juries in High Court defamation actions:

- the role of the jury in the award of damages in defamation cases is embedded in our legal system,³⁸² and improves access to justice by placing citizens at the heart of the justice system;³⁸³
- juries are best placed to determine what “*an ordinary reasonable reader*” would have understood the words to mean;³⁸⁴ to act as arbiters of community standards on what is defamatory and to assess the impact of a defamatory statement on the plaintiff;³⁸⁵ and to act as a deterrent to the more extreme excesses of the media;³⁸⁶
- plaintiffs get comfort from a vindication of their good names by their peers;³⁸⁷ and
- the risk of excessive and disproportionate awards of damages (which may be punitive rather than compensatory in nature) could be reduced by providing for a mechanism for the judiciary to issue more detailed guidance to a jury on the range of damages permissible.³⁸⁸

One submission following the Symposium expressed the view that the key risk in abolishing juries is that a ‘respectability’ threshold enters the frame, with digital media, tabloid journalism, ‘entertainment’ media and other non-traditional forms of content generation placed at an unconscious disadvantage. Juries are a leveller.³⁸⁹

³⁷⁸ MGM Ltd.

³⁷⁹ Independent News & Media, MGM Ltd.

³⁸⁰ Crowley Miller Solicitors, Eoin O'Dell.

³⁸¹ Department of Communications, Climate Action and Environment, NewsBrands Ireland.

³⁸² Joint Oireachtas Committee on Justice and Equality.

³⁸³ Johnsons Solicitors.

³⁸⁴ Johnsons Solicitors.

³⁸⁵ Department of Communications, Climate Action and Environment, Law Society on behalf of solicitors.

³⁸⁶ Law Society, anonymous solicitor(s).

³⁸⁷ Department of Communications, Climate Action and Environment, NewsBrands.

³⁸⁸ Johnsons Solicitor.

³⁸⁹ McCann Fitzgerald.

4.2.3 Comparative Perspectives

In **England and Wales**, section 11 of the Defamation Act 2013 (2013 Act) removed the presumption of trial by jury in defamation cases as envisaged under section 69 of the Senior Courts Act 1981. Courts now have the discretion to order a jury trial but there is no requirement to do so. The rationale for this change was to provide judges with greater scope to achieve an early resolution of cases in an expeditious manner that is more economical. According to research undertaken by the Scottish Law Reform Commission on this question, the prevailing view amongst specialist practitioners in England and Wales is that the occasions on which the court will exercise its discretionary power to order trial by jury are likely to be “extremely rare” and confined to cases in which the defendant is a public authority, or where the position of the claimant gives rise to a risk of involuntary bias on the part of the trial judge. Factors militating against trial by jury are seen as including: the advantages of a reasoned judgment; proportionality; and the promotion of effective case management.³⁹⁰

Where a defamation case is heard by a jury in England and Wales, the jury retains its role in assessing the amount of damages.³⁹¹ Both parties can make submissions to the jury on the appropriate level of awards and judges may provide guidance to the jury on the levels of damages that have been awarded in previous cases and the set penalties for various personal injury awards.³⁹²

In **Scotland**, the Defamation and Malicious Publication (Scotland) Act 2021³⁹³ provides for the removal of the presumption that proceedings are to be tried by jury. The Policy Memorandum on the Bill (as initiated) explains the rationale for this proposal as follows:

*Courts currently do not have the discretion to choose the form of factual enquiry most appropriate to the circumstances of individual cases. By removing the presumption [of trial by jury], the Bill increases the ability of courts to effectively manage defamation claims according to their particular circumstances, thereby reducing the costs of an action on all sides. Where appropriate courts will retain a discretion to order trial by jury.*³⁹⁴

In **Northern Ireland**, it was noted in the report on *Reform of Defamation Law in Northern Ireland*³⁹⁵ that the issue in relation to whether juries should be retained is finely balanced. The report contains a provisional recommendation that a measure equivalent to section 11 of the Defamation Act 2013 should be introduced in Northern Ireland.

In **Canadian** defamation trials, the role played by the jury varies from state to state. In the majority of jurisdictions, parties must make a request in advance if they want the case to be tried by a jury but courts may refuse this request if the trial will require prolonged investigation of evidence. In British Columbia parties may request a jury and this request cannot be turned down. In Manitoba and Nova Scotia the default situation is trial by jury which can only change

³⁹⁰ *Report on Defamation* (2017), Scottish Law Reform Commission, p. 79.

³⁹¹ Defamation Act 2013 section 11.

³⁹² *ibid.*

³⁹³ <https://www.legislation.gov.uk/asp/2021/10/enacted>

³⁹⁴ Defamation and Malicious Publication (Scotland) Bill (as initiated), Policy Memorandum, p.22. <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf> .

³⁹⁵ *Reform of Defamation Law in Northern Ireland*, Recommendations to the Department of Finance, Dr Andrew Scott (2016).

if all parties consent to having a case heard by a judge alone. In Saskatchewan, any party may request a jury but they are responsible for paying the full cost of using the jury. In Quebec, juries in civil cases were abolished in 1976. In Ontario, defamation actions are generally treated like any civil action, with a presumption that a trial will be by judge alone unless a party requires otherwise. However, the Libel and Slander Act contemplates a role for juries in defamation actions. The Law Commission of Ontario's report on *Defamation Law in the Internet Age* notes that the number of defamation actions that proceed to jury trial is low and the number of actions determined by juries is even lower. The report recommends that the current law should not be changed.

In **Australia**, section 21 of the Model Defamation Provisions provides that, for jurisdictions that permit jury trials for defamation claims (all except South Australia, the Australian Capital Territory and the Northern Territory), a plaintiff or defendant in defamation proceedings may elect to have a jury trial but courts may order otherwise on the grounds that the case will require prolonged examination of records, or that the evidence may be too technically complicated for the jury to easily understand. This provision has been interpreted as meaning that an order must not be made on the court's own motion, but only on the application of a party.

The question of amending section 21 was considered in the context of a review of the Model Defamation Provisions. Stakeholders were asked if section 21 should be amended to clarify that the court could dispense with a jury on application by the opposing party or on the court's own motion, where the court considers doing so would be in the interests of justice (which could include case management considerations). The issue of whether an opposing party should be able to apply to dispense with a jury trial in the interests of justice is regarded as one to be addressed in each jurisdiction's civil procedure rules. Most stakeholders opposed amending section 21 to allow an order to dispense with a jury trial to be made on the court's motion; they were of the view that the current provision strikes an appropriate balance between the two competing issues of the right to trial by jury and case management considerations. They noted that juries play an important role, and that the right to elect for a jury trial should not be overridden by case management considerations. The Model Defamation Amendment Provisions 2020³⁹⁶ retain the current provisions in relation to when a court may order that defamation proceedings are not to be tried by a jury. The 2020 Provisions provide however that an election not to have a jury trial may be revoked where all the parties consent or with the leave of the court; such leave can be granted only if the court is satisfied that it is in the interests of justice for the election to be revoked.

In **New Zealand**, plaintiffs or defendants may apply to have their case heard by a jury, but a court can refuse on the grounds that the evidence is likely to be complex or time-consuming to examine.³⁹⁷ If the case is heard by a jury, the jury determines the damages to be awarded.

4.2.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- abolish juries in defamation cases;

³⁹⁶ The Model Defamation Amendment Provisions were approved by the Counsel of Attorneys-General on 27 July 2020 and must now be enacted into the law of each state and territory.

³⁹⁷ New Zealand, Defamation Act 1992, section 36.

- remove presumption of jury trials (subject to discretion of courts to order jury trial in appropriate cases);
- retain juries on questions of liability but remove juries from the decision on quantum of damages;
- make no change in relation to the role of juries in High Court actions.

Option 1: Abolish juries in defamation cases

Arguments in favour

- Jury trials are costly, result in delays in the hearing of cases and longer cases: civil juries are only empanelled for a portion of each court term; it is necessary to explain the law to juries in order to enable them to determine questions of fact; many defamation cases take years before they reach a final conclusion (see for example the *McDonagh* case referred to above). While some of the delay in reaching court may be caused by the parties, it is fair to assume that much of it is caused by the need for a jury trial e.g. both sides expected the *Higgins* case to last four days, but it took seven.³⁹⁸

Removing the jury from defamation actions would therefore promote more effective case management strategies and would allow for more efficient disposal of actions which would in turn reduce costs. It “*would make our defamation system fairer, quicker and more accessible*”.³⁹⁹

- Jury trials result in lack of transparency and unpredictability about outcomes: the lack of reasoned judgments in jury trials results in lack of transparency in relation to the jury’s reasoning for adopting their decision, the factors they took into account, etc. While the outcome of a legal dispute can never be predicted, the lack of reasoned judgments in jury cases makes it more difficult for legal practitioners to advise their clients in relation to the possible outcome of their case which may militate against settlement of disputes without recourse to the courts. A consequence of jury trials in the High Court is that “*it remains difficult to predict the outcome of defamation cases, both on questions of liability and on questions of quantum*”.⁴⁰⁰ An appeal against a verdict is highly likely where the verdict is not explained and falls outside the expected outcome of the parties.

Removing the jury from defamation actions would therefore generate greater certainty, consistency and transparency in relation to outcomes.

- Moreover, the unpredictability of outcomes and high level of damages and costs associated with jury trials mean that publishers often cannot take the risk to publish, resulting in a “chilling effect” on the media’s role as the watchdog for a democratic society. These factors may also inflate the settlement value of defamation cases as

³⁹⁸ A& L Goodbody, *Time to say goodbye: Why Ireland should remove juries from defamation cases*, 10 July 2020, <https://www.algoodbody.com/insights-publications/time-to-say-goodbye-why-ireland-should-remove-juries-from-defamation-cases>

³⁹⁹ *Ibid.*

⁴⁰⁰ Cox, N. and McCullough, E., *Defamation Law and Practice*, (Clarus Press, 2014) at para. 1-18.

defendants may consider paying an excessive settlement in order to avoid “*the lottery of a jury award*”.⁴⁰¹

- In accordance with the decision of the ECtHR in *Independent Newspapers (Ireland) Ltd v. Ireland*⁴⁰², judges are required to give reasons for the quantum of damages. Removing questions of damages from juries should therefore result in greater consistency, prevent excessive awards and alleviate any negative implications of excessive damages for discussion of matters of public interest by the media and others.
- Defamation law is complex and juries are not best placed to balance conflicting constitutional rights i.e. the right to the protection of one’s good name and the right to freedom of expression. For example, it has been argued that section 26 of the Act, which provides for a defence of fair and reasonable publication on a matter of public interest, is a complex defence requiring the defendant to prove that the statement was published (a) in good faith, (b) in the course of, or for the purposes of, discussion of a matter 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 extend of publication of the statement did not exceed that which was reasonably sufficient. A jury may not be best placed to determine these complex issues.
- The removal of juries might result in early applications for the determination of the actual meaning of the words complained of becoming commonplace⁴⁰³ and thus obviate the need for a full hearing. For example, in a case involving Denis O’Brien and Post Publications Ltd, (relating to an article published in the Sunday Business Post in 2015), the jury, after a 17 day hearing in early 2019, found that the newspaper’s reports of the plaintiff’s borrowing did not have the defamatory meaning contended by the plaintiff.⁴⁰⁴ It has been suggested that this conclusion could have been reached in a preliminary trial on meaning⁴⁰⁵ which is provided for in section 14 of the Act.
- The right to a jury trial is not guaranteed by the Constitution, but rather a right conferred by statute.⁴⁰⁶ While the courts have consistently acknowledged that under the current legal framework, the role of juries in defamation actions is sacrosanct, they have also acknowledged that “(t)here may be other ways of resolving the right to a good name and the right to inform the public,, such as entrusting the task solely to a judge in the High Court.....”⁴⁰⁷

⁴⁰¹ A & L Goodbody, *Time to say goodbye: Why Ireland should remove juries from defamation cases*, 10 July 2020, <https://www.algoodbody.com/insights-publications/time-to-say-goodbye-why-ireland-should-remove-juries-from-defamation-cases>.

⁴⁰² [2017] ECHR 567 (App no. 28199/15).

⁴⁰³ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, Dr Andrew Scott (June 2016) at para 2.119. See “Denis O’Brien could face legal bill of up to €1m for lost case” at

⁴⁰⁴ See “Denis O’Brien could face legal bill of up to €1m for lost case” at

<https://www.irishtimes.com/news/crime-and-law/courts/high-court/denis-o-brien-loses-defamation-case-again>

⁴⁰⁵ O’Dell, E, *O’Brien’s case should never have reached full trial*, Sunday Business Post, 3 March 2019 (available on cearta.ie).

⁴⁰⁶ *Bradley & Ors (t/a Malcomsom Law) v Maher* [2009] IEHC 389.

⁴⁰⁷ Charleton J. in *McDonagh v Sunday Newspapers*. [2017] IESC 46.

- In *Higgins v. Irish Aviation Authority*⁴⁰⁸, the jury in the High Court was, for the first time in a defamation action, provided with details of damages awarded in other cases with a view to guiding them on the amount of damages that should be awarded. Despite this, the jury awarded the plaintiff €387,000 which was subsequently reduced to €76,500 by the Court of Appeal (i.e. an 80% reduction). It has therefore been argued that the guidance given to the jury on other awards – a reform introduced by the Defamation Act 2009 - did not work in this case.⁴⁰⁹
- Retention of jury trials in High Court defamation cases is inconsistent with the abolition of juries for all other High Court civil cases, except for civil assaults. One of the reasons why the Courts Act 1988 removed the jury from most tort actions was because of the unsustainably high level of damages awarded by juries in such actions.⁴¹⁰
- Juries have already been removed from Circuit Court defamation cases.

Arguments Against

- The role of the jury in defamation cases has long been a feature of, and is embedded in, the Irish legal system.
- Given the definition of a defamatory statement (i.e. a statement that tends to injure a person’s reputation in the eyes of reasonable members of society), access to a jury is the best mechanism to vindicate the right to one’s good name under the Constitution; jury members are best placed to assess the impact of defamatory statements about a plaintiff because juries act as arbiters of community standards on what is defamatory.⁴¹¹
- Juries act as a great leveller.⁴¹²
- With correct instruction and guidance by a judge in relation to the quantum of damages, the jury is best placed to determine the appropriate level of damage to compensate for the harm caused by a defamatory statement; section 31 of the 2009 Act provides, for the first time, that a judge shall give directions to the jury, and that the parties may make submissions to the court, in relation to damages; it is hoped that this provision will, as indicated in *Kinsella v Kenmare Resources*,⁴¹³ “*result in the making of awards which are not only proportionate to the injury sustained in any individual case but which will also be proportionate when considered in the context of awards of damages in other*

⁴⁰⁸ *Higgins v The Irish Aviation Authority* [2016] IEHC 245.

⁴⁰⁹ A& L Goodbody, *Time to say goodbye: Why Ireland should remove juries from defamation cases*, 10 July 2020, <https://www.algoodbody.com/insights-publications/time-to-say-goodbye-why-ireland-should-remove-juries-from-defamation-cases>.

⁴¹⁰ Cox, N. and McCullough, E., *Defamation Law and Practice*, at para. 11-13.

⁴¹¹ See for example, MacMenamin J (McKechnie J concurring) in *McDonagh v. Sunday Newspapers* ([2017] IESC 59) where it is noted that “*The right to a good name, freedom of expression and public opinion are closely connected concepts, in which the concept of ‘the view of right thinking people’ are inherently part of the test. Juries are intended to reflect the views of the public. They represent the public mind and public opinion in balancing the constitutional values embodied in statutory form. This ‘public dimension’ is of great relevance in measuring whether a publication is actually defamatory at all; if it is, whether there is a defence to it; and if a publication is found to be defamatory, the measure of damages.*”

⁴¹² McCann Fitzgerald.

⁴¹³ [2019] IECA 54.

proceedings including personal injuries actions.” Despite the fact that the Act has been in force for more than 10 years, it is not possible to assess the effectiveness of this provision as there is not yet a large body of case-law under the 2009 Act from the appellate courts.

- It is possible that arguments in relation to the length of jury trials and delays could be addressed by active case management, requiring legal issues regarding the pleadings to be determined at the interlocutory stage.
- It is permissible under the European Convention on Human Rights to retain juries in defamation actions. In its judgment in *Independent Newspapers (Ireland) Ltd v. Ireland*⁴¹⁴, the European Court of Human Rights (ECtHR) held that “*it is entirely legitimate to involve citizens in different aspects of the administration of justice*”.⁴¹⁵
- In *Tolstoy Miloslavsky v. United Kingdom*,⁴¹⁶ the ECtHR held that it cannot be a requirement of “prescribed by law” in Article 10 ECHR “that the applicant, even with appropriate legal advice, could anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case”.

Option 2: Remove presumption of jury trial

Arguments in favour

The arguments set out above in relation to removal of juries from defamation cases apply. The following additional arguments are also relevant:

- The removal of the presumption of jury trials is now a common practice amongst other common law jurisdictions and would bring Ireland into line with those jurisdictions, in particular England and Wales and Scotland.
- It could be argued that this is the best mechanism to ensure compatibility with the constitutional protection of one's good name - it would still allow for jury hearings in specific cases, but it would address, at least in part, some of the problems and drawbacks with the automatic access to a jury in this jurisdiction.
- Removing the presumption of trial by jury, should increase the ability of the courts to effectively manage defamation claims according to their particular circumstances and result in speedier trials, thereby reducing the costs of an action for all sides.

Arguments Against

- Depending on how any such provision is framed, the arguments against the removal of juries from High Court defamation cases set out above would apply.

⁴¹⁴ [2017] ECHR 567 (App no. 28199/15).

⁴¹⁵ *Independent Newspapers (Ireland) Ltd v. Ireland* [2017] ECHR 567 (App no. 28199/15) para. 105.

⁴¹⁶ [1995] 20 EHRR 442.

Option 3: Retain juries on questions of liability but remove juries from the decision on quantum of damages

Arguments in favour

- The Law Reform Commission, in its 1991 *Report on The Civil Law of Defamation*,⁴¹⁷ recommended that in High Court defamation actions issues of fact, other than the assessment of damages, should be determined by a jury but that damages in such actions should be assessed by the judge. They also recommended that the jury should be entitled to include in their verdict a finding that the plaintiff is entitled to nominal damages only.⁴¹⁸
- Juries would continue to have a role in defamation cases, which is important as ordinary members of society are best placed to act as arbiters of community standards on what is defamatory.⁴¹⁹

Arguments Against

- The Legal Advisory Group on Defamation in its 2003 Report⁴²⁰ indicated that such a division of functions as between judge (assessment of damages) and jury (assessment of liability) would not operate well in practice. It took the view that such an approach could place judges in a difficult position since they would not be privy to the seriousness with which the jury viewed the defamatory matter. The Group therefore concluded that juries should continue to have a role in assessing damages in the High Court.
- In *McDonagh v. Sunday Newspapers*⁴²¹, O'Donnell J. noted that “*in a defamation case the question of whether the words are defamatory, and if so the damage done to the specific reputation of the individual, are bound up together*”.⁴²²

Option 4: Make no change to role of juries in High Court actions

Arguments in favour

- The arguments against abolishing juries at option 1 above would apply.
- The Legal Advisory Group on Defamation in its 2003 Report recommended that juries should be retained in High Court defamation actions.

Arguments against

- The arguments in favour of abolishing juries set out at option 1 above would apply.

Recommendations

The following option is recommended:

⁴¹⁷ The Law Reform Commission also recommended that juries should be restored in Circuit Court defamation cases.

⁴¹⁸ Law Reform Commission Report on *The Civil Law of Defamation*, December 1991, p. 106.

⁴¹⁹ See quotation from *McDonagh v. Sunday Newspapers* ([2017] IESC 59) in footnote 403.

⁴²⁰ *Report of the Legal Advisory Group on Defamation*, March 2003.

⁴²¹ [2017] IESC 59 2.

⁴²² *ibid* para 32.

- Option 1: Abolish juries in defamation cases.

The following options are not recommended:

- Option 2: Remove presumption of jury trial;
- Option 3: Retain juries on questions of liability but remove juries from the decision on quantum of damages; and
- Option 4: Make no change in relation to role of juries in High Court actions.

4.3 Time Limits and Delays by Parties

4.3.1 Current Legal Situation

Section 38 of the Act amends section 11 of the Statute of Limitations 1957 to provide for a general limitation period of one year “*from the date on which the cause of action accrued*” for the bringing of a defamation action. The court may direct an additional period not exceeding two years. The Act sets out a strict test for the giving of such a direction: the court must not give such a direction unless it is satisfied that the interests of justice require the giving of the direction, the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given. The court must, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the one year limitation period and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

In relation to statements published on the internet, section 38(b) inserts a new subsection (3B) in section 11 of the 1957 Act to provide that “*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*”.⁴²³

Professor Neville Cox, in his presentation to the Symposium on Reform of Defamation Law, noted that as the number of cases decided under the 2009 Act increases, so too does judicial interpretation of its provisions. He went on to note that there has been case-law in relation to, *inter alia*:

“when a defamation action might be struck out for delay,⁴²⁴ because it is frivolous, vexatious or discloses no cause of action,⁴²⁵ or for want of prosecution or abuse of process,⁴²⁶ and in particular, of whether and when a discretionary extension to the limitation period under s. 38 of the Act might be warranted.⁴²⁷ These judgments put

⁴²³ <http://www.irishstatutebook.ie/eli/2009/act/31/section/38/enacted/en/html#sec38> ;

⁴²⁴ *Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8.

⁴²⁵ *Jones v. Coolmore Stud* [2019] IEHC 652; *Kelly v Allied Irish Bank plc* [2019] IESC 72; *VK v. MW and Others* [2018] IECA 290; *Barrett v. Joyce* [2018] IEHC 823.

⁴²⁶ *O’Beirne v. Bank of Ireland Mortgage Bank and Others* [2016] IEHC 364, [2016] 6 JIC 2805; *Corrigan v. Kevin P Kilrane & Co. Solicitors* [2017] IEHC 488.

⁴²⁷ *Morris v. Ryan* [2019] IECA 86; *Oakes v. Spar (Ireland) Ltd* [2019] IEHC 642; *O’Brien v. O’Brien* [2019] IEHC 591; *O’Sullivan v. Irish Examiner Limited* [2018] IEHC 625; *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684; *Hynes v Allied Irish Banks Plc* [2018] IEHC 229 .

flesh on the bones of the statutory terms but,, do not raise concerns in relation to the terms themselves."⁴²⁸

4.3.2 Issues raised in submissions

One submission to the review suggested that the limitation period should be one year or the age of majority plus one year.⁴²⁹ Another submission argued that the standard limitation period of one year to initiate a case should be increased to two years, with the lesser time-frame acting as an obstruction to some litigants who may be forced to proceed before they are ready, thus providing a motivation to some defendants to drag out and delay proceedings as a matter of course in order to limit the ability of the litigant to start a case.⁴³⁰

The submission from the Houses of the Oireachtas Joint Committee on Justice and Equality cited the differing treatment of traditional and internet publication as confusing and something which carried potential for unfairness to plaintiffs, such as 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*". The Committee expressed the view that the separate provision for the Internet should be removed, and that the standard rules in relation to publication should apply to the Internet as to any other medium.⁴³¹

It was also argued that there was an undue weighting towards trial and that there should be an express statutory requirement that defamation plaintiffs must proceed with due expedition. Stagnant defamation claims result in some defendants having to bear ongoing costs and uncertainty associated with long term proceedings, or claims revived several years after original publication. In order to remedy this, it was argued that the Act should include an express statutory jurisdiction to dismiss claims where there have been no proceedings within 2 years of issuing proceedings, unless there are special circumstances.⁴³²

4.3.3 Comparative Perspectives

In **England, Wales and Northern Ireland**, the general time limit for initiating a defamation action is 1 year (or in the case of disability, 1 year from the date on which the person ceased to be under a disability). A court has discretion to dis-apply the time limit, if it appears that it would be equitable to do in certain circumstances.⁴³³

In **Scotland**, the Defamation and Malicious Publications (Scotland) Act 2021 amends the Prescription and Limitation (Scotland) Act 1973 to provide for a reduction of the limitation period for initiating a defamation action from 3 years to 1 year. It also provides that any period of mediation or, in the case of media complaints any period where the parties attempt to resolve the dispute by a complaint process or expert determination, is to be disregarded for the purposes of determining the limitation period.⁴³⁴

⁴²⁸ Prof. Neville Cox, (Trinity College Dublin), 'Irish defamation law: the 2009 Act and the need for reform'. (Download PDF) at

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

⁴²⁹ Dublin Bus.

⁴³⁰ Christian Morris.

⁴³¹ This issue is considered in Chapter 7.

⁴³² McCann Fitzgerald.

⁴³³ Sections 5 and 6 of the Defamation Act 1996 which amend the Limitation Act 1980 (England and Wales) and the Limitation (Northern Ireland) Order 1989 (Northern Ireland).

⁴³⁴ Sections 33 to 33A.

In **Ontario**, the Law Commission in its report on *Defamation Law in the Internet Age* recommends that the general two-year limitation period in the Limitations Act should be adopted.

4.3.4 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- increase the standard limitation period to two years;
- where parties engage in alternative dispute resolution mechanisms, increase the limitation period to take account of time devoted to such mechanisms;
- provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances;
- amend section 11(3B) of the Statute of Limitations to remove differences between off-line and online publication.

Option 1: Increase standard limitation period to two years

Arguments in favour

- Would lessen pressure to initiate proceedings by litigants with lesser access to resources and who may need more time for consideration, advice and preparation.
- Could encourage parties to engage in alternative dispute resolution mechanisms and afford more time to consider such solutions.

Arguments against

- This matter was considered by the Legal Advisory Group which favoured a one year limitation period with the option for a court to direct that the limitation period be dis-applied in a case where it is satisfied that any prejudice which the plaintiff might suffer if the action were not to proceed significantly outweighs any prejudice which the defendant might suffer if the action were to proceed.⁴³⁵
- The aim of defamation proceedings is for the plaintiff to vindicate his/her reputation; it is therefore in the interests of the plaintiff to initiate proceedings without unnecessary delay in order to repair the damage that has been done to his/her reputation.
- The Act already provides discretion to the court to extend the period up to two years.
- There is no legal difficulty with the current time limit e.g. in *Taheny v. Honeyman & ors*,⁴³⁶ Peart J noted that the time limits set out in the 2009 Act “are less generous than for many other types of action, but nevertheless provide plenty of time for the taking of any legal advice the plaintiff wishes, and for such proceedings to be commenced”.

⁴³⁵ *Report of the Legal Advisory Group on Defamation*, March 2003 at pp. 27-28.

⁴³⁶ [2015] IEHC 883.

Option 2: Where parties engage in alternative dispute resolution mechanisms, increase standard limitation period to take account of time devoted to such mechanisms

Arguments in favour

- This proposal might encourage plaintiffs to engage in alternative dispute resolution mechanisms before initiating legal proceedings.

Arguments against

- It is already possible for a judge to extend the limitation period to two years which should facilitate plaintiffs who wish to avail of alternative dispute resolution mechanisms.
- This proposal may lead to uncertainty in relation to the limitation period.

Option 3: Provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances

Arguments in favour

- The purpose of defamation proceedings is for the plaintiff to vindicate his/her reputation, so it should be in the interests of the plaintiff to progress the case.
- Excessive delays can have adverse effects on all parties to the proceedings e.g. in *Ganley v. RTE*⁴³⁷ (which did not relate to the issue of delay), the High Court stated:

*It is not fair on a person who considers himself to have been defamed that his name should, if he is correct in his contentions, stand tarnished without appropriate relief being granted for the better part of a decade. It is not fair on the relevant journalists, if they did nothing wrong, that they should remain mired in defamation proceedings for such a protracted period. And there have to be and are concerns as to the chilling effect for free speech, a right of the most profound significance, if defamation proceedings are generally to become enormously lengthy and hence enormously costly affairs.*⁴³⁸
- This proposal should reduce long-term costs of defamation cases.
- The Law Reform Commission Report on *The Civil Law of Defamation* recommended that:

*“(I) where no step has been taken within one year from the issuing of the plenary summons, the defendant should be entitled to have the proceedings dismissed for want of prosecution unless the court orders otherwise and (II) if such proceedings have been struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court”.*⁴³⁹

⁴³⁷ [2017] IEHC 78.

⁴³⁸ *Ganley v RTE* [2017] IEHC 78 at para. 113.

⁴³⁹ Law Reform Commission Report on *The Civil Law of Defamation*, December 1991, at para. 13.2.

Arguments against

- The Review Group on the ‘Review of the Administration of Civil Justice’ recommended that “*provision be made by rules of court to provide for automatic discontinuance, subject to a power on the court’s part to reinstate the proceedings*” and that automatic discontinuance would apply “*to proceedings which, within a period of 30 months of their commencement, have not been notified to the court as ready for trial*”.⁴⁴⁰ Adoption of a different approach in respect of defamation cases may result in lack of clarity and consistency in the law.
- Provided that there is discretion for the court not to dismiss the action where to do so would result in injustice being done to the plaintiff, there are no other obvious arguments against the proposal to provide for discontinuance of actions not being pursued.

Option 4: Amend section 11(3B) of the Statute of Limitations to remove differences between off-line and online publication

Arguments in favour

- This proposal would standardise the rules in relation to publication in any and all media and fora.

Arguments against

- The current provision reflects a recommendation in the *Report of the Legal Advisory Group*.
- The distinction reflects the reality of the internet.

Recommendations

The following option is recommended:

- Option 3: Provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances.

The following options are not recommended:

- Option 1: Increase the standard limitation period to two years;
- Option 2: Where parties engage in alternative dispute resolution mechanisms, increase standard limitation period to take account of time devoted to such mechanisms; and
- Option 4: Amend section 11(3B) of the Statute of Limitations to remove differences between off-line and online publication.

⁴⁴⁰ REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE REPORT (October 2020) at p. 134, available at https://www.justice.ie/en/JELR/Pages/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.

4.4 Case Management

4.4.1 Main issues raised in course of review

Several submissions expressed the view that current lengthy duration and high costs involved in defamation actions could be reduced by the introduction of more stream-lined case management procedures, or pre-action protocols.⁴⁴¹ Existing systems were cited as potential models, such as Part 15 of the Legal Services Regulation Act 2015 which provides for a pre-action protocol relating to clinical negligence actions and the requirements to be complied with by the parties before such actions are brought; as well as the current system in England and Wales, where early Court appointed dates for Case Management Conferences are preceded by both parties answering questionnaires, submitting reasoning and directions in advance, along with proposed dates for various trial stages.⁴⁴²

It was suggested that where a complainant is seeking damages, the complainant should be required to state the sum he/she is willing to accept in damages and the sum required for costs if the case is to be settled at that time.⁴⁴³ The position set out by the parties under such a protocol could also be taken into account by the court when considering any costs order.⁴⁴⁴ Another submission⁴⁴⁵ suggested that a defendant should be afforded the opportunity to make a tender similar to what is provided under section 17 of the Civil Liability and Courts Act 2004, which requires both plaintiff and defendant to serve a Notice of Offer of Settlement on each other. These offers are lodged in Court but the judge would not be aware of the terms of the offers until judgment has been delivered. The judge can have regard to the offers and reasonableness of the conduct of the parties when considering the question of costs in the action. However, while it is unclear whether a plaintiff has to make an offer under section 17 first or whether there is to be an exchange of offer at the same time, any such provisions should provide that the plaintiff should be required to make the formal offer first in order to avoid trial by ambush.

4.4.2 Options for reform and recommendations

Based on the submissions received, the following options were identified and are recommended:

- The subject of civil procedure in the courts (including pre-action protocols, case management, etc.) was considered extensively by the Review Group on the ‘Review of the Administration of Civil Justice’ (the ‘Kelly Report’).⁴⁴⁶ It is recommended that these issues be considered in the context of the implementation of the recommendations of the Review Group.
- Proactive judicial case management of defamation claims should be encouraged, in line with the Kelly Report, in order to reduce delays and costs.

⁴⁴¹ Newsbrands, McCann Fitzgerald, MGN, Journal Media, Law Society, Twitter.

⁴⁴² Journal Media; UK Ministry of Justice Practice Direction 29 – the Multi-Track, supplementing CPR Part 29: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part29/pd_part29

⁴⁴³ ISME, MGN Ltd.

⁴⁴⁴ MGN Ltd.

⁴⁴⁵ William Fry (solicitors).

⁴⁴⁶ *Report of the Review of the Administration of Civil Justice*, October 2020 (Chapter 5 – Civil Procedures in the Courts); http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

- It is recommended that, as it already applies in personal injuries cases, provision be made for the making of a tender by the defendant following receipt of a tender by the plaintiff which would be taken into account in determining costs.

The arguments in favour and against the latter recommendation are as follows:

Arguments in favour

- This already applies in personal injuries cases.
- This would mean that parties would be required to state their terms of settlement, on a basis that will have consequences in costs, before the case proceeds to trial which might encourage the settlement of cases; it would also mean that the terms of the tender and the reasonableness of the conduct of the parties in making the tender would be taken into account in determining costs.
- Unlike a lodgement in settlement as provided for in section 29, this provision would require the plaintiff to first indicate what he/she would accept in damages before the defendant makes an offer.

Arguments against

- Defendants already have the option of making an offer of amends or making a lodgement in settlement of the action.
- This issue may have less relevance if pre-action protocols are adopted (The Legal Services Regulation Act inserts the following provision in section 17 of the Civil Liabilities and Courts Act: “(6A) This section does not apply to a clinical negligence action within the meaning of Part 2A if an offer to settle the claim had, before the bringing of the action, been made by any party to the action in accordance with the pre-action protocol.”).

4.5 Choice of Jurisdiction - concerns about ‘libel tourism’

Introduction

‘Libel tourism’ is a term used to refer to ‘forum shopping’ in defamation actions.

In a straightforward defamation case, the person claiming to have been defamed, the author and publisher of the allegedly defamatory statement, and the audience to whom the statement was published, are all based in Ireland. Accordingly, it is the Irish courts that have jurisdiction to hear and decide the case, and Irish law that will be applied.

However, in an increasingly globalised and interconnected world, the position is often more complicated. The statement may be published about a person based in Country A, by a person based on Country B, using an internet platform or social media app based in Country C, and then accessed by other persons in Countries D, E and F.

In which of countries A to F should the plaintiff bring defamation proceedings? May the plaintiff do so in all of those countries?

In such situations, international law provides some rules on which country is the appropriate jurisdiction, but may still allow the plaintiff a choice. Where this is the case:

*'the choice of jurisdiction forms part of the exercise of one's right of access to the courts, as guaranteed by the [European] Convention [on Human Rights].'*⁴⁴⁷

The plaintiff may naturally wish to bring proceedings in the most convenient country (e.g. where they live or work) or in a country with whose language, or legal system, they are more familiar.

'Forum shopping' describes the practice of choosing the court in which to bring an action based on the most favourable outcome, even where there is no, or only a tenuous, connection between the legal issues and the jurisdiction. Such practice may be observed in various fields and is not limited to defamation cases. ... It is the lack of, or the far-fetched nature of, the link between the subject-matter of the dispute, and the jurisdiction where the lawsuit was filed, that distinguishes forum-shopping from the ordinary choice of forum.

Forum shopping does not necessarily involve abuse of procedural or other rights by the claimant, nor malicious intent. Wishing to have the best prospects of success for one's case is not in itself an illegitimate interest....'

However:

*'...At the same time, ... forum shopping may negatively impact a range of human rights. Where the claimant acts with malicious intent or abuses his rights, such impact is likely to be exacerbated.'*⁴⁴⁸

4.5.1 Choice of jurisdiction: the position under EU law

The main rules in Ireland on choice of jurisdiction in defamation cases are contained in EU Regulation 1215/2012⁴⁴⁹, known as the Brussels I (Recast) Regulation. This Regulation generally applies to civil and commercial cases⁴⁵⁰ that involve more than one country, if the countries concerned are members of the European Union. It sets out agreed common rules of procedure, for deciding which country's courts will have jurisdiction and which country's laws will apply, and provides for mutual recognition and enforcement in EU Member States of the court orders made under those rules.

Article 4.1 of the Regulation provides that:

⁴⁴⁷ Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states, ed. Emeric Prévost, Council of Europe, September 2019, p. 6.

⁴⁴⁸ Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states, Council of Europe, September 2019, p. 6.

⁴⁴⁹ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁵⁰ With some exclusions (e.g. family law, bankruptcy/insolvency, ...) that are not relevant to defamation law.

'1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

Article 7.2 adds an alternative: in tort cases (such as defamation),

'A person domiciled in a Member State may be sued in another Member State: in the courts for the place where the harmful event occurred or may occur...'

These two core principles re-state the position on defamation law as it applied under the earlier EU 'Brussels I' Regulation⁴⁵¹, and before that, under an international convention, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Therefore, two important judgments of the European Court of Justice, that were decided respectively under the Convention and under the Brussels I Regulation, are still relevant in interpreting and applying the Recast Regulation.

*Shevill v Presse Alliance SA*⁴⁵² referred to *print-only* defamatory publication. The plaintiff, a UK national living in Yorkshire, sued a French newspaper, *France-Soir*, over an allegedly defamatory article. *France-Soir* was published extensively in France, with only a very small circulation in England and Wales – so the newspaper argued that only the French courts could have jurisdiction to hear the defamation proceedings. The EU Court of Justice, however, held that where a defamatory newspaper article was distributed in several Member States, the defamed person could issue proceedings for damages against the publisher:

- *either* before the courts of the Contracting State to the 1968 Convention in which the publisher is established, which has jurisdiction to award damage for *all* the harm called by the publication within Contracting States,
- *or* before the courts of each Contracting State in which the article was distributed – though those courts are limited to awarding damages for the injury caused *in that State* to the plaintiff's reputation.

However, in *eDate Advertising GmbH v. X and Martinez v. MGN Ltd*,⁴⁵³ the European Court of Justice ruled that those two options were insufficient in the context of *online* publication, and added a third option:

'... the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control.'

It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.'

⁴⁵¹ The 'Brussels I' Regulation - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – which was repealed and replaced by the Brussels I (Recast) Regulation, Regulation (EU) 1215/2012.

⁴⁵² *Shevill v Presse Alliance*, 1995, C-68/93; applied in Ireland by Barr J. in *Ewins & others v Carlton*, [1997] IEHC 44, and by Kelly J., in *Hunter v Duckworth*, [2000] IIR 510.

⁴⁵³ Joined cases *eDate Advertising GmbH v. X and Martinez v. MGN Ltd*, C-509/09 and C-161/10.

The Court held that it was necessary, therefore, to add a third option, in order to ensure that the plaintiff could ‘bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred.’

Such an overall assessment of the damage ‘might best be assessed by the court of the place where the alleged victim has his centre of interests ..’. Normally this was the place of a person’s habitual residence, but ‘a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.’⁴⁵⁴

Following this interpretation, *three* options are now available in the case of online defamation. The plaintiff can choose to take an action:

- *either* before the courts of the EU Member State where the publisher is established, which have jurisdiction to award damage for *all* the harm caused by the publication within the territory of the EU,
- *or* before the courts of each EU Member State in which the article was distributed – though they are limited to awarding damages for the injury caused *in that State* to the plaintiff’s reputation,
- *or* before the courts of the EU Member State where the plaintiff has their centre of interests, which have jurisdiction to award for damages *all* the harm caused by the publication within the territory of the EU.

Cox and McCullough note that the EU Court of Justice ruling in *eDate Advertising GmbH v. X and Martinez v. MGN Ltd* was applied in Ireland, by Kearns P. in *CSI Manufacturing Ltd v. Dun and Bradstreet*⁴⁵⁵, a defamation case arising out of subscription-only material published online about the creditworthiness of the plaintiff company.

Kearns P. held, however, that the ‘centre of interests’ test laid down in *Martinez* would only apply after the plaintiff established that there had been publication in Ireland (Cox and McCullough criticise that conclusion).⁴⁵⁶

However, concerns have been expressed, by some stakeholders at EU level, about the availability of a relatively wide range of jurisdiction choices to defamation plaintiffs, under the Recast Regulation and the two judgments discussed above.

In May 2020, 25 European-level NGOs published a joint letter on press freedom⁴⁵⁷ to the European Commission, calling for the introduction of anti-SLAPP⁴⁵⁸ legislation at EU level. Among the points made in their letter was that in their view, plaintiffs now enjoy too much flexibility under the Recast Regulation, in choosing the jurisdiction for a defamation claim: and that this risks facilitating abuse of process and vexatious proceedings, particularly the

⁴⁵⁴ *eDate Advertising GmbH v. X and Martinez v. MGN Ltd*, C-509/09 and C-161/10, at paras 45-46 and 48-49.

See Cox, N. and McCullough, E., *Defamation Law and Practice*, p. 65-66.

⁴⁵⁵ [2013] IEHC 547.

⁴⁵⁶ Cox, N. and McCullough, E., *Defamation Law and Practice*, 2nd edition, p. 66-67.

⁴⁵⁷ <https://www.ecpmf.eu/letter-to-the-european-commission-concerning-the-threat-of-vexatious-litigation-against-journalists-activists-and-others/>.

⁴⁵⁸ See section 4.9 of this chapter, regarding SLAPPs.

deliberate issue of proceedings in jurisdictions that have little connection with the dispute. The NGOs proposed that the Recast Regulation be reviewed, as a matter of urgency, to address this concern. They attached a supporting legal paper, prepared by the Centre for Private International Law at the University of Aberdeen.⁴⁵⁹

4.5.2 Choice of jurisdiction: non-EU countries

The position is more complex where one or more of the countries concerned are not EU Member States.

Similar rules to the Brussels I Recast Regulation apply as regards Iceland, Norway and Switzerland, under the Lugano Convention⁴⁶⁰.

Otherwise, the courts are likely to decide which country has jurisdiction by following the (mainly common-law) doctrine of '*forum non conveniens*' – of avoiding the case being decided in a jurisdiction that is unsuitable. Cox and McCullough state that '*Where publication occurs both in Ireland and in jurisdictions that are not party to Regulation 44/2001 [now, to Regulation EU 1215/2012], the question of jurisdiction will fall to be decided by the normal forum non conveniens rules.*'⁴⁶¹

A court that is asked to decide a case originating outside its own jurisdiction may refuse to do so, under the '*forum non conveniens*' doctrine, if it is satisfied that there is another tribunal having competent jurisdiction '*in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.*'⁴⁶²

In deciding what is a more suitable forum, the courts will consider whether there is another jurisdiction with which the parties have significantly closer connections⁴⁶³. For example, the English courts have refused jurisdiction in defamation proceedings brought in England by a Singapore citizen who had lived in Singapore almost all his life, against a Singapore newspaper which distributed only about 12 copies in England; and by a Texas-based oilman against Forbes magazine, where the court concluded that the centre of the plaintiff's business and social life was in Texas, although he also had family and business connections in England⁴⁶⁴.

In Ireland, the Supreme Court upheld a refusal by the Court of Appeal, in *Ryanair v Fleming*, to accept jurisdiction in defamation proceedings taken by an Irish company against an Australian pilot, who lived with his family in Australia, and had never visited Ireland. The case arose from comments posted by the pilot about Ryanair practices, made from Australia and published on a website forum operated by a company in California.

The Supreme Court held that there was no evidence that any third party had accessed the post from Ireland, so no evidence of publication in this jurisdiction; moreover, it was a '*fundamental*

⁴⁵⁹ Attached paper: <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>.

⁴⁶⁰ *Gatley on Libel and Slander*, 12th edition, p. 932.

⁴⁶¹ Cox, N. and McCullough, E., *Defamation Law and Practice*, 2nd edition, para 2.103. See also Maher, *The Law of Defamation* (2nd edition) 2018, paras 3.50 – 3.55.

⁴⁶² *Gatley on Libel and Slander*, 12th edition, para 24.27

⁴⁶³ See the detailed discussion at *Gatley on Libel and Slander*, 12th edition, para 24.28.

⁴⁶⁴ *Jeyeretnam v Mahmood*, 11 Jan. 1991 unreported; *Wyatt v Forbes Inc.*, 2 Dec. 1997 unreported, *Gatley on Libel and Slander*, 12th edition, para 24.28.

*principle that in the absence of special considerations, a foreign defendant should be sued where he or she has his or her place of domicile’.*⁴⁶⁵

4.5.3 ‘Libel tourism’ – perception or reality?

During the 1990s and 2000s, commentators in England developed a concern about so-called ‘libel tourism’. There was a perception that litigants with no real English connection were taking defamation actions in the English courts, in order to take advantage of that jurisdiction’s more generous libel laws, even where the statement complained of had been more widely published in other jurisdictions.

Section 9 of the Defamation Act 2013 in England and Wales was specially designed to inhibit any such practices⁴⁶⁶. As originally introduced, the main subsections provided:

‘9. Action against a person not domiciled in the UK or a Member State [of the EU] etc.

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.’

The explanatory notes for new subsection (2) state that it was intended to ‘overcome the problem of courts readily accepting jurisdiction, simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only’; for example, the English court might decline jurisdiction if the statement in question had been published 100,000 times in another jurisdiction and only 5,000 times in England⁴⁶⁷. The Lord Chancellor, introducing the amending Bill in the House of Commons, said his concerns arose from wealthy foreigners using the English courts to stifle investigative reporting, giving a hypothetical example of a ‘Saudi businessman ... threatening an American publication with an action because of an article that has had a tiny circulation in the United Kingdom.’⁴⁶⁸

⁴⁶⁵ *Ryanair v Fleming*, 2017 IESCDET 8.

⁴⁶⁶ Ali G. R. Auda (2016) *A proposed solution to the problem of libel tourism*, *Journal of Private International Law*, 12:1, 106-131, DOI: [10.1080/17441048.2016.1140992](https://doi.org/10.1080/17441048.2016.1140992) ; *Gatley on Libel and Slander*, 12th edition, para 24.29.

⁴⁶⁷ The explanatory note adds that the court might wish also to take account of other factors, “including, for example, the amount of damage to the claimant’s reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere.”

⁴⁶⁸ *Gatley on Libel and Slander*, 12th edition, footnote to para 24.29.

When originally introduced, section 9 did not apply to defendants who were domiciled in other EU Member States or in Lugano Convention countries – in order to avoid any conflict under EU law with the Brussels I Recast Regulation or the Lugano Convention.

However, after the UK’s withdrawal from the European Union, the section title and subsection (1) were further amended⁴⁶⁹. They now provide:

9. Action against a person not domiciled in the UK [remaining text deleted]

*(1) This section applies to an action for defamation against a person who is not domiciled—
(a) in the United Kingdom [remaining text deleted].’*

4.5.4 Issues raised in submissions

Several submissions referred to section 9 of the England and Wales Defamation Act 2013 as relevant in tackling the apparent problem of ‘libel tourism’ in that jurisdiction, and expressed concern that Ireland could become a destination of choice for international defamation actions given the differences in jurisdiction threshold standards.⁴⁷⁰

They suggested that this could be discouraged in Ireland by introducing a similar provision, (based on appropriate jurisdiction, or as part of a serious harm test) which could restrict those with little or negligible connection to Ireland using it as a legal forum.

Submissions referred to the ‘country of origin’ principle contained in Article 3(1) of the e-Commerce Directive, which provides that an information society service should follow the laws of the Member State in which it is established, not the laws of each Member State to which it provides its services). They suggested that the same approach should be applied in cases of defamation law.⁴⁷¹ However, this would appear to be a matter for EU, rather than for Irish, law.

Submissions also argued that following the changes made by the 2013 Act in England and Wales, a lower evidential burden now applies in Ireland than in England and Wales, and that this creates an incentive for international plaintiffs, who do not have a significant link with this country and who would previously have taken their proceedings in the English courts, to do so in Ireland.⁴⁷²

4.5.5 Options for reform

Option 1: Threshold provision requiring a court to consider the appropriateness of Ireland as a forum for a defamation action, where the plaintiff has more substantial links with another jurisdiction.

Arguments in favour

⁴⁶⁹ [The Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(S.I. 2019/479\)](#).

⁴⁷⁰ Crowley Millar, Google, INM, Local Ireland, Newsbrands, NUJ, Ronan Daly Jermyn.

⁴⁷¹ Google.

⁴⁷² Independent News Media

- This would combat the risk of ‘defamation tourism’ into Ireland, following the changes made by the Defamation Act 2013 in England and Wales;

Arguments against

- There appear to be no clear data on whether there has been any increase in the number of defamation cases brought in Ireland by plaintiffs based in other jurisdictions;
- Any changes to the requirements of the Brussels I Recast Regulation appear to be a matter for EU, rather than Irish, law.

Recommendation

The following option is recommended:

- Option 1: To address the perceived risk of international forum-shopping or ‘defamation tourism’ into Ireland: require the court to be satisfied that Ireland is ‘clearly the most appropriate place’ for the action to be brought (as in England and Wales), in cases not falling under the rules of the Brussels I Recast Regulation.

4.6 Costs and accessibility of defamation actions

4.6.1 Issues raised in submissions

It was widely expressed in submissions that the legal costs of undertaking defamation proceedings, particularly in the High Court, are often onerously high due to several factors, such as lengthy time to trial, requirement for senior counsel, presence of juries, risk of exposure to high damages and awarding of costs against the unsuccessful party. Such a risk of high costs can act as a disincentive to either initiate or defend defamation actions, resulting in a ‘chilling effect’ on free speech, journalism, certain sections of business, media and civil society lacking significant financial resources.⁴⁷³

It was argued that, from a private individual perspective, the exclusion of defamation legal actions from the Civil Legal Aid scheme is not compatible with Article 6 ECHR or with Article 47 of the EU Charter of Fundamental Rights; in addition to acting as disincentive to defend such actions which may lead to the withdrawing of a statement, rather than defending it.⁴⁷⁴

One submission argued that the financial implications of taking defamation proceedings effectively placed such proceedings out of reach of non-profit entities such as charities. Given limited financial resources, it suggested that a dedicated legal aid programme for charities should be introduced.⁴⁷⁵

⁴⁷³ FLAC, INM, ISME, Law Society, Local Ireland, McCann Fitzgerald, Newsbrands, Twitter. David Reynolds, Dialogue Ireland, Hugh O’Driscoll.

⁴⁷⁴ FLAC, ICCL.

⁴⁷⁵ Dialogue Ireland.

4.6.2 Options for reform

The general issue of litigation costs has been considered by the Review Group on the ‘Review of the Administration of Civil Justice’ which made a number of recommendations.⁴⁷⁶

Based on the submissions received, the following options for reform specific to defamation actions were identified:

- remove the exclusion of defamation claims from the Civil Legal Aid Act 1995; this issue together with the relative priority to be afforded to defamation cases to be considered within the forthcoming overall review of civil legal aid;
- provide a dedicated legal aid programme for charities.

Option 1: Remove the exclusion of defamation from the Civil Legal Aid Act 1995; this issue, together with the relative priority to be afforded to defamation cases, to be considered within the forthcoming overall review of civil legal aid

Arguments in favour

- This proposal would be in line with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights.
- This proposal would promote equality of access to justice.

Arguments against

- This issue should be considered in the context of the overall review of the civil legal aid scheme which is due to commence in early 2022.
- Implementation of this proposal would result in significant costs to exchequer.
- The introduction of ADR for defamation claims should reduce the need to extend the civil legal aid scheme to defamation actions.
- Providing income-tested legal aid may result in an increase of frivolous cases taken without fear of consequences or accountability.
- Providing income-tested legal aid would still preclude many middle-income persons taking defamation cases.
- This proposal would go against an overall aim of taking defamation cases out of the courts.

⁴⁷⁶ *Report of the Review of Administration of Civil Justice*, October 2020, at Chapter 9 – Litigation Costs; http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf.

Option 2: Introduce a dedicated legal aid programme for charities

Arguments in favour

- There are no obvious arguments in favour of treating charities differently to other organisations.

Arguments against

- This proposal could result in significant costs to the public finances.
- Providing legal aid to some organisations, and not others, may cause disagreement and challenges.
- This proposal would go against an overall aim of taking defamation cases out of the courts.

Recommendations

The following option is recommended:

- Option 1: Remove the exclusion of defamation from the Civil Legal Aid Act 1995; this issue together with the relative priority to be afforded to defamation cases to be considered within the forthcoming overall review of civil legal aid.

The following option is not recommended:

- Option 2: Introduce a dedicated legal aid programme for charities.

4.7 Criminal offences relating to defamation

4.7.1 Current Legal Position

Section 35 of the Act abolishes the common law offences of defamatory libel, seditious libel and obscene libel.

4.7.2 Issues raised in the course of the Review

One submission⁴⁷⁷ to the review suggested the introduction of an offence of “malicious injury to the reputation of another” and another⁴⁷⁸ suggested that the offence of criminal libel should be restored. Finally, one submission⁴⁷⁹ suggested the introduction of a statutory penalty for malicious libel suits which should only apply if the court finds *mala fides* on the part of the person who takes the case.

⁴⁷⁷ Law Society – anonymous solicitor(s).

⁴⁷⁸ Michael Williams.

⁴⁷⁹ David Reynolds.

4.7.3 Options for reform

Based on the submissions received, the following options were identified:

- introduce an offence of “malicious injury to the reputation of another” or an offence of criminal libel;
- introduce a statutory penalty for malicious taking defamation proceedings.

Option 1: Introduce an offence of “malicious injury to the reputation of another” or an offence of criminal libel

Arguments in favour

- The 2009 Act abolished the offence of defamatory libel; there are no obvious arguments for the reintroduction of a similar offence at this stage.

Arguments against

- The criminal libel actions that were abolished by the 2009 Act “*were relatively few and far between and tended to involve situations where the publication was intentionally malicious and deeply harmful*”.⁴⁸⁰
- The legal tests for such prosecutions as enunciated in Irish case-law required showing that the public interest – as distinct from the private feelings of the plaintiffs – required the institution of criminal proceedings. Cox & McCullough conclude that “(g)iven the difficulty of prosecutions for criminal libel under the law as it stood prior to 2009, the abolition of the crime is of less practical significance than it might initially appear.”⁴⁸¹
- This suggestion was raised in only two submissions and does not appear to be widely supported.
- Section 42 of the Act provides for an action for malicious falsehood, but it is limited to damage related to the plaintiff’s property, professional or business interests.

Option 2: Introduce a statutory penalty for maliciously taking defamation proceedings

Arguments in favour

- There are no obvious arguments in favour of this proposal.

Arguments against

- A criminal offence (where the criminal standard of proof applies – beyond reasonable doubt) is unlikely to be more effective than existing civil remedies already available to the courts where the civil burden of proof (balance of probabilities) applies.

⁴⁸⁰ Cox, N. and McCullough, E., *Defamation: Law and Practice*, (Clarus Press, 2014) at para. 1-26.

⁴⁸¹ *ibid* at para. 1-31.

- This suggestion was raised in only one submissions and does not appear to be widely supported.

Recommendations

The following options are not recommended:

- Option 1: Introduce an offence of “malicious injury to the reputation of another” or an offence of criminal libel; and
- Option 2: Introduce a statutory penalty for maliciously taking defamation proceedings.

4.8 Evidential rule - reference to a criminal conviction

4.8.1 Current Legal Position

Section 43(2) of the Act provides that where a person has been convicted of an offence in the State, the fact of his/her conviction, and any findings of fact made during the course of the proceedings for the offence concerned, shall be admissible in evidence in a defamation action.⁴⁸²

4.8.2 Main issues raised in course of review

One submission⁴⁸³ to the review suggested that a provision similar to section 13 of the England and Wales Civil Evidence Act 1968, subject to specified amendments, should be introduced.

The rationale for this proposal is that while it is well established in Irish law that a certificate of a criminal conviction is admissible in civil cases as *prima facie* evidence of guilt, this leads to difficulties in some defamation cases. It is open to plaintiffs to contend that they were not guilty of the offence in question and have, therefore, been defamed by suggestions that they were.

As the law stands, the fact of a conviction is to be distinguished from the fact of guilt. Further, if a convicted person contests a criminal conviction in a defamation case, a defendant is likely to be put to considerable expense re-litigating the case, with little prospect of recouping the costs incurred.

The relevant provisions of section 13 are as follows:

“Conclusiveness of convictions for purposes of defamation actions.

-
- (d) *In an action for libel or slander in which the question whether the plaintiff did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, he stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.*

⁴⁸² Section 43(1) makes similar provision in respect of acquittal of an offence.

⁴⁸³ NewsBrands.

(e) In any such action as aforesaid in which by virtue of this section the plaintiff is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which he was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.”

The submission suggested that the phrase “*at the time when that issue falls to be determined*” should be replaced with “*at the time of the publication complained of*”: as the position at the time of the publication complained of is the matter at issue, and it is then that any damage to the plaintiff’s reputation has been caused.

4.8.3 Option for reform

Based on the submissions received, the following option was identified:

- amend section 43(2) of the Act to provide that proof of conviction of an offence shall be conclusive evidence that an individual committed the offence.

Arguments in favour

- This would be in line with the recommendation in the Law Reform Commission Report which recommended the introduction of a statutory provision to provide:
 - (a) *where in a defamation action the question of whether a person party to the action committed a criminal offence is relevant; proof that he stands convicted of the offence by a court of competent jurisdiction in the State shall be conclusive evidence that he committed the offence;*
 - (b) *the conviction of a person not party to the defamation action by a court of competent jurisdiction in the State should be evidence, but not conclusive evidence, of facts on which it was based;*

Arguments against

- The current provision which makes conviction and any findings of fact in the criminal proceedings admissible as evidence in the defamation trial but does not attach any special weight to such evidence or specify any inferences that must be drawn sets an appropriate evidential standard.

Recommendation

It is recommended that further consideration be given to the implications of amending the evidential test set out in section 43(2) of the Act.

4.9 Measures to counter mis-use of defamation proceedings (‘SLAPP’ actions)

4.9.1 What are SLAPPs?

‘SLAPP’ is an acronym standing for a ‘Strategic Lawsuit Against Public Participation’. SLAPPs are usually defined on the following lines:

*“groundless or exaggerated lawsuits initiated by state organs, business corporations or powerful individuals against weaker parties who express criticism or communicate messages that are uncomfortable to the litigants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition. While civil society actors can be vulnerable to such initiatives, the nature of journalists’ work leaves them particularly exposed.”*⁴⁸⁴

Research on SLAPPs, both across Europe and internationally, suggests that defamation actions are among a range of different types of civil and criminal⁴⁸⁵ actions which may be mis-used as SLAPPs, depending on the jurisdiction concerned⁴⁸⁶.

Of course, like any other actor, state organs (or powerful companies or individuals) are entitled (sometimes, even obliged) to respond to those who disagree with them, to exercise their right of access to the courts, and to vigorously defend their legal rights and interests⁴⁸⁷.

Conversely, as the European Court of Human Rights has repeatedly held, ‘civil society actors’ – particularly the media, but also NGOs and individuals who are engaged in public interest issues - must be able to exercise their right to freedom of expression effectively in relation to matters of public interest. The Court has underlined, moreover, that “... *there exists a strong public interest in enabling ... groups and individuals outside the mainstream to contribute to public debate by disseminating information and ideas*’ on such matters, ‘*subject to the proviso that they act in good faith in order to provide accurate and reliable information*”, and that a clear distinction is made between statements of fact, and value judgements⁴⁸⁸.

The challenge posed by the concept of SLAPPs is to identify whether some legal actions by certain actors go beyond the legitimate exercise of their rights, and constitute an abuse of the litigation process - whose main purpose is not to determine legal issues fairly (or, in some cases, at all), but rather to exploit the litigation process, and any significant power imbalance between the parties, to threaten and silence those who raise contrary questions or arguments, in good faith, on matters of public interest. Such abusive proceedings could raise legitimate concerns for governments and for society as a whole, if they risk having a ‘chilling effect’ on free public debate in a democratic society.

⁴⁸⁴ European Commission, *On the European democracy action plan*, COM (2020) 790 final, 3.12.2020, p. 14.

⁴⁸⁵ *Safety of Journalists and the fighting of Corruption in the EU*, above, pp. 72-73. (Ireland is mentioned as one of just four of the EU Member States, and just 15 out of 57 OSCE Participating States, to have repealed all general provisions on criminal defamation and insult.)

⁴⁸⁶ *Safety of Journalists and the fighting of Corruption in the EU*, (Study prepared for the Parliament’s Committee on Civil Liberties, Justice and Home Affairs), Tarlach McGonagle and others, European Parliament, July 2020, at p. 72. Defamation and insult are still criminal offences in many EU Member States, and ‘are still applied with some degree of regularity’ in a number of these, including against the media, with significant chilling effects on journalistic freedom of expression.

⁴⁸⁷ See, for example, the comments of the European Court of Human Rights in *Steel and Morris v U.K.* [2005] ECHR (App no. 68416/01) discussed above in section 2.2.3, at paras 93-94 of the judgment.

⁴⁸⁸ *Steel and Morris v. U.K.* [2005] ECHR (App no. 68416/01) above, at paras 89-90.

Clearly, this is not to suggest that defamation proceedings are intrinsically abusive – the European Court of Human Rights has emphasised that protecting the reputation of an individual is one of the grounds on which the right to freedom of expression can legitimately be limited⁴⁸⁹ - but rather that a minority of plaintiffs use defamation - together with other civil and criminal proceedings – in an abusive manner.

This has led to the adoption of ‘anti-SLAPP’ laws in a number of States in the United States and in Canada, and to calls for the development of EU ‘anti-SLAPP’ legislation, which are considered in more detail below.

The 2020 European Parliament study on *Safety of Journalists and the fighting of Corruption in the EU* concluded that:

*“Independent, investigative journalism plays a vital role in informing the public on issues of general interest in society, such as social developments, public figures, corruption and wrongdoing. Strategic Lawsuits Against Public Participation (‘SLAPPs’) pose a serious ongoing threat to the safety of journalists, to quality journalism and, more generally, everyone who seeks to contribute to public debate. SLAPPs also indirectly pose a threat to the public’s right to be properly informed on matters of interest to society.”*⁴⁹⁰

4.9.2 The development of concerns about SLAPPS in North America and in Europe

The term ‘SLAPP’ was first coined⁴⁹¹ in the 1990s, by academics in the United States who were researching on the strategic use of litigation by powerful companies to deter criticism or protest against their land use or land development activities by NGOs and individuals, typically on environmental or public health grounds.

The SLAPP concept has since been adopted and developed by a range of actors in different countries, including lawyers, legislators, NGOs, the media, governments and even international organisations.

For example, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has issued a Note and recommendations on SLAPPs and international human rights law and practice⁴⁹². As these point out, a particular country’s legal environment may be more or less fertile for SLAPPs, depending on a range of different factors, such as how expensive legal costs are (including any caps on damages and the availability of legal aid), the elasticity of laws targeting speech (especially defamation), and the existence of safeguards (such as anti-SLAPP legislation, or power to award legal costs to the defendant if proceedings are held to be an abuse of process).

Attention to the concept of SLAPPs in Europe followed much later than in North America. However, it has intensified considerably in recent years, amid overall concern about increasing

⁴⁹⁰ *Safety of Journalists and the fighting of Corruption in the EU*, above, pp. 74-75.

⁴⁹¹ By Professors George Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996).

⁴⁹² <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>

prevalence and seriousness of physical attacks and threats against journalists, as well as of other abuse, intimidation and threats against journalists and NGOs.

Recent attacks within the EU include the murders of investigative journalists Daphne Caruana Galicia in Malta in 2017, Jan Kuciak in Slovakia in 2018, and Lyra McKee in Northern Ireland in April 2019; violent physical attacks against journalists in Italy, France, the UK and Bulgaria in 2019; and 20 journalists in Italy living under 24-hour police protection in 2019, following credible threats to their lives. The Council of Europe also noted reports in 2019 of lawsuits or criminal charges being issued against media workers in six EU Member States⁴⁹³; and added reports in 2019 of SLAPPs being issued against journalists in Malta, Croatia, Belgium, the UK and France⁴⁹⁴.

The Council of Europe has established an online Platform for the protection and safety of journalists, where European NGOs working on freedom of speech can report attacks and threats to journalists, including lawsuits that appear to be SLAPPs⁴⁹⁵.

In February 2018, a small cross-party group of MEPs wrote to Vice-President Timmermans of the European Commission, expressing concerns about litigation commenced in Arizona against Daphne Caruana Galicia by a Maltese bank on which she had written a number of critical articles, and several specified lawsuits against other journalists. The letter called on the Commission to bring forward a legislative proposal for an EU “anti-SLAPP” directive, which would give investigative journalists and media groups a right to seek summary dismissal of “vexatious lawsuits” and would create a fund for the financial support of media groups resisting such lawsuits.⁴⁹⁶ The MEPs also proposed the creation of a new EU register that would “name and shame” firms who issued SLAPPs.

In May 2020, 25 press freedom organisations published a joint letter to the European Commission calling for the introduction of anti-SLAPP legislation at EU level, and attaching a supporting paper from the Centre for Private International Law at the University of Aberdeen.⁴⁹⁷

In June 2020, 119 NGOs from across Europe published an open letter⁴⁹⁸ expressing their concern about SLAPPs brought by powerful actors intending to intimidate and prevent watchdogs such as journalists, activists, trade unions, media, and civil society organisations, from holding them accountable. The organisations argued that the increasing prevalence of SLAPPs was becoming a threat to freedom of expression, public participation and freedom of assembly. They called for legal measures, similar to those proposed by the letter to Vice-

⁴⁹³ *Hands off Press Freedom, 2020 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and the Safety of Journalists*, Council of Europe, 2020, pp. 6-11.

⁴⁹⁴ *Hands off Press Freedom*, above, pp. 21-22.

⁴⁹⁵ The CoE’s partner NGOs for the Platform include the European Federation of Journalists, the European Broadcasting Union, PEN International, Article 19, Index on Censorship and Reporters Without Borders.

⁴⁹⁶ <https://www.eppgroup.eu/how-we-ake-it-happen/with-eu-countries/malta/news/meps-continue-to-pile-on-pressure-for-anti-slapp-legislation>

⁴⁹⁷ <https://www.ecpmf.eu/letter-to-the-european-commission-concerning-the-threat-of-vexatious-litigation-against-journalists-activists-and-others/>

⁴⁹⁸ <https://www.access-info.org/wp-content/uploads/2020-06-05-Ending-SLAPP.s-NGO-Policy-Paper-119-FINAL.pdf>

President Timmermans, to be introduced at EU level to provide procedural safeguards and support for those threatened with SLAPP lawsuits.

These issues are documented and examined in detail across EU Member States in two extensive reports, published by the European Parliament⁴⁹⁹ and the Council of Europe⁵⁰⁰ respectively in 2020. However, the studies did not identify any examples of anti-SLAPP legislation already in force in EU Member States and concluded that to date, SLAPPs remain largely unrecognised in national legal systems with little consideration of their use and impact.

The Parliament study's final recommendations⁵⁰¹ call on the European Commission to accelerate work on a comprehensive legislative package to prevent SLAPPs in Europe. This should consist of "*the drafting of a dedicated anti-SLAPP EU Directive*", as well as appropriate amendments to the Brussels I (recast) Regulation (the EU legislation governing cross-border litigation.) Any legislative reforms should be "*carefully aligned with the principles established by the European Court of Human Rights in its case-law on freedom of expression and defamation.*" The legislation would benefit from, and should include, active participation by a range of stakeholders.

In September 2020, the Commission issued its first "Rule of Law Report", under a new initiative proposed by Commission President, Ursula von der Leyen, in her State of the Union address earlier that year. In that speech, the President had placed media freedom as central to the rule of law:

*"The rule of law helps protect people from the rule of the powerful. It is the guarantor of our most basic of everyday rights and freedoms. It allows us to give our opinion and be informed by a free press."*⁵⁰²

The Report underlined that the rule of law is "enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States" and that:

*"The European Union is based on a set of shared values, including fundamental rights, democracy, and the rule of law. These are the bedrock of our society and common identity. No democracy can thrive without independent courts guaranteeing the protection of fundamental rights and civil liberties, nor without an active civil society and a free and pluralistic media. Globally, the EU is recognised as having very high standards in this area. Nevertheless, these high standards are not always universally applied, improvements can be made, and there is always a risk of a backward step."*⁵⁰³

The Report referred in particular to the murders of Daphne Caruana Galizia and Jan Kuciak, who had been investigating high-level corruption and organised crime allegations, as a "*wake-up call reminding Member States of the obligation to guarantee an enabling environment for*

⁴⁹⁹ Study: *Safety of journalists and the fighting of corruption in the EU*, Tarlach McGonagle & others, European Parliament (at the request of the LIBE Committee), July 2020.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU\(2020\)655187_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU(2020)655187_EN.pdf)

⁵⁰⁰ *Hands off Press Freedom: Attacks on Media in Europe Must Not Become a New Normal*, (Annual Report by the partner organisations to the CoE Platform to Promote the Protection and Safety of Journalists), Council of Europe, April 2020.

⁵⁰¹ *Safety of journalists and the fighting of corruption in the EU*, above, p. 100.

⁵⁰² President von der Leyen, *State of the Union Address 2020*, cited in COM (2020) 580, *2020 Rule of Law Report: The rule of law situation in the European Union*, p. 1.

⁵⁰³ COM (2020) 580, *2020 Rule of Law Report*, p. 1.

journalists, protect their safety and proactively promote media freedom and media pluralism.” It emphasised the importance of investigative journalism for strengthening the capacity of the criminal justice system to fight corruption.⁵⁰⁴

The Report also highlighted the range of threats faced by journalists, including SLAPP lawsuits:

*“In a number of Member States, journalists and other media actors increasingly face threats and attacks (physical and online) in relation to their publications and their work, in various forms: the deployment of SLAPP lawsuits; threats to public safety and actual physical attacks; online harassment, especially of female journalists; smear campaigns, intimidation and politically oriented threats.... Particular examples have been highlighted in the country chapters on Bulgaria, Croatia, Hungary, Slovenia and Spain. Threats and attacks have a chilling effect on journalists, and entail the risk of a shrinking public debate on controversial societal issues.”*⁵⁰⁵

In December 2020, the Commission announced that it will present “*an initiative to protect journalists and civil society against SLAPPs*” in late 2021, as part of its Democracy Action Plan⁵⁰⁶”The initiative is likely to take the form of a Directive and a non-legislative measure (recommendation).⁵⁰⁷

In her speech on 10 March 2021 to the European Parliament’s plenary debate on media freedom, Commission Vice-President Jourova underlined that:

“the competences of the Commission when it comes to media are very limited. ... I want us to identify how we can widen and strengthen the toolbox that the Commission has, from financial support, to regulation and enforcement actions. We need a tool which recognises the role of media as key players in a democratic society. At this moment, we only have the rules which recognise the role of the media as the actors on the European Single Market, and this is what is limiting our ability to act.”

The Commission is currently undertaking a public consultation on this issue.⁵⁰⁸

Furthermore, before the Justice and Home Affairs Council Meeting on 7/8 October 2021, Ministers attended a working lunch to discuss the issue of SLAPPs and the need to protect journalists from abusive litigation. The purpose of the discussion was to contribute to the preparation of the European Commission’s initiative to protect journalists and rights defenders against this type of abusive litigation. The debate focused on national experience and good practices in fighting SLAPPs, as well as on the cross border dimension of this phenomenon.⁵⁰⁹

4.9.3 The legal position in Ireland

⁵⁰⁴ COM (2020) 580, *2020 Rule of Law Report*, pp. 15 and 17.

⁵⁰⁵ COM (2020) 580, *2020 Rule of Law Report*, p. 20.

⁵⁰⁶ See also *SLAPP. in the EU context*, P. Bard & others, 29 May 2020, preliminary study, at FN

⁵⁰⁷ <file:///H:/Downloads/090166e5e2c6fc53.pdf>.

⁵⁰⁸ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders_en.

⁵⁰⁹ <https://www.consilium.europa.eu/en/meetings/jha/2021/10/07-08/#>.

The concept of anti-SLAPP measures has not been widely discussed as yet in Irish law; and there are currently no specific legal measures designed to counter a SLAPP (in the sense that this concept has been developed in some other jurisdictions.)

Irish law includes measures to respond to litigation which amounts to an abuse of process, including for example the inherent jurisdiction of the courts to strike out vexatious proceedings⁵¹⁰. However, these powers lack the statutory flanking and supporting measures - for example, in relation to costs –and the statutory mechanisms to assist the court in balancing competing rights and public interests, that are a feature of successful anti-SLAPP legislation in other jurisdictions⁵¹¹.

4.9.4 Issues raised during the review

The concept of SLAPPs was not explicitly raised by submissions to the review.

However, it is noticeable that a number of submissions raised fears and concerns that echo those typical of SLAPP cases. Many stakeholder proposals set out earlier in this Report in support of introducing a presumption of falsity, or a serious harm test, refer to such concerns.

For example, the Business Journalists' Association submitted that:

“We argue that the current regime in practice limits legitimate reporting and debate on the activities of individuals and organisations that wield considerable influence over Irish life and the economy.

..... People and organisations with large financial resources can exploit [existing defamation law] by using the law to deaden or stymie reporting on their activities through responding to virtually any coverage with solicitors' letters, threats of legal action, or both.

There is now a significant danger of reporters and media outlets “self-censoring” to pre-empt being drawn into legal actions, that even when they amount to nothing, sap reporters' and editors' time and energy and media organisations' finances.

.... The current regime is particularly flawed because the costs associated with legal action are prohibitively high for most ordinary citizens, but is weighted in favour of those who can afford to initiate and maintain claims against the media. There is no doubt it can encourage spurious claims by those with deep financial pockets, which, no matter how ill-founded, require a response. This wastes hours and resources.

.... Rising costs coupled [with] rising awards in cases where plaintiffs are successful mean the stakes are extraordinary high for media organisations. It can be financially attractive for media organisations to settle claims rather than undertake the financial risk of defending a report. That undermines the public's right to information.”⁵¹²

4.9.5 Comparative perspectives

⁵¹⁰ *Gilchrist v Sunday Newspapers & others*, [2017] IECA 190, para 14.

⁵¹¹ See discussion below under Comparative Perspectives.

⁵¹² Business Journalists' Association

In the **United States**, a number of States- including California - developed and enacted legislation allowing a defendant to apply to court at an early stage in a SLAPP lawsuit, for it to be dismissed if the court was satisfied that it was without merit, as a breach of the defendant's right to freedom of expression. If the person who brought the lawsuit convinces the court that it can probably succeed, then the lawsuit can go ahead.

The intention was to provide a quick, effective and relatively inexpensive mechanism to combat such suits – such laws often provided that the person who brought the SLAPP must pay the costs of the dismissal application. This is particularly important in the US context, due to high legal fees and the “American rule” of costs apportionment (whereby each party to a lawsuit is normally responsible for its own legal costs).

As of June 2019, at least 29 US states have anti-SLAPP statutes⁵¹³: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Utah, Vermont. (In two other States, Washington and Minnesota, anti-SLAPP statutes were struck down as unconstitutional (in 2015 and 2017 respectively).

The scope of these anti-SLAPP statutes varies, due to development of the SLAPP concept. Tarlach McGonagle points out that when the American professors Pring and Canan first formulated the concept of a SLAPP, they defined it as primarily involving

*“communications made to influence a governmental action or outcome, which, secondarily, resulted in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organisations (NGOs) on a (c) substantive issue of some public interest or social significance.”*⁵¹⁴

This would explain why some State anti-SLAPP laws in the US have a narrower focus - applying only to actions brought by public applicants against people who have challenged or opposed such applications to government bodies. Other statutes are drafted with a wider focus, and apply to speech seeking to influence decisions by the legislature or executive branch.

Thus a recent op-ed in the New York Times⁵¹⁵ (which acknowledged that it had itself been the target of a number of SLAPP actions) explained that the New York State had enacted an anti-SLAPP law over 25 years previously, but that it “*applies only to suits brought over real estate developments, zoning and the like, for example when a developer sues environmentalists who oppose a project.*” Conversely, a Bill now pending before the State legislature ‘*would broaden the scope to include matters of ‘public interest’, which should be ‘broadly construed’*” and it would strengthen the court’s right to award the defendant costs and fees.’ The NY Times also argued that a strong federal anti-SLAPP statute was long overdue, and would reduce the scope for plaintiffs to go ‘forum-shopping’ from States with stronger anti-SLAPP laws, to those with none.

⁵¹³ <https://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1>

⁵¹⁴ *Safety of Journalists and the fighting of Corruption in the EU*, Tarlach McGonagle and others, European Parliament, July 2020, at p. 75. Emphasis added.

⁵¹⁵ New York Times, 17 July 2020: <https://www.nytimes.com/2020/07/17/opinion/new-york-slapp-frivolous-lawsuits.html>

The broadest scope of protection to date appears to have been provided by the California anti-SLAPP statute, which protects not only traditional petitioning activity, but also expression connected with issues of public concern. States which have closely followed the California model include Colorado, Indiana, Louisiana, Nevada, Oregon, Oklahoma, and Tennessee.

At the same time, the US statutes have a drawback, as potential models for any Irish anti-SLAPP measures. It is the difference in the constitutional context. The First Amendment to the US Constitution affords a particularly high level of protection to the right to freedom of expression: it is not subject to a constitutional balance with the right to the protection of individual privacy, or the right to reputation and good name, in the same manner as the right to freedom of expression under the Irish Constitution or under the European Convention on Human Rights.⁵¹⁶ The US anti-SLAPP legislation does balance freedom of expression against the right of access to the courts and to due process – but not against rights to reputation and privacy, which makes it less helpful as a model for Irish law.

In **England and Wales**, there are no equivalents to the anti-SLAPP measures developed in other jurisdictions.

In 2009, Alastair Mullis and Andrew Scott advocated that options for anti-SLAPP measures should be included in any further reform of English libel law⁵¹⁷: “*We acknowledge that such behaviour [abusive defamation proceedings, seeking to intimidate journalists or others from public-interest reporting on the activities of the powerful] does from time to time occur, although we do not see any evidence that it is typical of libel claimants generally.*” Their main concern was to address the risk that the cost of being embroiled in defamation proceedings could in itself exercise a chilling effect for many defendants.

While this proposal was not ultimately taken up in the preparation of the Defamation Act of 2013, their analysis⁵¹⁸ remains interesting in the Irish context:

- The authors noted that British judges arguably already had power, under the Civil Procedure Rules, to assess the motivation of a litigant and to strike out a case that amounts to an abuse of process, including one that is “*vexatious ... or obviously ill-founded*”, including in a case where a litigant issued proceedings with no intention of ever bringing them to a conclusion.
- However, a power to strike out alone would not be effective. “*The unusual feature of SLAPPs is that their bite is most often felt prior to the substantive question reaching court.*” Realistically, many defendants would capitulate and self-censor, rather than incurring the extra costs and burden of defending a lawsuit against a determined and financially powerful opponent. It was recognised that being sued could in itself have a chilling effect on freedom of expression.
- So it was vital to ensure “*some disincentive to the intimidatory legal suit being brought in the first place*”.. Defendants could be given an option of claiming their legal costs back from the SLAPP litigant, or perhaps of counter-suing him or her for damages for

⁵¹⁶ Cox, N. and McCullough, E., *Defamation: Law and Practice*, 2014, para 1.07 – “.. comparative models of defamation law such as those that exist in the United States, where the Constitution protects free speech in terms that are very robust and do not protect any express right to a good name, are unlikely to be of any relevance in so far as the Irish model is concerned.”

⁵¹⁷ Alastair Mullis & Andrew Scott, *Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation*, 2009 Communications Law 14(6), ISSN 1746-7616 (also at LSE Research Online, at: <http://eprints.lse.ac.uk/27135/>)

⁵¹⁸ Above, at pp. 12-13 of the LSE website text.

the breach of free-expression rights. “*The prospect that the defendant might ‘SLAPP-back’ would immediately see a prospective claimant pause to reconsider the advisability of bringing an intimidatory action.*”

- Again, arguably the courts could develop the existing torts of malicious civil proceedings or abuse of process to provide such redress but legislative intervention would be better. One reason is that anti-SLAPP measures to defend the right to freedom of expression by allowing a court to strike out proceedings at an early stage where not demonstrably well founded, would also need to be carefully thought out to ensure that they remained compatible with the right of access to justice.

In **Scotland**, in October 2020, the Justice Committee of the Scottish Parliament discussed submissions from Scottish PEN and from the media, seeking inclusion of anti-SLAPP measures, during its consideration of the Defamation and Malicious Publications (Scotland) Bill, (now the Defamation and Malicious Publications (Scotland) Act 2021). The Committee agreed with the need to protect against SLAPPs, but was reluctant at that stage to add new elements to a Bill which had already been some time in preparation.⁵¹⁹

4.9.6 Comparative focus: Ontario

Building on the experience of US anti-SLAPP legislation at State level, anti-SLAPP laws have also been enacted in three Canadian provinces (which jointly account for about 74% of Canada’s population⁵²⁰).

Ontario adopted its Protection of Public Participation Act in 2015, and **British Columbia** followed with a ‘*virtually identical*’⁵²¹ Protection of Public Participation Act in March 2019. (**Quebec** has even earlier legislation, having inserted anti-SLAPP provisions at articles 51-54 of its Code of Civil Procedure by an amending Bill in 2009. However, its legal system is closer to the French civil law model, so the Ontario and British Columbia Acts seem more relevant examples for the Irish legal system.)

In March 2020, the Law Commission of Ontario published a major report, *Defamation Law in the Internet Age*, which includes an analysis and evaluation of the Ontario anti-SLAPP legislation⁵²² five years after its enactment.

The Law Commission concluded that:

“ ... *the anti-SLAPP legislation is an appropriate and valuable tool for weeding out weak or unmeritorious defamation claims that unduly infringe freedom of expression. ... Anti-SLAPP motions are a powerful tool for protecting freedom of expression and defendants in Ontario defamation actions. It is not an exaggeration to say that anti-SLAPP motions are gradually revolutionising defamation law in this province.*”⁵²³

The discussion that follows looks at how the Ontario Act works. (For simplicity, we are assuming that the suspected SLAPP in the following example is a defamation case, but the

⁵¹⁹ Scottish Parliament, Justice Committee – 17th Report 2020 – *Defamation & Malicious Publication (Scotland) Bill*, Stage 1 Report (14 October 2020).

⁵²⁰ Canada’s overall population in the 2016 census was roughly 35 million. The (rounded) populations of Ontario (13.5 million), Quebec (8 million), and British Columbia (4.5 million), amount to 26 million in total.

⁵²¹ *Defamation Law in the Internet Age*, Law Commission of Ontario, March 2020, at p.52.

⁵²² *Defamation Law in the Internet Age*, above, at pp. 50-54.

⁵²³ *Defamation Law in the Internet Age*, above, pp. 50-51.

Protection of Public Participation Act applies to any form of SLAPP proceedings, including for example contract cases.)

In *procedural terms*, the Ontario legislation essentially provides that:

- A defendant can make a preliminary application to court (an ‘anti-SLAPP motion’) asking the court to dismiss defamation proceedings that they consider to be a SLAPP, as having an undue impact on their freedom of expression;
- Such applications are fast-tracked for summary hearing, meaning that they will be decided without the court first hearing the defamation proceedings;
- The application can be made at any time after the defamation proceedings have begun;
- Once the application has been filed, it effectively freezes the defamation proceedings until the application (and any appeal) has been decided;
- If the defendant establishes that the plaintiff in the defamation proceedings was acting in bad faith, or for an improper purpose, the Act provides that an award of damages can also be made against the plaintiff.

Special statutory costs presumptions apply

If the defendant succeeds in getting the defamation proceedings dismissed, there is a statutory presumption that the plaintiff in those proceedings will be directed to pay the defendant’s costs (both of the application to dismiss, and of the defamation proceedings) and that this will be on a ‘full indemnity’ basis. However, if the defendant loses their application for summary dismissal, there is a statutory presumption that they will *not* be directed to pay the plaintiff’s costs of that application. Both presumptions are subject to the judge’s discretion.

The legal balancing tests

The Ontario Act provides for a three-stage test to decide whether the defamation proceedings should be summarily dismissed:

(a) The ‘public interest’ test

In order to proceed with their application to dismiss the defamation proceedings, the defendant in those proceedings must show, on the balance of probabilities, that they arise from “*an expression made by [that] person that relates to a matter of public interest.*”

If the defendant succeeds in meeting this test, the court must then dismiss the defamation proceedings, unless the plaintiff in those proceedings can meet two further tests.

(b) The ‘merits’ test

The plaintiff in the defamation proceedings has to show that, on the balance of probabilities, that there are ‘*grounds to believe*’ that the defamation proceedings have ‘*substantial merit*’, and that the defendant has ‘*no valid defence*’ to them.

An element of this test is that the Act requires the plaintiff to show that the defendant’s ‘expression’ is likely to cause sufficient potential harm to their reputation to merit the case being allowed to proceed. Defamation law in Ontario, as in Ireland, presumes that a defamatory statement will generate commensurate damage to reputation, and does not require the plaintiff to show that ‘serious harm’ is likely to result. The Law Commission report points out, however, that exceptionally, the practical effect of an anti-SLAPP dismissal application “*is to reverse*

*the common law presumption of damage and impose a serious harm test on plaintiffs before they can proceed with a defamation action.”*⁵²⁴

(c) *The ‘balancing test’*

If the plaintiff does so satisfy the court, the court must consider whether the harm to the plaintiff resulting from the defendant’s ‘expression’ is sufficiently serious that the public interest in permitting the defamation proceedings to continue outweighs the public interest in protecting the defendant’s freedom of expression.

The court is allowed to take account here of the defendant’s motives for publishing the expression.

Views of stakeholders

The Law Commission consulted with stakeholders on how well they considered the anti-SLAPP mechanism to be working. Different stakeholder groups held quite different views: “*For media stakeholders and others concerned with expressive freedom, the motion is a valuable means of discouraging trivial defamation claims that would otherwise cast a significant chill on freedom of expression. For plaintiffs, the motion is an over-broad mechanism with the extreme consequence of denying some defamation victim a legal remedy even where they would have been able to prove that defamation occurred.*” However, “*the majority of stakeholders either favoured the legislation or were resigned to its existence.*”

The Commission’s own analysis was that “*From a defamation law reform perspective, the importance of anti-SLAPP legislation is that it denies a legal remedy to plaintiffs with legitimate defamation claims where there is insufficient preliminary evidence of serious reputational harm. As a result, the legislation represents a significant encroachment on the reputational interests traditionally protected by defamation law. This is necessary to better protect freedom of expression in relation to public interest communications ...*”.⁵²⁵

Interpretation by the Canadian courts

The tests set out in the legislation had been considered in a number of 2018 judgments of the Ontario Court of Appeal, which had provided “*a thoughtful framework for finding the difficult dividing line between a legitimate defamation action and a SLAPP*”. The Court had identified several hallmarks of SLAPP actions that courts may consider, including a “*financial or power imbalance*” strongly favouring the plaintiff, and had expanded on the Supreme Court of Canada’s earlier case-law on what is meant by ‘*public interest*’.

Two of these decisions were appealed to the Supreme Court of Canada, which upheld the approach of the legislation in both cases in September 2020. *Pointes*⁵²⁶ was in many ways a classic North American SLAPP case. It arose from a claim for \$6 million for breach of contract, in a dispute between a land development company and a not-for profit association representing local interests. The association was opposed to the proposed development, and its president gave evidence at a hearing by the Ontario Municipal Board that in their view, the development would cause ecological and environmental damage to the region. Permission for the development was refused. The development company argued that the president’s evidence breached an earlier agreement between it and Pointes, which had imposed limits on what Pointes could do in relation to the developer seeking approval for the development from the

⁵²⁴ *Defamation Law in the Internet Age*, above, at p. 52.

⁵²⁵ *ibid.*

⁵²⁶ *1704604 Ontario Ltd v Pointes Protection Association* [2020] SCC 22

relevant authorities. Pointes was supported in the case by a spectrum of organisations representing civil liberties, journalists, environmentalists, media freedoms, women’s rights and aboriginal Canadians.

In a unanimous judgment, the Supreme Court decided to dismiss the developer’s action against Pointes. It agreed that the Pointes president’s evidence at the hearing was clearly a public interest matter. It ruled that the development company failed the ‘merits test’ – its claim was “*not legally tenable*” and depended on a very strained interpretation of its agreement with Pointes. And on the ‘balancing test’, the Court found that “*the harm likely to be suffered by the developer as a result of Pointes Protection’s expression lies at the very low end of the spectrum and correspondingly, so too does the public interest in allowing the proceeding to continue. ... In contrast, the public interest in protecting Pointes Protection’s expression is significant and falls at the higher end of the spectrum.*”

*Platnick*⁵²⁷ arose from a leaked email in which one professional expressed critical views of another. Dr Platnick was a medical doctor who was often engaged by insurance companies to assess personal injuries suffered by claimants. Ms Bent was a lawyer who frequently represented accident victims. She sent an email to members of an Ontario lawyers’ association in which she claimed that Dr Platnick had altered reports provided by medical specialists. The email was anonymously leaked and published, and Dr Platnick sued for defamation, contending that the email caused significant reputational damage. Ms Bent asked the court to dismiss the defamation proceedings, arguing that she was covered by qualified privilege. The Supreme Court ruled by five to four in favour of Dr Platnick, and directed that the proceedings be allowed to continue.

The Supreme Court held in *Bent* that the public interest in protecting free expression can be determined by reference to the core values underlying the Canadian Charter of Rights and Freedoms. The right to reputation is seen as reflecting the innate dignity of the individual, a concept which underlies all the Charter rights. The Court will seek to strike an appropriate and careful balance between freedom of expression and the protection of reputation, as equally important rights⁵²⁸.

The careful and balanced approach taken in the formulation and interpretation of Ontario legislation seems of particular interest for Irish defamation law.

4.9.7 Options for reform

The legislative measures that have been developed in Canada, under Ontario’s Protection of Public Participation Act 2015, to counter SLAPP lawsuits appear of particular interest in the context of Irish defamation law, because of:

- their emphasis on supporting public participation in debate on issues of public interest,
- the judicious balance that they propose between the right to freedom of expression and the protection of reputation, which seems compatible with the approaches of the Irish Constitution and of the European Convention on Human Rights, and
- their insistence on placing the public interest as the determining criterion for deciding conflicts between those rights.

⁵²⁷ *Bent v. Platnick* [2020] SCC 23

⁵²⁸ *Bent v. Platnick* [2020] SCC 23, paras 163, 168.

Option: Introduce an ‘anti-SLAPP’ summary dismissal mechanism

The option is to introduce an ‘anti-SLAPP’ mechanism to allow a defendant to bring a motion to court seeking early dismissal of defamation proceedings against them which appear to be without merit and contrary to the public interest, using as a model the approach taken by Ontario’s Protection of Public Participation Act 2015.

Arguments in favour

- Experience across a range of jurisdictions indicates that so-called SLAPPs⁵²⁹ have become an important threat to freedom of expression and debate on matters of public interest.
- Submissions to the review widely reflect a view that threats of defamation proceedings by powerful individuals or organisations exercise a real chilling effect on Irish investigative journalism, even when the proceedings are seen as meritless.
- There is a need for innovative approaches to provide an effective anti-SLAPP mechanism. Given the objectives underlying the SLAPP strategy, such a mechanism should aim to allow for early dismissal of the SLAPP proceedings, a presumption that the person applying for dismissal will not be liable for the litigation costs, and an award of damages against the SLAPP plaintiff in appropriate cases.
- Such a mechanism will involve the court making a decision on the merits of the main proceedings at an early stage. Given the Constitutional protection for the right to protection of good name and of access to the courts, the criteria for the court to decide on a summary dismissal application need to be carefully designed and balanced with the right to freedom of expression and the public interest in fostering free debate and information.
- The Ontario model proposed has been operating successfully in Ontario (and in British Columbia) and is the subject of a very positive recent evaluation by the Law Commission of Ontario.
- The approach of the Ontario legislation and of the Canadian courts interpreting it appears very compatible with Irish law, given that it is based on balancing the rights to reputation and to freedom of expression under the Canadian Charter of Rights and Freedoms, and strongly emphasises the public interest as the deciding criterion.

Arguments against

- Given the novelty of the proposed approach, there is a risk of extra court applications and appeals in the short term, while courts and parties work through the implications of new

⁵²⁹ SLAPPs (Strategic Lawsuits Against Public Participation) are legal proceedings, often without merit, whose main objective is not to succeed on the substantive issue claimed. Instead, they seek to deter debate or criticism by the defendant on matters of public interest, which is inconvenient to the plaintiff’s interests, by generating disproportionate costs and burden of litigation to intimidate and obstruct them.

legal principles. However, the Ontario experience to date suggests that this model works well and is sustainable.

- Allowing for summary dismissal of proceedings at an initial stage, without full argument, carries a risk that in a small number of cases, defamation proceedings may be dismissed where the plaintiff could have a valid case, but is not able to prove it at this early stage. However, alternative solutions – including the general application of a ‘serious harm’ test, or reversing the presumption of falsity – appear to pose much larger risks in this regard. Careful formulation of the proposed mechanism, and the Courts’ respect for the constitutional rights of protection for good name and access to the courts, should minimise this risk.

Chapter 5: Alternative Dispute Resolution

5.1 *Print media - Press Council and Press Ombudsman*

5.1.1 Establishment, Membership and Functions

The Defamation Act 2009 (section 44) provides that the Minister for Justice⁵³⁰ may give statutory recognition to a self-regulating body for the print media to be known as the “Press Council”.

The rationale for the establishment of the Press Council was to provide for an independent mechanism for the expeditious and informal resolution of complaints without recourse to litigation. Schedule 2 of the Act sets out the minimum requirements in relation to the Press Council.

The Press Council of Ireland (including the Press Ombudsman) was established in 2008 by the press industry as an independent body to provide a complaints handling process which would enable members of the public to seek redress if something was published in an Irish newspaper, magazine or online news publication which breached the Code of Practice of the Press Council of Ireland.

The Defamation Act 2009 (Press Council) Order 2010 (S.I. No. 163 of 2010) recognises the Press Council of Ireland as the Press Council for the purposes of the Defamation Act.⁵³¹ The Press Council is therefore a non-statutory body but is recognised by statute.

The owners of any periodical in circulation in the State, or part of the State, are entitled to be a member of the Press Council, but membership is voluntary. A “periodical” is defined as any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates in the State and includes any version that is published on the internet or by other electronic means.⁵³² At present the member publications of the Press Council include all daily and Sunday newspapers published in the State, the majority of local newspapers, many Irish magazines, some online-only news publications, some student publications and the associated digital outlets of member publications.⁵³³

The main features of the Press Council are set out below.

The Press Council is independent in the performance of its functions; it consists of 13 members (7 independent public interest members (including the chairperson), 5 representing the interests of owners and publishers, and one representing the interests of journalists). It is funded by subscriptions paid by its member publications.

⁵³⁰ Minister responsible changed from Minister for Justice and Equality to Minister for Justice under the Justice and Equality (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. No. 452 of 2020).

⁵³¹ This confers qualified privilege to the Press Council and Press Ombudsman in their decisions and to the press in publishing these decisions.

⁵³² Defamation Act 2009, section 2.

⁵³³ Press Council membership consists of 16 national newspapers (including the Irish editions of UK titles), 55 regional or local newspapers, 17 magazines, 12 student publications and 17 online-only news publications. A full list of member publications is available on the Press Council’s website: www.presscouncil.ie (October 2021).

The principal objects of the Press Council are to –

- (a) ensure the protection of freedom of expression of the press,
- (b) protect the public interest by ensuring ethical, accurate and truthful reporting by the press,
- (c) maintain certain minimum ethical and professional standards among the press,
- (d) ensure that the privacy and dignity of the individual is protected.

In accordance with paragraph 10 of Schedule 2 to the Act, the Code Committee⁵³⁴ of the Press Council has drawn up a Code of Practice⁵³⁵ which sets out 11 principles which members are required to adhere to. These Principles include ethical standards, rules and standards intended to ensure the accuracy of reporting where a person's reputation is likely to be affected, rules and standards intended to ensure that intimidation and harassment of persons does not occur, and rules and standards intended to ensure that the privacy, integrity and dignity of the person is respected. According to the submission by the Press Council of Ireland and Press Ombudsman to the Future of Media Commission, "*(a)ll members (of the Press Council) are committed to upholding the provisions of the Code of Practice of the Press Council and participating in the complaints process of the Office of the Press Ombudsman*".⁵³⁶

Paragraph 8 of Schedule 2 to the Act empowers the Press Council to receive, hear and determine complaints concerning the conduct of its members.

The Press Council is empowered to appoint the Press Ombudsman, following an open competition, to deal with such complaints. The Office of the Press Ombudsman provides an independent, fair, free and fast service. All complaints must, in the first instance, be referred to the editor of the relevant publication. Complaints which cannot be resolved between a complainant and the editor are dealt with by the Office of the Press Ombudsman which will seek to resolve the case by conciliation or mediation.⁵³⁷ Where a complaint cannot be resolved by either of those means, the Press Ombudsman will issue a decision which can require the taking of a series of remedial actions, including the publication of the decision of the Ombudsman, the publication of the correction of inaccurate facts or information relating to the complainant, the publication of a retraction in respect of the material complained of, and any other such action as the Ombudsman deems appropriate.⁵³⁸ Typically, most complaints are resolved within 4-6 weeks.

According to the 2020 Annual Report of the Press Council and Press Ombudsman, half of the complaints processed during 2020 were resolved to the satisfaction of the complainant.

⁵³⁴ The Code Committee is made up of editors or their representatives.

⁵³⁵ <https://www.presscouncil.ie/press-council-of-ireland-1/code-of-practice->

⁵³⁶ Submission by Press Council of Ireland and Press Ombudsman to the Future of Media Commission, January 2021 <https://www.presscouncil.ie/office-of-the-press-ombudsman/press-releases-and-annual-reports/Press-Releases/submission-by-press-council-of-ireland-and-press-ombudsman-to-the-future-of-media-commission>

⁵³⁷ The conciliation service provides a quick, fair and free method of resolving complaints. The aim of the conciliation process is to find an amicable resolution to complaints in a speedy and non-legalistic manner without a decision having to be made as to whether there was a breach of the Code of Practice.

Mediation involving an editor and the complainant meeting on a voluntary and confidential basis to discuss the complaint with the aim of arriving at a mutually satisfactory settlement. It is facilitated by a trained mediator from the Ombudsman's Office who assists the parties to clarify the issues involved and explore options for coming to a resolution.- see Annual Report of Press Council of Ireland and Office of the Press Ombudsman 2020, at pp. 11 & 12;

<https://www.presscouncil.ie/fileupload/Press%20Council%20Annual%20Report%202020.pdf>.

⁵³⁸ Paragraph 9(1)(c) of Schedule 2.

Complaints were resolved in a variety of ways including: the amendment or deletion of online material, the publication of a correction, apology or clarification, an undertaking by the editor in relation to future coverage of the subject matter of the complaint, the publication of a right of reply, an explanation by the editor in relation to the background to the article, and a meeting with the editor.⁵³⁹

Decisions of the Press Ombudsman can be appealed to the Press Council.⁵⁴⁰ The grounds for appeal are:

- that the procedures followed in making the decision were not in accordance with the published procedures for submitting and considering complaints;
- that significant new information relevant to the original complaint is available that could not have been or was not made available to the Press Ombudsman before making the decision;
- that there has been an error in the Press Ombudsman’s application of the Principles in the Code of Practice.⁵⁴¹

According to the submission by the Press Council of Ireland and Press Ombudsman to the Future of Media Commission:

“The level of participation and co-operation by member publications of the Press Council newspapers, magazines and online-only news services in the complaints handling process has been one-hundred per cent. The main concerns of complainants relate to truth and accuracy, distinguishing fact from comment, respect for rights including privacy, the avoidance of prejudice – all hallmarks of responsible news reporting and high quality journalism in a constitutional democracy.”⁵⁴²

The making of a complaint to the Press Ombudsman/Press Council does not prevent an applicant from engaging in legal action. However, if the subject matter of the complaint is subject to court proceedings, consideration of the complaint will be postponed until the conclusion of the court proceedings provided that the court proceedings are concluded within 2 years and that all information in relation to the complaint is submitted to the Press Ombudsman within the three month deadline for making a complaint.

The extent to which a member of the Press Council adhered to the Council’s code of standards and abided by determinations of the Press Council or Press Ombudsman, or adhered to equivalent standards, can be taken into account by the court in determining whether it was fair and reasonable to publish a statement under section 26 (Fair and reasonable publication on a matter of public interest) of the Act.

⁵³⁹ Annual Report of Press Council of Ireland and Office of the Press Ombudsman 2020 at p.12; <https://www.presscouncil.ie/fileupload/Press%20Council%20Annual%20Report%202020.pdf>.

⁵⁴⁰ Paragraph 9(2) of Schedule 2.

⁵⁴¹ Press Ombudsman’s website: www.presscouncil.ie.

⁵⁴² Submission by Press Council of Ireland and Press Ombudsman to the Future of Media Commission, January 2021; <https://www.presscouncil.ie/office-of-the-press-ombudsman/press-releases-and-annual-reports/Press-Releases/submission-by-press-council-of-ireland-and-press-ombudsman-to-the-future-of-media-commission>

5.1.2 Statistics

Over its 13 years of operation, the Office of the Press Ombudsman has received an average of 350 complaints per annum. Many complaints are resolved directly by editors through the Office's conciliation process. In every instance where a formal decision of the Press Ombudsman upheld a complaint, the decision of the Press Ombudsman and, where relevant, the outcome of appeals to the Press Council have been published in accordance with strict publication guidelines laid down by the Press Council.⁵⁴³

Data from the 2020 Annual Report of the Press Council and Press Ombudsman⁵⁴⁴ show that the Office of the Press Ombudsman received 347 complaints in 2020 (55 of these complaints related to one article, a court report of a case involving a 15 year old girl). The most common ground of complaint concerned breaches of truth and accuracy requirements (Principle 1), followed by children (Principle 9), prejudice (Principle 8) and breaches of privacy requirements (Principle 5). Of the complaints received in 2020, 25 were resolved to the satisfaction of the complainant and publisher, 25 were decided by the Press Ombudsman (7 were upheld (3 overturned on appeal), 12 were not upheld, sufficient remedial action was offered by the publication to resolve the complaint in 5 cases, and there was insufficient evidence in 1 case to enable a decision to be made). Three cases were still live at the end of 2020. The remainder were either dealt with in other ways (e.g. resolved by the editor to the satisfaction of the complainant) or not dealt with for various reasons (e.g. not pursued beyond preliminary stage, postponed because complaint was subject to ongoing court proceedings, publication was not a member of the Press Council, complaint was out of time, complaint was a matter for another regulatory authority (mainly the Broadcasting Authority of Ireland or the Advertising Standards Authority of Ireland), etc.). Of the complaints that were resolved by the Press Ombudsman to the satisfaction of complainants during 2020, the majority related to online articles and quite a number related to court reports.⁵⁴⁵

The Press Council considered 14 appeals (2 related to appeals carried forward from 2019) of which 3 were upheld.

More detailed statistics in relation to 2020 are set out in Appendix 6

5.2 Broadcast Media - Broadcasting Authority

Section 49 of the Broadcasting Act 2009 provides that any person whose honour or reputation has been impugned by an assertion of incorrect facts or information in a broadcast shall have a right of reply. In accordance with subsection (3) of section 49, the Broadcasting Authority of Ireland (BAI)⁵⁴⁶ has developed a statutory Right of Reply Scheme.⁵⁴⁷

⁵⁴³ Submission by Press Council of Ireland and Press Ombudsman to the Future of Media Commission, January 2021; <https://www.presscouncil.ie/office-of-the-press-ombudsman/press-releases-and-annual-reports/Press-Releases/submission-by-press-council-of-ireland-and-press-ombudsman-to-the-future-of-media-commission>.

⁵⁴⁴ *Annual Report 2020*, Press Council of Ireland and Office of Press Ombudsman <https://www.presscouncil.ie/about-us/recent-decisions-and-news/press-council-of-ireland-and-office-of-the-press-ombudsman-annual-report-2020>

⁵⁴⁵ *ibid* at pp.. 12 & 13;

⁵⁴⁶ The Online Safety and Media Regulation Bill 2022 provides for the dissolution of the BAI and the establishment of a Media Commission which will take on the present functions of the BAI.

⁵⁴⁷ Broadcasting Authority of Ireland RIGHT OF REPLY SCHEME (May 2011), www.bai.ie

The Right of Reply Scheme applies to all broadcasters regulated in the State. It does not apply to broadcasters licensed in other countries, but broadly received in this jurisdiction, e.g. BBC, Channel 4 or Sky.

A right of reply provides for the correction of incorrect facts or information; it does not provide for the broadcast of an alternative or contrary opinion. The onus is on the person making the request for a right of reply to provide as much detail as possible to show that the information or facts broadcast about him/her were incorrect and impugned his/her reputation. The aim of the scheme is to provide free and speedy redress without having to have recourse to legal proceedings. Such a reply generally takes the form of a scripted statement drafted by the broadcaster and approved by the requester.

A decision by a broadcaster to refuse to grant a right of reply (including a failure to provide a response to the request, failure to agree on the form of the reply or failure to broadcast the reply) can be appealed to the Compliance Committee of the BAI. A failure to comply with a decision of the Compliance Committee in relation to the appeal can ultimately lead to an application by the BAI to the High Court for an appropriate order to ensure compliance by the broadcaster with the Committee's decision. The High Court can rule that the broadcaster must comply with the decision, vary the decision or refuse the BAI's application.

Exercising a right of reply under the Scheme does not preclude a person from pursuing a legal action against a broadcaster for defamation. However, the Broadcasting Act provides as follows:

- the granting of a right of reply does not constitute an express or implied admission of liability by the defendant in a defamation action and is not relevant to the court's determination of liability in the action;⁵⁴⁸
- the defendant in a defamation action may give evidence in mitigation of damage, that he/she granted, or offered to grant, a right of reply to the plaintiff in respect of the statement to which the action relates, either before the bringing of the action, or as soon as practicable thereafter, in circumstances where the action was commenced before there was an opportunity to grant or offer to grant a right of reply;⁵⁴⁹ and
- evidence of the granting of a right of reply is not admissible in any civil proceedings as evidence of liability on the part of the defendant.⁵⁵⁰

The right of reply scheme is separate from the BAI's complaints process.

5.3 Online Safety and Media Regulation Bill

The updated General Scheme of the Online Safety and Media Regulation Bill was published in December 2020.⁵⁵¹ The online Safety and Media Regulation Bill 2022 was published on 25 January 2022.⁵⁵² The Bill provides *inter alia* for the dissolution of the Broadcasting Authority

⁵⁴⁸ Section 49(13).

⁵⁴⁹ Section 49(14).

⁵⁵⁰ Section 49(16).

⁵⁵¹ <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>.

⁵⁵² <https://www.oireachtas.ie/en/bills/bill/2022/6/>.

of Ireland and the assignment of all the present functions of the Authority to the Media Commission.

The right of reply scheme provided for in section 49 of the Broadcasting Act 2009 will be retained (subject to necessary technical modifications)⁵⁵³ and the functions of the BAI in relation to the scheme will be transferred to the Media Commission.⁵⁵⁴

5.4 Mediation Act 2017

The Mediation Act 2017 provides a comprehensive statutory framework to promote the resolution of disputes through mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and reducing the stress and acrimony which often accompanies court proceedings.

The Act *inter alia*:

- introduces an obligation on solicitors and barristers to advise parties to a dispute to consider using mediation as a means of resolving the dispute;
- provides that a court may, on its own initiative or on the initiative of the parties, invite the parties to consider mediation as a means of resolving the dispute.

The scope of the Act includes all civil proceedings that may be instituted before a court, save for certain exceptions provided for in section 3 of the Act. Subsection (2) of section 3 provides that nothing in the Act shall be construed as replacing a mediation or other dispute resolution process provided in any other enactment or instrument made under any enactment, or in any contract or agreement

Part 3 (sections 14 and 15) sets out the obligations of practicing solicitors and barristers as regards mediation.

Section 14(1) provides that a practicing solicitor, prior to issuing proceedings on behalf of a client, shall:

- (a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings;
- (b) provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services;
- (c) provide the client with information about:
 - (i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and
 - (ii) the benefits of mediation;
- (d) advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and/or their children is at risk.

⁵⁵³ Section 12 of Bill.

⁵⁵⁴ Section 59 of Bill.

In addition, section 14(2) and (3) provide for the obligations on solicitors to lodge the appropriate documents with the courts, in advance of proceedings, that the client has been advised of the option of mediation.

Section 15 of the Act provides that regulations may be made providing for the application to practising barristers, who are authorised to issue proceedings on behalf of a client who is not represented by a practising solicitor, of obligations similar to those imposed on practising solicitor under section 14 (outlined above).⁵⁵⁵

The Act provides for the recognition by the Minister for Justice of a body to be known as the Mediation Council of Ireland. The functions of the Council include the promotion of public awareness of, and provision of information to the public on the availability and operation of mediation and the maintenance and development of standards in the provision of mediation. The Justice Plan 2021 includes a commitment to “*designate a body by Ministerial Order as Mediation Council which satisfies the criteria set out in the relevant legislation, published in 2017, to support the development of the mediation profession as an important supplement and alternative to traditional judicial processes*”.⁵⁵⁶

5.5 Review of the Administration of Civil Justice Report

The remit of the Review Group established to review and reform the administration of civil justice in the State included a requirement to examine the current administration of civil justice in the State with a view to encouraging alternative methods of dispute resolution. The report of the Review Group concluded as follows:

5.1

.... Ireland now has an extensive and robust legal framework supporting recourse to ADR in the form of the rules of court and provisions of the Arbitration Act 2010 and the Mediation Act 2017. The Review Group does not see any immediate need for further enhancement of that framework.

5.2

The Review Group shares the view of some respondents that it is perhaps still too early to gauge the practical effectiveness or otherwise of the recent mediation reforms in the rules of court and the Mediation Act 2017 and that in the absence of data (the number of cases wherein parties have been invited to consider mediation etc.) at this time, any such assessment would be speculative.

5.3

The Review Group acknowledges and endorses views expressed by some respondents as to the importance of education and orientation focussed on practitioners and litigants and extension of ADR to categories of dispute where it is underutilised. These suggestions

⁵⁵⁵ Regulations have not been made under this section as of 1 November 2021.

⁵⁵⁶ http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf at p. 22.

speak to the need for cultural change and perhaps also a change in emphasis in certain areas of professional legal training and education.”⁵⁵⁷

5.6 Main Issues raised in course of review

The main issues raised in the course of the review of the Act were as set out hereunder.

5.6.1 Remit of the Press Council ⁵⁵⁸

A number of submissions to the review stated that it is unclear if the definition of “periodical”⁵⁵⁹ in the Act includes in its scope online only news publications or online news sites of print media which publish unique content in addition to the versions of their printed newspaper. In this regard it was suggested that the phrase “includes any version thereof published on the internet or by other electronic means” could mean that publication on the internet or by other electronic means is not in itself a periodical but comes within the definition only if the internet or electronic version is a version of an existing periodical. It was therefore suggested that the Act should be amended to clarify that online only news sites are publications to reflect the changed media landscape and in order to ensure that the Press Council remains relevant. Some submissions suggested that the scope of the Press Council should be extended to include, for example, individual journalists and self-publishers (to respond to the increase in self-publication, blogging and ‘citizen journalism’), app providers, online publication that is not generated by a newspaper and online publications of broadcasters.

5.6.2 Role of the Press Council

The following suggestions were made in relation to the role of the Press Council/Press Ombudsman.

Complainants should be encouraged to participate in the complaints process offered by the Office of the Press Council/Press Ombudsman as an alternative to, or before taking, a defamation action and publishers should be encouraged to sign up to the Press Council Code of Practice by becoming a member of the Press Council.⁵⁶⁰

Whether the plaintiff sought redress through the Press Council before initiating legal proceedings, and publication of a correction, clarification, apology or an offer to take sufficient action to address a complaint to the satisfaction of the Press Ombudsman should be taken into account in determining the outcome of a subsequent court action.⁵⁶¹

⁵⁵⁷ Review of the Administration of Civil Justice Report at p. 405 (Chapter 12 Summary of Recommendations); http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf.

⁵⁵⁸ McCann Fitzgerald, NUJ, Press Council, Public Relations Institute of Ireland,

⁵⁵⁹ “Periodical” is defined in the 2009 Act as follows:

“Periodical” means any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates, in the State at regular or substantially regular intervals and includes any version thereof published on the internet or by other electronic means.

⁵⁶⁰ Johnsons Solicitors, Independent News and Media, Press Council, Public Relations Institute of Ireland.

⁵⁶¹ Press Council.

A refusal to take up an offer of correction, clarification or apology should be considered in a subsequent defamation case.⁵⁶²

The fact that a media organisation is a member of the Press Council and adheres to its rules should mitigate to some degree the idea that it has published a report irresponsibly – a consideration when it comes to the amount of damages being considered.⁵⁶³

The Press Ombudsman should be given the power to levy fines of up to €25,000 on media organisations, with the option that such a fine would go to the complainant or to an agreed third party.⁵⁶⁴

Following the Symposium, it was suggested that solicitors should be obliged to inform their clients in situations where defamation proceedings are being considered of the services provided by the Press Council and Press Ombudsman.⁵⁶⁵

5.6.3 Mediation ⁵⁶⁶

A number of submissions suggested that mediation should be encouraged/legislated for;⁵⁶⁷ should be a statutory requirement;⁵⁶⁸ or encouraged by way of sanctions imposed by the Court.⁵⁶⁹ Another submission suggested that a Defamation Recognition Commission should be established.⁵⁷⁰

One submission following the Symposium suggested that all plaintiffs should be required to submit their complaint to the Press Council/Press Ombudsman, if eligible for consideration by those bodies, before initiating legal proceedings and that all documents, including the outcome of consideration of the complaint, should be submitted to the court. Evidence that the plaintiff's complaint had been submitted to the Press Ombudsman/Press Council but had been found to be ineligible for consideration by that body because the article complained of did not fall within the Press Council's Code of Practice should be sufficient reason for commencing a defamation action. The requirement for the matter to be considered in the first instance by the Press Ombudsman/Press Council should not be interpreted as requiring the courts to replicate, amend or endorse any decision of the Press Ombudsman/Press Council.⁵⁷¹

Another submission, following the Symposium, suggested that consideration should be given to establishing an ADR route under any revised legislation, a measure that would save costs and increase the possibility of claims being resolved in a timely manner.⁵⁷²

⁵⁶² Press Council.

⁵⁶³ Independent News and Media.

⁵⁶⁴ Public Relations Institute of Ireland.

⁵⁶⁵ Press Ombudsman, Irish Council for Civil Liberties.

⁵⁶⁶ The Mediation Act 2017 has been enacted since these submission were made.

⁵⁶⁷ Law Society – anonymous solicitor(s), McCann Fitzgerald Solicitors.

⁵⁶⁸ Law Society – anonymous solicitor(s), Johnsons Solicitors.

⁵⁶⁹ Law Society – anonymous solicitor(s).

⁵⁷⁰ Crowley Millar Solicitors.

⁵⁷¹ Professor John Horgan.

⁵⁷² McCann Fitzgerald.

5.6.4 Right of reply scheme

The Department of Communications, Climate Action and Environment⁵⁷³ noted that in its report to the Minister for Communications, Climate Action and Environment on its statutory review of the right of reply scheme under the Broadcasting Act, the Broadcasting Authority of Ireland concluded that the operation and effectiveness of the Scheme are broadly positive. It also noted that broadcasters are aware of the Scheme but that very few viewers and listeners use the Scheme, potentially using other mechanisms such as the BAI complaints process or proceedings under the Defamation Act for redress. The Department therefore suggested that increased use of the Right of Reply Scheme should be encouraged, along with other examples such as the remedies provided by the Office of the Press Ombudsman. One submission to the review suggested that the Act should be amended to provide for a right of reply scheme.⁵⁷⁴

5.7 Comparative Perspectives

In the **United Kingdom**, the Leveson Inquiry into press standards was established following widespread concerns about alleged unlawful activities carried out by some sections of the press, such as phone hacking. The Leveson Report⁵⁷⁵ recommended a new framework for Press regulation, with the principle of independent and effective self-regulation at its core. The Report resulted in the establishment of the Press Recognition Panel which is an independent body established in November 2014 under the Royal Charter on Self-Regulation of the Press to oversee regulation of the press and other news publishers. Its role is to recognise regulators (approved regulators) who satisfy the 29 criteria set out in the Royal Charter establishing the Press Recognition Panel. The 29 criteria are intended to ensure that an approved regulator is, among other things, independent, adequately funded, equipped with the powers and mechanisms to ensure that publishers adhere to standards of accuracy and fairness, and provide the public with proper opportunities to raise concerns about the conduct of the regulator's members. The role of the Press Recognition Panel is to ensure *inter alia* that approved regulators satisfy these criteria.⁵⁷⁶

At present there are two press regulators in the UK namely IMPRESS and IPSO, only one of which is approved by the Press Regulation Panel i.e. IMPRESS (see below). However, a significant number of print and most digital-only publishers are not members of a regulator. As far as the traditional press are concerned, the Evening Standard, The Financial Times, the Guardian and The Independent operate their own internal complaints and standards processes.⁵⁷⁷ Most digital only publishers are not members of a regulator; they exercise their own in-house complaints systems.⁵⁷⁸ Therefore, most news publishers (online and print) have no regulation or external complaints handling processes.

⁵⁷³ The relevant function is now in the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media.

⁵⁷⁴ Michael Williams.

⁵⁷⁵ Report on An Inquiry into the Culture, Practices and Ethics of the Press (29 November 2012).

⁵⁷⁶ Press Recognition Panel website: <https://pressrecognitionpanel.org.uk/>.

⁵⁷⁷ *Press Recognition Panel, Annual report on the recognition system* (February 2021), p.16.

⁵⁷⁸ *ibid.*

IMPRESS regulates 104 publishers, who represent 174 titles, across the UK.⁵⁷⁹ It is independent of the publishers that it regulates. It *inter alia*, maintains a Standards Code and assesses any breaches of the Code by its members. It also provides an arbitration scheme which is free to all parties and is aimed at protecting publishers against the risk of court costs and exemplary damages.⁵⁸⁰ As indicated in the previous paragraph, IMPRESS is approved by the Press Recognition Panel.

IPSO is a regulator for the newspaper and magazine industry in the UK. 88 publishers representing 2,600 titles⁵⁸¹ are members of IPSO. Its functions include the investigation of complaints about printed and online material that may breach the Editor's Code of Practice.⁵⁸² IPSO also runs low cost arbitration schemes (voluntary and compulsory) to settle legal disputes involving IPSO members. If a claim is upheld, the arbitrator can generally grant the same relief as a court (including damages).⁵⁸³ However, IPSO is not approved by the Press Recognition Panel as it does not meet all of the recognition criteria for the Scheme of Recognition established under the Royal Charter on Self-Regulation of the Press. The Press Recognition Panel's 2021 *Annual report on the recognition system* describes IPSO as "a trade complaint handling body with no independent oversight".⁵⁸⁴ According to the Press Recognition Panel's 2021 report, IPSO has indicated that it does not intend to apply for recognition by the Press Recognition Panel.⁵⁸⁵

Sections 34 to 42 and Schedule 15 of the Crime and Courts Act 2013 set out a new system for exemplary damages and costs in respect of publishers of news-related material aimed at encouraging the press to join an approved regulator⁵⁸⁶ (see Chapter 6).

Canada has two press complaints organisations, the National NewsMedia Council and the Conseil de presse du Québec.

The National NewsMedia Council is a voluntary, self-regulatory ethics body. Membership of the Council includes most daily and community newspapers, news magazines and online news organisations across Canada, with the exception of Quebec which is served by the Conseil de presse du Québec. The Council does not impose its own code of practice but expects members to adhere to their own or some generally-accepted code of journalistic standards, practice and ethics. It considers complaints against members concerning accuracy, journalistic standards and ethics in gathering and reporting the news. It seeks to resolve complaints by mediation and if that fails it will adjudicate on the complaint. Decisions on complaints are final and not subject to appeal.⁵⁸⁷

⁵⁷⁹ *ibid*, p. 8.

⁵⁸⁰ <http://www.impress.press>

⁵⁸¹ *ibid*, p.14 (based on information from IPSO Annual Report 2019).

⁵⁸² The Code is drawn up by the Editors Code of Practice Committee which is comprised of 10 editors from the national, regional and magazine industry, 3 independent lay members and the chairman and chief executive of IPSO. (*Press Recognition Panel Annual Report, 2020*, p.34).

⁵⁸³ <http://www.ipso.co.uk>

⁵⁸⁴ *Press Recognition Panel Annual Report on recognition system 2021*, p.13, (<http://www.pressrecognitionpanel.org.uk>).

⁵⁸⁵ *ibid*, p. 15.

⁵⁸⁶ Explanatory Notes on Crime and Courts Act 2013, <https://www.legislation.gov.uk>.

⁵⁸⁷ <http://www.mediacouncil.ca>

Conseil de presse du Québec (Quebec Press Council) is a private tripartite organisation; its Board of Directors and all its committees are made up of journalists, members appointed by media organisations, and public members. Membership is voluntary. It is independent of Government. Its scope extends to all media organisations that publish or broadcast in Quebec, whether they belong to print or electronic media, regardless of whether they are members of the Council. The Council acts as a dispute resolution panel for the Quebec press industry. It has no regulative jurisdiction and no judicial, legislative or coercive powers. It imposes sanctions that are strictly of a “moral nature”.⁵⁸⁸

In **Australia**, the Australian Press Council is an independent self-regulatory body funded by its members. The majority of major publications are members of the Council. The purpose of the Council is to promote freedom of speech and responsible journalism. It is the principal body responsible for responding to complaints about Australian newspapers, magazines, journals and associated digital outlets.⁵⁸⁹ The Press Council has no power to award compensation or impose fines or other sanctions. Where a complaint is upheld, it can issue a reprimand or censure; call for (but not require) the publication of an apology, retraction or correction; or request the publisher to take other specified remedial action. It can also call for other specified measures to prevent the recurrence of the type of breach in question.⁵⁹⁰

The **New Zealand** Media Council is an independent self-regulatory media complaints body funded by the industry. It was founded as the New Zealand Press Council but changed its name in 2018 to reflect the incorporation of broadcasters and digital publishers into its membership. It investigates complaints against its members, including in relation to accuracy, fairness and balance, and privacy. The Media Council’s adjudications are based on ethical principles; it does not recover debts or seek monetary compensation for complainants.⁵⁹¹

5.8 Options for Reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- broaden the remit of the Press Council;
- require a person to have recourse to the Press Council before initiating legal proceedings;
- impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman or the BAI right of reply scheme before issuing proceedings;
- provide that the fact that a media organisation is a member of the Press Council and adheres to its rules should be taken into consideration in determining the quantum of damages;
- include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings;
- give the Press Council the power to levy fines;
- impose an obligation on parties to a dispute to consider mediation;
- establish a statutory body (with the power to grant redress, including compensation) to adjudicate on complaints of defamation;

⁵⁸⁸ <http://www.counseilpresse.qc.ca>

⁵⁸⁹ <http://www.presscouncil.org.au>

⁵⁹⁰ *Australian Press Council, Annual Report 2017-2018*, p.17.

⁵⁹¹ <http://www.mediacouncil.org.nz>

- provide for a new defence of right of reply.

Option 1: Broaden the remit of the Press Council

Option 1.1: Amend the Act to clarify that online only news sites fall within the definition of periodical

Arguments in favour

- In light of the increasing prevalence of online only publications, and in order to be relevant to modern forms of publishing, the remit of the Press Council should be explicitly extended to cover online only news sites.
- Most, if not all, print publications already have an online presence; where a publication is a member of the Press Council, their on-line versions fall within the remit of the Press Council in the same way as the print versions. It would be logical to treat all online publications in the same manner.
- This proposal would remove any doubts in relation to the remit of the Press Council.
- This would extend the use of the Press Council Code of Practice to support best practice.

Arguments against

- Some online only news publications (e.g. breakingnews.ie, TheJournal.ie) are already members of the Press Council so it is not necessary to amend the law.
- Any proposal to amend the definition of ‘periodical’ would need to be carefully worded so as to ensure that it does not include bloggers, citizen journalists, etc. It may be difficult to define online news sites in such a way.

Option 1.2: Extend the remit of the Press Council to cover online publications by broadcasters

Arguments in favour

- Online publications of print media and online only publications are members of the Press Council so it would be logical to allow broadcasters who publish online to become members.
- The distinction between various media is no longer clear cut. “*While newspapers are becoming broadcasters, producing videos and podcasts, broadcasters are increasingly producing text-based journalism online in blogs and other formats. In between, there is the growing number of online-only publications that are neither newspapers nor broadcasters.*”⁵⁹²

⁵⁹² Press Council remit must cover online and social media, Michael Foley and Patrick Smyth, Irish Times, 17 August 2020, <https://www.irishtimes.com/opinion/press-council-remit-must-cover-online-and-social-media-1.4331574>.

- Different regulatory systems apply to different journalists (even within the one organisation). The Press Council provides a voluntary regime for print media and online-only news platforms. Broadcasting is regulated under the Broadcasting Act by the Broadcasting Authority of Ireland (BAI), but there is no regulatory system for online offerings of broadcasters. Furthermore, the “*BAI has an ethical code that covers news and current affairs that is underpinned by law, leading to an anomaly whereby some journalists in an organisation are ethical by law and others are ethical by following a voluntary, ethical code*”.⁵⁹³ Extending the scope of the Press Council to online publications of broadcasters would help introduce a more uniform system of regulation.
- In its submission to the Future of Media Commission, the Press Council and Press Ombudsman stated:

*“We also see the Council as continuing to be the regulator for online-only news publications which do not have print editions. We see the Council’s function including the regulation of video and audio inserts into its members publication. We are confident that as the platforms merge and the distinction between platforms becomes less clear there remains a clear and evident role for the Office of the Press Ombudsman and the Press Council.”*⁵⁹⁴
- The remit of press/media councils in a number of Member States extends beyond traditional media e.g. in **Sweden**, the scope of the Media Ombudsman/Media Council⁵⁹⁵ extends to newspapers, magazines, broadcast media and their websites and social media; in the **Netherlands** the remit of the Press Council extends to print, online, broadcasting, and social media, as long as it relates to journalistic conduct;⁵⁹⁶ and in **Denmark** the scope of the Press Council⁵⁹⁷ extends to print media, radio and TV, online media (covers all kinds of websites as long as what is published on the website is imparted periodically to the public and has a form of news representation; the website must be either registered with the Press Council or receive media subsidies in order to fall within the competence of the Press Council).
- The current *ad hoc* regulatory system is out of date and reflects a time when the distinction between print and broadcasting was clear.

Arguments against

- Broadcasters are already subject to regulation by the BAI; articles published online by broadcasters tend to reflect material published in their broadcasts; it would not be appropriate to have broadcasters subject to both the BAI and Press Council.

Option 1.3: Extend the scope of the Press Council to include individual journalists, bloggers, etc.

⁵⁹³ Press Council remit must cover online and social media, Michael Foley and Patrick Smyth, Irish Times, 17 August 2020, <https://www.irishtimes.com/opinion/press-council-remit-must-cover-online-and-social-media-1.4331574>

⁵⁹⁴ Submission by Press Council of Ireland and Press Ombudsman to the Future of Media Commission, January 2021; <https://www.presscouncil.ie/office-of-the-press-ombudsman/press-releases-and-annual-reports/Press-Releases/submission-by-press-council-of-ireland-and-press-ombudsman-to-the-future-of-media-commission>.

⁵⁹⁵ <https://presscouncils.eu/members-sweden>.

⁵⁹⁶ <https://presscouncils.eu/members-netherlands>.

⁵⁹⁷ <https://presscouncils.eu/members-denmark>.

Arguments in favour

- Extending the scope of the Press Council to include individual journalists, bloggers, etc. would better reflect the reality of how information is communicated.

Arguments against

- Bloggers and “citizen journalists” are not the same as professional journalists; allowing them access to Press Council membership might be perceived as a devaluation of the profession of journalist.
- Material published in news publications is subject to editorial control which should act as a filter that does not exist in the case of bloggers and citizen journalists.
- There would be difficulties of defining these concepts.
- The Press Council hasn’t requested that its remit be extended in this way.
- The report on Media Councils in the Digital Age⁵⁹⁸ found that all organisations that were surveyed as part of the study⁵⁹⁹ indicated that they only take complaints about journalistic content (but this concept is not defined); a broader scope was considered undesirable because it “*would go beyond the basic premise of media councils (which is that they deal with journalistic content) and because of pragmatic considerations (the workload would be too high)*”.⁶⁰⁰

Option 2: Require a person to have recourse to the Press Council/ Press Ombudsman in advance of taking a court action for defamation

Arguments in favour

- Requiring recourse to the Press Council/Press Ombudsman complaint handling mechanism would lead to the speedier resolution of complaints, reduce the burden defamation actions place on the courts and lead to an overall reduction of the costs and awards in defamation actions.

Arguments against

- The Act (section 6(2)) provides:
“The tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person), and “defamation” shall be construed accordingly.”

⁵⁹⁸ Media Councils in the Digital Age, An inquiry into the practices of media self-regulatory bodies in the media landscape today, Dr. Raymond A. Harder, Universiteit Antwerpen (Author) and Pieter Knapen, Vlaamse Raad voor de Journalistiek (Project Supervisor);

<https://presscouncils.eu/New-dataset-and-report-on-the-state-of-media-councils>.

⁵⁹⁹ This report is based on a study of 24 media councils, composed of 15 organisations from EU Member States and 9 from non-Member States plus 4 “ethical commission(s) embedded within the local journalists’ association or media association” (2 from EU Member States and 2 from non-Member States); *ibid* at p5. Details of the organisations surveyed are set out in Appendixes A to C of the report (pp. 20-24). Comparative Data on Media Councils was also published as part of the project that resulted in this report; <https://presscouncils.eu/New-dataset-and-report-on-the-state-of-media-councils>.

⁶⁰⁰ *ibid* at p. 11. (Media Councils in the Digital Age).

The Act is therefore not confined to the media.

- This proposal would apply to members of the Press Council only; it would not apply to broadcast media, print media that are not members of the Council or others who publish a defamatory statement.
- Requiring a person to first access the Press Council/Press Ombudsman complaint procedure may give rise to constitutional and ECHR difficulties in relation to the right to an effective remedy to vindicate the plaintiff's right to the protection of his/her good name.
- The current statutory powers of the Press Council/Press Ombudsman are limited and restricted to a range of remedial actions with no hard enforcement powers. The powers of the Press Council/Press Ombudsman would need to be significantly enhanced if a requirement was to be imposed on the plaintiff to pursue this course of action before applying to the Courts. Any proposal to enhance the powers of the Press Council/Press Ombudsman may however give rise to legal difficulties.
- Requiring a person who wishes to obtain a remedy that only a court can offer (e.g. damages) to have recourse to the Press Ombudsman/Press Council before having access to the courts would add an additional step to defamation proceedings resulting in increased costs and delays in resolving disputes.

Option 3: Impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman or the BAI right of reply scheme before issuing proceedings

Arguments in favour

- This would ensure that individuals are aware of the availability of the services of the Press Council/Press Ombudsman and of the BAI right of reply scheme before embarking on litigation. Any such provision could be modelled on sections 14 and 15 of the Mediation Act 2017. It would however need to be clarified that any such provision does not supersede those provisions.

Arguments against

- The added value of any such provision may be limited as it is likely that a majority of litigant wish to seek damages.

Option 4: Provide that the fact that a media organisation is a member of the Press Council and adheres to its rules should be taken into consideration in determining the quantum of damages

Arguments in favour

- This would reinforce the value of the Press Council and its Code of Practice.
- This would encourage publishers to become Press Council members and adhere to its Code of Practice; adherence to the Code would help ensure high standards of journalism.

Arguments against

- Broadcasters cannot be members of the Press Council and there is no similar organisation which they could join in order to benefit from any such proposal.
- Section 31(2) provides that in making an award of general damages in a defamation action, regard shall be had to all the circumstances of the case; moreover, section 31(1) provides that the parties in a defamation action may make submissions to the court in relation to the matter of damages; it would therefore be open to the defendant to argue that it is a member of the Press Council and adheres to its code of practice where it is relevant in any given case.

Option 5: Include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings

Arguments in favour

- This would encourage people to have recourse to the Press Council/Press Ombudsman and may result in the resolution of disputes without recourse to the courts.

Arguments against

- This proposal would only apply to members of the Press Council.
- The remedies available to the Press Council are limited; a person who believes that he/she has been the subject of a defamatory statement may wish to vindicate his/her good name through the courts and avail of the possibility of receiving damages. Whether or not such a person first sought redress through the Press Council should not affect the outcome of a court case.
- The offer of amends procedure already provides a mechanism for defendants to issue an apology and publish a correction together with the payment of damages and costs (if any). The issuing of an offer of amends must be taken into account in mitigation of damages where the question of damages is determined by the courts. This is a more effective mechanism for defendants who make a genuine mistake to mitigate damages that might otherwise be awarded against them.

Option 6: Empower the Press Council to levy fines

Arguments in favour

- There are no obvious arguments in favour of this proposal as defamation is a civil wrong.

Arguments against

- Providing for the imposition of fines in respect of defamation would have a chilling effect on freedom of expression.

- Any proposal to grant the Press Council/Press Ombudsman, which is not a statutory body,⁶⁰¹ powers to levy fines and make quasi-judicial determinations in relation to alleged defamatory material would give rise to serious constitutional and legal issues which would require careful consideration (and is unlikely to be legally permissible).
- Membership of the Press Council is voluntary; giving the Council the power to levy fines could act as a disincentive to becoming a member of the Press Council.
- This proposal would mean that different rules apply to members of the Press Council and to other persons who make defamatory statements.
- The Press Council hasn't requested such a power.
- The report on Media Councils in the Digital Age⁶⁰² found that of the organisations surveyed, only one could impose financial penalties namely, in the UK, IMPRESS may impose a fine of up to 1% of annual turnover on a media outlet that breaches IMPRESS's Ethics Code.⁶⁰³

Option 7: Impose obligation on parties to a dispute to consider mediation

Arguments in favour

- Mediation should be encouraged as an alternative to court proceedings as it would reduce costs, result in speedier resolution of disputes, save court time, and facilitate the reaching of a satisfactory outcome for both parties to the dispute.
- The General Scheme of the Online Safety and Media Regulation Bill imposes an obligation on the parties to a dispute to consider mediation.⁶⁰⁴

Arguments against

- The Mediation Act 2017 already provides a comprehensive statutory framework to promote the resolution of disputes through mediation as a viable, effective and efficient alternative to court proceedings. It is therefore not necessary to include a specific provision in the Defamation Act requiring parties to a dispute to consider mediation.

Option 8: Establish a statutory body (with the power to grant redress, including compensation or to impose an administrative financial sanction) to adjudicate on complaints of defamation

Arguments in favour

Body with power to grant redress, including compensation

⁶⁰¹ It is however recognised by statute (see 5.1.1).

⁶⁰² Media Councils in the Digital Age, An inquiry into the practices of media self-regulatory bodies in the media landscape today, dr. Raymond A. Harder, Universiteit Antwerpen (Author) and Pieter Knapen, Vlaamse Raad voor de Journalistiek (Project Supervisor); <https://presscouncils.eu/New-dataset-and-report-on-the-state-of-media-councils>.

⁶⁰³ *ibid* at pp. 16-15.

⁶⁰⁴ <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>.

- A statutory body with the power to adjudicate on complaints of defamation that could grant redress, including compensation, would provide an accessible and cheap means of vindicating an individual's right to a good name.

Body with power to impose administrative financial sanctions

- A statutory body with the power to adjudicate on complaints and impose administrative financial sanctions would encourage the adoption of high standards and safeguards to protect an individual's good name, including on the media, people who post on-line media, etc.

Arguments against

General

- Defamation law involves the balancing of two constitutional rights, the right to freedom of expression and the right to a good name; the balancing of those rights would best be determined by the courts.
- Many of the remedies available under the Defamation Act are more appropriate to a court e.g. the power to grant an order prohibiting the publication of a defamatory statement (injunction).
- The relatively small number of defamation cases likely to be referred to such a statutory body annually would not warrant the establishment of a body with wide-ranging powers.

Body with power to grant redress, including compensation

- The Constitution provides as follows:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.” (Article 34.1)

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.” (Article 37.1)

Therefore any proposal to establish such a body would give rise to constitutional issues and would require careful consideration.

Body with power to impose administrative financial sanctions

- The power to impose administrative financial sanctions against persons (in particular the media) in respect of allegations of defamation, could have a chilling effect on the constitutional right to freedom of expression.

Option 9: Provide for a new defence of right of reply

Arguments in favour

- There are no obvious arguments in favour of this defence.

Arguments against

- A right of reply already exists under the Broadcasting Act and is one of the ways complaints to the Press Ombudsman/Press Council may be resolved.
- The Defamation Act 2009 already provides for the defence of an offer to make amends i.e. an offer to make a suitable correction of the statement that is alleged to be defamatory and a sufficient apology, to publish that correction and apology in such manner as is reasonable and practicable in the circumstances and to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by the parties or as may be determined to be payable.
- The Circuit Court already has jurisdiction to make a declaratory order under section 28 of the Defamation Act or correction order under section 30, if a defendant is not willing to offer a right of reply voluntarily.

Recommendations

The following options are recommended:

- Option 1.1: Broaden the remit of the Press Council to clarify that online-only news sites fall within the definition of periodical,
- Option 1.2: Consider extending the remit of the Press Council to cover online publications by broadcasters;
- Option 3: Impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman, or the BAI right of reply scheme, before issuing proceedings;
- Option 5: Include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings;
- Option 7: Impose an obligation on parties to a dispute to consider mediation.

The following options are not recommended:

- Option 1.3: Broaden the remit of the Press Council to include individual journalists, bloggers, etc.;
- Option 2: Require a person to have recourse to the Press Council/ Press Ombudsman before initiating legal proceedings;
- Option 4: Provide that the fact that a media organisation is a member of the Press Council and adheres to its rules should be taken into consideration in determining the quantum of damages;
- Option 6: Empower the Press Council to levy fines;
- Option 8: Establish a statutory body (with the power to grant redress, including compensation or to impose an administrative financial sanction) to adjudicate on complaints of defamation; and
- Option 9: Provide for a new defence of right to reply.

Chapter 6: Remedies for defamation

6.1 Damages

6.1.1 Current Legal Position

The Defamation Act 2009 contains a number of provisions in relation to damages as set out below.

Section 6(5) provides that the tort of defamation is actionable without proof of special damage.⁶⁰⁵

Section 13 provides that the Supreme Court⁶⁰⁶ may, in addition to any other order that it deems appropriate to make, substitute for any amount of damages awarded to the plaintiff by the High Court such amount as the Supreme Court considers appropriate.

Section 31 allows the parties in a defamation action to make submissions to the court in relation to damages; and, in the case of a defamation action brought before a jury in the High Court, requires the judge to give directions to the jury in relation to damages.

Furthermore, section 31 provides that in making an award of general damages,⁶⁰⁷ the court shall have regard to all of the circumstances of the case (subsection (3)); it sets out a comprehensive, but non-exhaustive, list of factors which the court must have regard to when determining damages (subsection (4)).

Subsection (6) provides that a defendant may, for the purposes of mitigating damages, give evidence (a) with leave of the court, of any matter having a bearing on the plaintiff's reputation which is related to the defamatory statement, or (b) of an award of damages to the plaintiff in another action taken in respect of a statement which contained substantially the same allegations as are contained in the defamatory statement published by the defendant.

Subsection (7) provides that the court may, in a defamation action, make an award of damages (special damages) to the plaintiff in respect of financial loss suffered by him/her as a result of the injury to his/her reputation caused by the publication.

Section 32 provides for aggravated and punitive damages.

Aggravated damages may be awarded where the defendant conducted his/her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement; such damages can only be awarded where the court also finds the defendant liable to pay compensatory damages to the plaintiff in respect of a defamatory statement (subsection (1)).

⁶⁰⁵ Damages that can be calculated and quantified such as loss of earnings or medical expenses.

⁶⁰⁶ Section 74(1) of the Court of Appeal Act 2014 provides:

References (howsoever expressed) to the Supreme Court, in relation to an appeal, including proceedings taken by way of case stated, which lies (or otherwise) to it in any enactment passed or made before the establishment day, shall be construed as references to the Court of, unless the context otherwise requires.

⁶⁰⁷ Damages that the law presumes to flow from the defendant's act.

Punitive damages may be awarded if it is proved that the defendant intended to publish the defamatory statement and knew that the statement would be understood to refer to the plaintiff and that it was untrue or was reckless as to whether or not it was true; such damages can only be awarded where the court also finds the defendant liable to pay compensatory damages to the plaintiff in respect of a defamatory statement (subsection (2)).

Both sections 31 and 32 provide that “court” means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury.

The role of general damages in a defamation action is to “*compensate (the plaintiff) for the damage to his reputation, vindicate his good name⁶⁰⁸ and take account of the distress, hurt and humiliation which the defamatory publication has caused*”.⁶⁰⁹ In *Kinsella v. Kenmare Resources and Charles Carville*,⁶¹⁰ Irvine J held that “*damage to a plaintiff’s reputation can have far-reaching consequences*” and that compensation “*must be sufficiently large such that if disclosed to a bystander it would readily convince them of the baselessness of the allegation complained of*”.⁶¹¹ Furthermore, the Court held that any award of damages must

“be fair to the plaintiff and the defendant and should not be excessive. An award should certainly not be large to the point that it will not only have the effect of vindicating the plaintiff’s good name, but also of restricting freedom of expression, particularly that enjoyed by the media”.

6.1.2 Main issues raised in course of review

The general consensus among those who responded to the review was that the level of damages awarded in defamation cases is excessive.⁶¹² The concerns expressed in relation to the level of damages included the following:

- Damages should be proportionate, fair to the plaintiff and defendant, and objectively reasonable in light of the common good and social conditions in the State.
- Damages are extremely high in this jurisdiction compared with other common law jurisdictions; they are out of proportion to the possible harm caused in many cases.
- The level of damages awarded in defamation cases has a chilling effect on freedom of expression and negatively impacts on Ireland’s democratic system and international reputation; the fear of long and expensive trials where juries can, and have, awarded very large damages, may be an inhibiting factor in terms of journalists pursuing certain stories and undermines journalists in their democratic duty to hold to account those in positions of power and influence.
- The ECtHR has accepted that excessive awards of damages undermine the right to free speech and a free press.
- Excessive awards could lead to the closure of newspapers and a loss of jobs.

⁶⁰⁸ The primary function, according to the judgment in *Kinsella v. Kenmare Resources* [2019] IECA 54.

⁶⁰⁹ *Leech v. Independent Newspapers (Ireland) Limited* [2014] IESC 79, quoting from *de Rossa v. Independent Newspapers* [1999] IESC 63 [1999] 4 IR 432.

⁶¹⁰ [2019] IECA 54.

⁶¹¹ *Kinsella v. Kenmare Resources* [2019] IECA 54, at para. 121.

⁶¹² Anonymous1, Anonymous2, L. Crowley, DCU Socio Legal Research Centre, DIT, K. Fitzpatrick, , Independent News and Media, Law Society (anonymous solicitors), McCann Fitzgerald, NewsBrands, T. O’Conaill, E. O’Dell, Public Relations Ireland, D. Reynolds, RTE.

- Excessive damages are more punitive than compensatory.
- The costs of defending a defamation action are often quite high and exceed those in personal injuries cases; costs should be capped at 30% of the award.

One contributor suggested that the changes in practice and procedure effected by section 31 of the 2009 Act may be insufficient, and further reform may therefore be necessary, but noted that at the time of the submission there was no evidence that the procedures were wanting or that damages under the Act are too high because of lack of case-law under the Act.⁶¹³ It was argued that there is a requirement for the High Court to be able to go further to guide juries and take steps to prevent the awarding of excessive damages which are clearly punitive in nature, rather than compensatory/to vindicate the plaintiff's reputation.⁶¹⁴ Another argued that section 31 has brought about only limited changes and defamation awards remain much higher than elsewhere in Europe.⁶¹⁵

Having identified the general issues set out above, some specific recommendations were made in relation to damages as set out hereunder.

Role of juries

A large number of submissions recommended that juries should be removed from defamation actions or, alternatively, that their role should be limited; one of the main reasons for these suggestions was the level of damages currently awarded by juries in defamation actions. The role of juries is considered in Chapter 4.

Introduce a cap on damages, or a book of quantum

The following recommendations were made in relation to the quantum of damages:

- a cap on damages should be introduced;
- a book of quantum that specifies awards for different levels of damage should be drawn up;
- courts should be required, in making an award of general damages, to have regard to the levels of damages for pain and suffering awarded in claims for personal injuries.

The rationale for the introduction of one of the above proposals was that it would help reduce the severity of the risk that a defamation action places on the media, without affecting the protection of the right to a good name and reputation.⁶¹⁶

One submission to the review following the Symposium suggested that a plaintiff should be required to explicitly set out the quantum of the damage caused and to pursue their action in a court of appropriate jurisdiction for that quantum.⁶¹⁷

*Closing instructions and submissions to jury*⁶¹⁸

The following recommendations were made in relation to submissions and instructions to juries:

⁶¹³ E O'Dell.

⁶¹⁴ Johnsons Solicitors.

⁶¹⁵ Independent News and Media.

⁶¹⁶ Anonymous1, L Crowley, K Fitzpatrick, Anonymous2, Independent News and Media, Journal Media, MGN Ltd, T O'Conaill, E. O'Dell Press Council, Public Relations Institute of Ireland, D Reynolds.

⁶¹⁷ ISME.

⁶¹⁸ DCU Socio Legal Research Centre, Law Society (anonymous solicitor), Newsbrands, RTE, McCann Fitzgerald (following Symposium).

- Counsel’s closing submissions and the judge’s charge to the jury should be split into two stages: counsels’ closing arguments and the judge’s charge to the jury should address liability only; if the material complained of is found to be defamatory, the issue of damages could then be addressed by the judge and counsel.
- Instructions to juries should reference liability and damages equally; instructions should not be dominated by the question of quantum of damages.
- Clearer guidance as to the role of judge and jury in setting damages should be introduced.
- Judges should instruct the jury on what they believe appropriate damages would be; strict guidelines on the harm necessary for large awards could be established.
- The Act should set out clearly the nature of the guidance to be provided to juries by the judge so that juries can assess damages at a reasonable and consistent level.
- One submission⁶¹⁹ to the review following the Symposium recommended that parties should be permitted to suggest a range of appropriate damages for consideration by the jury.
- Other submissions to the review following the Symposium suggested that better guidance should be given on appropriate damages which would take into account the factors of fairness and proportionality; consideration should be given to drawing up guidelines in determining appropriate levels of awards as exists already for personal injuries.⁶²⁰
- A submission to the review following the Symposium suggested that provision should be made for a clear and unambiguous structure for guidance for juries in respect of damages. The Act should set out clearly the nature of the guidance that can be provided, as confusion remains about what can and cannot be said to juries about damages.⁶²¹

Other suggestions

One submission suggested that the courts should be able to grant modest damages along with summary relief orders.⁶²²

A number of submissions suggested that provisions in relation to aggravated and punitive damages need to be amended; aggravated damages deny persons a right to a fair hearing under Article 6(1) ECHR.⁶²³

Submissions to the review following the Symposium suggested that defamation actions should be initiated in the Circuit Court rather than the High Court in order to reduce the level of damages.⁶²⁴

⁶¹⁹ McCann Fitzgerald.

⁶²⁰ ICEL, Press Ombudsman.

⁶²¹ McCann Fitzgerald.

⁶²² The Bar Council of Ireland.

⁶²³ Anonymous1, L Crowley, K Fitzpatrick, Anonymous2, H O’Driscoll.

⁶²⁴ Press Ombudsman, Professor J Horgan.

Another submission to the review following the Symposium suggested that section 26 of the Act could be amended to include a provision whereby courts would be required to take into account whether the plaintiff had availed of the services of the Press Ombudsman and Press Council when determining damages.⁶²⁵

6.1.3 Symposium on Reform of Defamation Law

In his contribution to the Symposium on Reform of Defamation Law, Professor Neville Cox noted that prior to the coming into force of section 32 of the 2009 Act the issue of aggravated damages was complex.⁶²⁶ On the one hand, at common law aggravated damages could be awarded if a defendant's conduct following the initial publication had compounded the harm generated by the initial publication. On the other hand, subsequent publication can generate a separate cause of action and so should not, in theory, factor into the calculation of damages in the previous case. For this reason, the tendency was to see subsequent publications as relevant but only in assessing malice specifically or the state of mind generally of the publisher. In *Ward v. The Donegal Times*,⁶²⁷ the Court declined to award aggravated damages for subsequent publications but allowed those publications to be taken into account in determining the discount that should apply to the quantum of damages arising from the making of an offer of amends under section 23 of the 2009 Act. The changes made by section 32 of the Act do not appear to have been considered in that case.

Moreover, Professor Cox pointed out that aggravated damages could always be awarded having regard to the manner in which a defence was conducted but that section 32 provides that it is only this that can warrant such an award. He stated that there is a question as to whether or not the common law approach to aggravated damages survived the enactment of the 2009 Act.

Professor Cox therefore suggested that the question of whether the common law concept of aggravated damages survived the enactment of the 2009 Act is an issue that would merit clarification in any reform of the law.⁶²⁸

With regard to the issue of damages more generally, Professor Cox discussed a number of alternatives that might be considered for amendment of the Act as follows:

- *a judicially imposed convention of capping damages awards or a legislative cap*: either approach would be problematic; the quantum of damages is a question of fact and thus not one on which the court should rule as a matter of law. Furthermore, the purpose of damages in defamation cases, while nominally compensatory, is multifaceted and must be part vindictive (i.e. vindicate the good name of the plaintiff), part deterrent and part punitive.⁶²⁹ The quantum awarded is also a signal of the falsity of the publication and the damage that has been caused. There is therefore a concern that if judges were to take over the issue of assessing the level of damage and as a result the levels were to be reduced,

⁶²⁵ ICEL.

⁶²⁶ Prof. Neville Cox, (Trinity College Dublin), '*Irish defamation law: the 2009 Act and the need for reform*'. (Download PDF) at Prof. Neville Cox, (Trinity College Dublin), '*Irish defamation law: the 2009 Act and the need for reform*'. (Download PDF) at:

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

⁶²⁷ [2016] IEHC 711.

⁶²⁸ *Defamation Law and the 2009 Defamation Act*, Professor Neville Cox, November 2019,

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

⁶²⁹ *Nolan v. Sunday Newspapers Ltd* [2017] IEHC 367.

this could signal to the general public that what had happened to a particular plaintiff as a result of a defamatory statement was not particularly serious; this might result in an inadequate protection of the right to a good name.

- *guidance to appellate courts*: recast section 31 of the 2009 Act to provide guidance to appellate courts on proportionality of awards/factors to be taken into account in assessing the quantum of damages (in light of ECtHR judgment in *Independent Newspapers (Ireland Ltd)*⁶³⁰): such an approach might be constitutionally suspect.
- *directions to jury*: the legislation should be more explicit as to what the judge's directions to the jury should entail, and specify how references to previous awards and to awards in personal injury actions should be used in such cases.⁶³¹

Guidance may be obtained from the comprehensive judgments of the Supreme Court in *McDonagh v. Sunday Newspapers (No. 2)*⁶³² and *Kinsella v. Kenmare Resources*.⁶³³ In *McDonagh (No. 2)*, Denham C.J. indicated that the factors that would be relevant in determining the amount of damages were the gravity of the libel, its effect on the plaintiff, the extent of the publication and the conduct of the newspaper. Denham C.J. also indicated that it was relevant that the plaintiff had a blemished reputation and that it was helpful to bear in mind factors such as the value of money, the average wage and the cost of a car. O'Donnell J. pointed to the explicit protection of the right to a good name in the Constitution, the nature of defamation cases, which unless settled, will involve the defendant persisting in the view that publication was lawful, and the role of damages in vindicating reputation, especially in a digital age where the law of libel was the only "pro-reputation" counter-balance to the tendency to seek attention in a crowded marketplace through lurid headlines and outrageous stories. In *Kinsella*⁶³⁴, Irvine J. indicated that juries should be informed that awards are not taxed and asked how long it would take someone to earn a specified amount of money.

With regard to referring to awards in previous defamation cases and in personal injuries cases, there are arguments both ways; on the one hand it can be argued that the benefit of such an approach is that it can give a jury a sense of perspective; on the other it can be argued that conclusions of fact (quantum of damages) in cases should not set precedents for future cases particularly because of the fact-dependent nature of defamation actions and the fact that the functions of damages in defamation cases are conceptually different to those in, for example, personal injuries actions.

⁶³⁰ *Independent Newspapers (Ireland) Ltd v. Ireland* [2017] ECHR 567 (App no. 28199/15).

⁶³¹ In a subsequent High Court case, *Higgins v. Irish Aviation Authority* [2016] IEHC 245, counsel on both sides, and the trial judge, addressed the jury as to awards made to plaintiffs in other cases of defamation, and as to the maximum usually applicable to awards of general damages in personal injuries cases. This was the first time a jury was provided with information in relation to exact damages awarded in other cases (see *Higgins v. The Irish Aviation Authority* [2020] IECA 157).

⁶³² [2017] IESC 59.

⁶³³ [2019] IECA 54.

⁶³⁴ *Kinsella v. Kenmare Resources and Charles Carville* [2019] IECA 54.

6.1.4 Comparative Perspectives ⁶³⁵

In **England and Wales**, the Defamation Act 1952 (sections 3 and 12) contains limited provisions in relation to damages. There is an effective capping on damages in England and Wales in line with awards for non-pecuniary loss in personal injuries cases (around £300,000).⁶³⁶

The Leveson Report⁶³⁷ recommended a new framework for Press regulation, with the principle of self-regulation at its core. Sections 34 to 42 and Schedule 15 of the Crime and Courts Act 2013 set out a new system for exemplary damages and costs in respect of publishers of news-related material aimed at encouraging the press to join a recognised regulator⁶³⁸ (see Chapter 5)⁶³⁹. Section 34 of the Act provides that exemplary damages may not be awarded against a defendant if the defendant was a member of an approved regulator. The court may however disregard this provision in specified circumstances: exemplary damages may be awarded under section 34 if the court is satisfied that the defendant's conduct has shown a deliberate and reckless disregard of an outrageous nature for the claimant's rights, the conduct is such that the court should punish the defendant for it, and other remedies would not be adequate. The awarding of exemplary damages is a matter for the judge alone (it cannot be left to the jury, in a jury trial). Section 39 provides that aggravated damages may be awarded only to compensate for mental distress and not for purposes of punishment. Section 40, which has not been commenced, broadly requires publishers of newspapers and other print media to bear the costs of unsuccessful libel plaintiffs if they are not registered with a recognised self-regulator. Other than in exceptional circumstances, a person who sues a publisher member of an approved regulator rather than raising the point through the approved regulator's arbitration system would pay their own costs and those of the publisher, irrespective of the outcome of the case. The arguments against the commencement of section 40 have focused on the concern that, by choosing not to join an approved regulator, a publisher risks facing court costs in a legal action even if they win.⁶⁴⁰ In March 2018, the Government stated that it intended to ask Parliament to repeal section 40.⁶⁴¹ Section 40 does not appear to have been repealed.⁶⁴²

In **Northern Ireland**, the report on *Reform of Defamation Law in Northern Ireland* does not include general proposals in relation to damages.⁶⁴³

In **Scotland**, Part 2 of the Defamation and Malicious Publications (Scotland) Act 2021 includes provisions in relation to damages in the case of malicious publication which damages property or business interests of the plaintiff.

⁶³⁵ The issue of corporate bodies and damages is examined in Chapter 2.

⁶³⁶ Scott, Dr Andrew, 'Cascading effort in defamation reform: four key themes', Presentation to Symposium on Reform of Defamation Law, 14 November 2019

http://www.justice.ie/en/JELR/AScott_Paper_Defamation.pdf/Files/AScott_Paper_Defamation.pdf

⁶³⁷ *Report on An Inquiry into the Culture, Practices and Ethics of the Press* (29 November 2012)

⁶³⁸ Explanatory Notes on Crime and Courts Act 2013, <https://www.legislation.gov.uk>.

⁶³⁹ There is at present only one recognised self-regulatory body, IMPRESS which represents 104 publishers, who represent 174 titles, across the UK (see chapter 5).

⁶⁴⁰ *Press Recognition Panel, Annual report on the recognition system* (February 2021), at p. 9.

⁶⁴¹ *ibid* at p. 19.

⁶⁴² <https://www.legislation.gov.uk/ukpga/2013/22/section/40>.

⁶⁴³ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, Dr Andrew Scott, June 2016.

In **Australia**, section 34 of the Model Defamation Provisions provides that in determining the amount of damages to be awarded in defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. Section 35 (as amended)⁶⁴⁴ provides that the maximum amount that may be awarded for non-economic loss is \$250,000 and provides that this amount should be awarded in only the most serious cases. This amount is subject to annual review and stands at \$432,500 (approximately €280,000) with effect from 1 July 2021. A separate award of aggravated damages may be awarded where warranted. A plaintiff cannot be awarded exemplary or punitive damages for defamation. Section 38 sets out a non-exhaustive list of factors that may be taken into account in mitigation of damages e.g. the defendant has issued an apology or published a correction, the plaintiff has already recovered damages for defamation in respect of any other publication of matter having the same meaning or effect as the defamatory material. If the court finds for the plaintiff as to more than one cause of action, damages may be assessed in a single sum.

In **New Zealand**, the Defamation Act 1992 provides that in proceedings for defamation, it is not necessary to allege or prove special damage. The Act provides that punitive damages may only be awarded where the defendant has acted in flagrant disregard of the rights of the plaintiff. It sets out matters that must be taken into account in mitigation of damages namely (i) the nature, extent, form, manner, and time of the publication by the defendant of any correction, retraction, apology, statement of explanation and/or any rebuttal; (ii) the terms of any injunction or declaration that the court proposes to make or grant; and (iii) any delay for which the plaintiff is responsible between the publication of the matter in respect of which the proceedings are brought and the decision of the court in those proceedings.

Furthermore, the Act also sets out additional factors that may be taken into account in mitigation of damages; specifically it provides that the defendant may prove (i) specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate; (ii) that the plaintiff has already brought proceedings, recovered damages or received or agreed to receive compensation in respect of any other publication by the defendant, or by another person, of the same or substantially the same matter.

Nothing in the Act limits any other rule of law by virtue of which any matter is required or permitted to be taken into account in mitigation of damages.

Where, on appeal, a verdict is set aside the court may, with the consent of the parties, substitute its own award of damages for that of the trial court.

6.1.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- clarify the situations where aggravated damages may be awarded;
- amend section 31 to set out in greater detail the guidance to be given in relation to damages;
- provide for a cap on damages;

⁶⁴⁴ The Model Defamation Amendment Provisions 2020 were approved by the Council of Attorneys-General on 27 July 2020; each state and territory must now enact legislation to give effect to the amended provisions.

- draw up a book of quantum or guidelines;
- require all cases to be initiated in the Circuit Court;
- allow courts to award modest damages with summary reliefs;
- set out rules in relation to closing instructions to the jury;
- require the plaintiff to explicitly set out the quantum of damage caused.

Option 1: Clarify the situations where aggravated damages may be awarded

Arguments in favour

- The law in relation to aggravated damages should be clear.

Arguments against

- There are no obvious arguments against this proposal.

In order to clarify the law, the Act could be amended to specifically provide that –

- (i) the common law no longer applies so that aggravated damages can only be awarded where the defendant conducted his/her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement; this proposal would mean that aggravated damages could not be awarded in respect of the manner in which the wrong was committed, or the conduct of the wrongdoer after the commission of the wrong as set out in *Conway v. Irish National Teachers Organisation*⁶⁴⁵;
- (ii) the common law no longer applies and set out in section 32(1) additional factors that can be taken into account in determining whether aggravated damages can be awarded e.g. the manner in which the wrong was committed, the conduct of the wrongdoer after the commission of the wrong; etc.; this would clarify the circumstances in which aggravated damages can be awarded; or
- (iii) section 32(1) is without prejudice to the common law; this would mean that factors other than those set out in section 32(1) could be taken into account in determining whether or not aggravated damages should be awarded; it would also allow for flexibility in relation to the issues to be taken into account.

Option 2: Amend section 31 to set out in greater detail the issues to be taken into account in determining damages

In assessing whether or not damages awards in defamation cases are excessive, the appellate courts consider the following:

- (a) the gravity of the defamation;
- (b) the effect on the plaintiff;
- (c) the extent of the publication;
- (d) the conduct of the defendant; and
- (e) the conduct of the plaintiff (where relevant).

In *Leech v. Independent Newspapers*⁶⁴⁶, McKechnie J. stated:

⁶⁴⁵ [1991] 2 IR 305.

⁶⁴⁶ *Leech v. Independent Newspapers* [2014] IESC 79.

“The following are some of the factors which will require consideration in any assessment of damages in this type of case, to be viewed in the context in which such matters have arisen:-

- (a) The extent of the wrong, of the harm inflicted and of the injury done;*
- (b) The damage to one’s reputation and standing in the eyes of reasonably minded members of the community;*
- (c) The restoration of that reputation and standing to a degree that will withstand any future challenge by any random member of the public who suspects that there is “no smoke without fire”;*
- (d) The degree of hurt, distress and humiliation suffered and any other aspect of one’s feelings that has been affected;*
- (e) The extent of the intrusion into one’s personal, business, professional or social life, or any combination thereof, to include the invasion of one’s privacy;*
- (f) Any other harmful effect, causatively resulting from the wrongdoing, not above mentioned;*
- (g) The gravity of the libel;*
- (h) The extent of the circulated publication;*
- (i) The response and reaction to the allegations as made; retraction and apology; re-affirmation of truth and justification – even with different meanings to those as pleaded;*
- (j) The overall conduct of the defendant, including those examples identified in Conway as constituting aggravation ([1991] 2 I.R. 305 at 317), and even extending to matters of exemplary condemnation on occasions; and*
- (k) Any other factor specific to the individual case which falls within the parameters of the principles as outlined.”*⁶⁴⁷

Moreover, in *McDonagh*⁶⁴⁸ (which pre-dates the 2009 Act) Denham C.J. noted that *“it is helpful to keep in mind factors such as, including but not limited to, the value of money, the average wage, and the cost of a car”*. She also noted that the awards in personal injuries cases have some relevance but the fact that there are usually high special damages awarded in cases of very serious injuries may cloud the comparison. She noted however that in assessing the matters of proportionality and reasonableness of damages in the future, the 2009 Act is relevant.

In *Kinsella*, Irvine J. endorsed the notion of juries being referred to the fact that damages awards are not taxed and being asked how long it would take a person to earn a specific amount of money.

In *Higgins v. Irish Aviation Authority*,⁶⁴⁹ the Court of Appeal noted that this was the first case where a jury was provided with information on awards in other defamation cases as well as the maximum level of general damages in personal injury cases. It pointed out that while previous cases are of some assistance, *“such assistance is necessarily limited by reason of the very different circumstances surrounding each case”*.

To the extent that it does not already do so, section 31 could therefore be amended to include the factors set out above.

⁶⁴⁷ *Leech v. Independent Newspapers* [2014] IESC 79, (No. 1 judgment by McKechnie J.) at para. 64.

⁶⁴⁸ *McDonagh v. Sunday Newspapers Ltd*, [2017] IESC 59.

⁶⁴⁹ [2020] IECA 277.

Arguments in favour

- This would address uncertainty in relation to the nature of guidance that can be given to juries (if they are retained in High Court actions) and provide greater guidance for the courts (in particular juries if they are retained in High Court actions) in determining the level of damages that should be awarded.
- It would provide greater guidance for parties to a defamation action which might encourage the settlement of such actions at an early stage.

Arguments against

- Section 31 already sets out a comprehensive list of issues that must be taken into account in determining damages.
- Subsection (3) of section 31 provides that in making an award of general damages in a defamation action regard shall be had to all the circumstances of the case; the court can, in an appropriate case, take any other relevant factors into account (of its own volition or on the basis of submissions on behalf of the parties or, in the case of jury trials, instructions from the judge).

Option 3: Provide for a cap on damages

On 30 September 2020, the Law Reform Commission published a *Report on Capping Damages in Personal Injuries Actions*.⁶⁵⁰ The Report examines whether it would be constitutionally permissible, or otherwise desirable, to provide for a statutory regime that would place a cap or tariff on some or all categories of general damages in personal injuries cases. The report states:

*“The Commission concludes that, in principle, legislation capping awards of general damages in personal injuries litigation could be constitutionally permissible. How any particular proposal is formulated will influence how likely or unlikely it is to be struck down. For instance... legislation that imposes a **presumptive** cap will, all other things being equal, be more likely to survive constitutional challenge than legislation imposing a mandatory cap. The actual amounts chosen in a cap, or caps, will also strongly influence whether the measure is taken to be proportionate under the Heaney standard or rational under the Tuohy standard.”*⁶⁵¹

The Report emphasises however that the Commission is an advisory body and that the constitutionality of proposed or enacted legislation is primarily a matter for the Government (advised by the Attorney General), Oireachtas and, ultimately, the courts.

Arguments in favour

- In *Independent Newspapers (Ireland) Ltd v. Ireland*⁶⁵², the ECtHR noted that unpredictably large awards of damages in defamation cases are considered capable, in principle, of having a chilling effect on the media’s right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

⁶⁵⁰ Law Reform Commission Report, *Capping Damages in Personal Injuries Actions* (LRC 126-2020).

⁶⁵¹ Law Reform Commission Report, *Capping Damages in Personal Injuries Actions* (LRC 126-2020) at p. 143

⁶⁵² [2017] ECHR 567 (App no. 28199/15).

- Cox and McCullough note that some commentators suggest that the level of damages awarded in defamation cases is excessive and that, where media defendants and matters of public interest are concerned, excessively high damages can have a chilling effect on freedom of expression and discussion on matters of public interest.⁶⁵³ A cap on damages could help to ensure against excessive awards of damages.
- A cap on damages would provide clear guidelines to courts (in particular juries if they are retained in High Court cases).
- A cap on damages would provide clear guidelines for parties to defamation actions and might encourage the early settlement of disputes.

Arguments against

- Defamation law involves the balancing of every citizen's right to a good name and the right to freedom of expression under the Constitution. Any proposal to introduce a cap on damages therefore gives rise to complex constitutional issues which would need careful consideration.
- An award of damages in a defamation action must compensate the plaintiff for the damage to his/her reputation, vindicate his/her good name and take account of the distress, hurt and humiliation which the publication caused.⁶⁵⁴ An award must be sufficiently large such that if disclosed to a bystander it would readily convince them of the baselessness of the allegation complained of.⁶⁵⁵

Any cap on damages would therefore have to be set sufficiently high to achieve those objectives in serious cases. A high cap may not be relevant to many cases as the effects of a defamatory statement may vary considerably from case to case. However, such a cap could be seen as the norm and could have the unintended effect of resulting in the award of high levels of damages in the majority of cases, particularly High Court jury cases.

On the other hand, the setting of a low cap on damages could mean that courts would frequently have to exceed the cap in order to ensure the vindication of the good name of the plaintiff, which could have the effect of making the cap redundant.

Moreover, a low cap on damages could be seen as suggesting that damaging a person's reputation is not a serious issue and could fail to vindicate a person's right to the protection of his/her reputation. Furthermore, setting a low cap could fail to take into account that harm to reputation can be genuinely destructive and lead to social ostracisation and opprobrium.

- Where a case is taken to the Circuit Court, there is already a cap on the amount of damages that can be awarded (€75,000); only plaintiffs who believe that they have suffered serious damage as a result of a defamatory statement are likely to take their

⁶⁵³ Cox, N. and McCullough, E., *Defamation Law and Practice* at para. 11-02.

⁶⁵⁴ Hamilton CJ in *de Rossa v. Independent Newspapers plc.* [1999] IESC 63 [1999] 4 IR 432 (at para 125) quoting from *John v MGN Ltd.* [1997] Q.B. 586.

⁶⁵⁵ *Kinsella v. Kenmare Holdings Plc Carville* [2019] IECA 54 and *Charles Carville*.

case to the High Court for fear of being responsible for costs should the award of damages be less than the Circuit Court limit.

- A high cap on damages could be seen as a benchmark for the settlement of disputes and could make plaintiffs reluctant to accept lower settlements.
- Section 13 of the Act specifically permits the Supreme Court⁶⁵⁶ on appeal to make its own assessment of the quantum of damages, and to substitute its own figure for the sum awarded by the High Court, something the Court had previously been reluctant to do.⁶⁵⁷ A number of large jury awards have been substantially reduced on appeal in recent high profile cases e.g. the Court of Appeal reduced the damages awarded in *Kinsella v. Kenmare Resources* from €10m to €250,000 and in *Higgins v. Irish Aviation Authority*⁶⁵⁸ from €387,000 to €76,500 (following the application of a 10% discount as a result of the defendant making an offer of amends). In *McDonagh v. Sunday Newspapers Ltd*⁶⁵⁹, the Supreme Court suggested that it would have reduced the damages awarded by a High Court jury from €900,000 to a figure closer to €75,000 had the case not been settled before the Court issued its judgments. Furthermore, in *Christie v. TV3*,⁶⁶⁰ which was heard in the High Court by a judge sitting alone, the Court of Appeal reduced the damages award from €140,000 to €36,000 (after a 40% discount was applied to take account of the offer of amends).

These cases should therefore provide guidelines for future defamation awards.

- A provision in England and Wales⁶⁶¹ similar to section 13 of the 2009 Act has resulted in the creation of an accepted maximum level for appellate court-approved awards in defamation cases. This maximum is a guide only;⁶⁶² in 2019 it stood at around £300,000 for the most serious defamations.⁶⁶³
- While no two defamations are the same, section 13 holds out the prospect of a corpus of decisions building up over the years and in effect setting a scale of awards for the most serious defamations. The existence of such a scale would not prevent courts/juries from making very large awards, but could guide plaintiffs and defendants and encourage settlements as both sides could be advised in advance where on the scale their case might be, in the event of the plaintiff succeeding.⁶⁶⁴

⁶⁵⁶ Section 74(1) of the Court of Appeal Act 2014 provides:

References (howsoever expressed) to the Supreme Court, in relation to an appeal, including proceedings taken by way of case stated, which lies (or otherwise) to it in any enactment passed or made before the establishment day, shall be construed as references to the Court of Appeal, unless the context otherwise requires.

⁶⁵⁷ Maher, John, *The Law of Defamation* (2nd edn.) at pp. 431 & 432.

⁶⁵⁸ [2020] IECA 157.

⁶⁵⁹ [2017] IESC 46.

⁶⁶⁰ *Christie v. TV3 Television Networks Limited*, [2017] IECA 128.

⁶⁶¹ Courts and Legal Services Act 1990, section 8(3).

⁶⁶² Maher, John, *The Law of Defamation* (2nd edn.) at p. 442

⁶⁶³ Scott, Dr Andrew, *Presentation to Symposium on Reform of Defamation Law*, 14 November 2019.

⁶⁶⁴ Maher J, *The Law of Defamation* (2nd edn.) at p. 432.

Option 4: Draw up a book of quantum⁶⁶⁵ or guidelines

Arguments in favour

- A book of quantum or guidelines should help ensure greater consistency in relation to the damages that are awarded in defamation cases.
- A book of quantum or guidelines could encourage the settling of cases at an early stage.

Arguments against

- It would be very difficult to draw up a book of quantum or guidelines for the following reasons:
 - (i) it is very difficult to compare defamation cases; in *McDonagh*,⁶⁶⁶ O'Donnell J. noted that “*it is a much more difficult task to compare defamations than it is to compare personal injuries*” and unlike personal injuries, it “*is more difficult to measure defamation in cases on any set scale*”. In the same case, Dunne J. stated that it is “*difficult to make a direct comparison between different defamations because of the variety of factors that may be at play, such as the nature of the defamatory allegation, the character and reputation of the person defamed, the extent of the publication and the impact on the person concerned, to name but a few*”⁶⁶⁷;
 - (ii) in *Kinsella*,⁶⁶⁸ Irvine J. noted that not only is the function of an award of damages in a defamation action different, for example, to that in a personal injuries action, but the injury inflicted is much more difficult to value because of its often highly subjective nature;
 - (iii) there is a lack of data available on which a book of quantum or guidance could be based as very few defamation cases are decided by appellate courts annually (see Chapter 4)⁶⁶⁹;

In *McDonagh*,⁶⁷⁰ McKechnie J. stated:

“The courts have, for the most part, come up with a reasonable idea of what a broken leg is worth, the value of a lost arm, and so on. There is a market which bears this out. Such is not solely dependent on court judgments or related to the Book of Quantum, but in substantial part reflects the notorious practice, which has been commonplace now for decades or more, of settlements being reached between indemnifiers and plaintiffs, thus creating

⁶⁶⁵ The recommendation by respondents in relation to a book of quantum was made before the enactment of the Judicial Council Act 2019 which provides for the establishment of a Personal Injuries Guidelines Committee and the adoption by the Judicial Council of the Personal Injuries Guidelines which will replace the book of quantum.

⁶⁶⁶ *McDonagh v. Sunday Newspapers (No. 2)* [2017] IESC 59 2, para 46.

⁶⁶⁷ *McDonagh v. Sunday Newspapers (No. 2)* [2017] IESC 59 3, para 11.

⁶⁶⁸ *Kinsella v. Kenmare Resources Carville* [2019] IECA 54.

⁶⁶⁹ The 2016 Book of Quantum for personal injuries awards was based on an examination of representative samples of over 51,000 closed personal injuries claims from 2013 and 2014 based on actual figures from court cases, insurance company settlements, State Claims Agency cases and PIAB data. (Law Reform Issues Paper Capping Damages in Personal Injuries, para. 1.11)

⁶⁷⁰ *McDonagh v. Sunday Newspapers (No. 2)* [2017] IESC 59 4 at para 42.

information which can readily be obtained within this market. There is also reasonable similarity between like cases. Accepting, of course, that a person's age, profession, trade or calling and one's physical and other characteristic will have a bearing (as they will on special damages, e.g. injury to a footballer's leg, a pianist's fingers, or the like), nevertheless, in general one will not have to search too far to find a reasonable comparator in respect of most personal injuries claims. Adjustments or variations may be required but in most instances such can be achieved..... By contrast, by virtue of both the relative infrequency of defamation cases and the extent to which they necessarily turn on their own facts, the same cannot be said of defamation;"

(iv) it is argued that the current level of damages is too high so any book of quantum would be unlikely to have the effect of reducing defamation awards.

- Appellate courts (in particular in cases decided following the ECtHR judgment of 17 June 2017 in *Independent Newspapers (Ireland) Ltd v. Ireland*)⁶⁷¹ set out in detail the reasoning for the level of damages awarded to successful plaintiffs. This reasoning should provide guidance for future awards.
- Section 31 of the Act already sets out issues to be taken into account in determining the level of damages; this is a more appropriate approach given that it is not possible to compare defamation cases.

Option 5: Require all cases to be initiated in Circuit Court

See chapter 4 – Circuit Court and High Court Jurisdictions.

Option 6: Allow courts to award modest damages with summary reliefs

See below regarding summary relief.

Option 7: Set out rules in relation to closing instructions to jury

This option will not be relevant if the recommendation to abolish juries is accepted (see chapter 2).

Arguments in favour

- This would address concerns raised by some respondents to the review in relation to the instructions issued to juries.

Arguments against

- This type of detailed issue in relation to the conduct of cases would best be dealt with by judges or in rules of court.
- This issue will not arise if juries are removed from defamation actions.

⁶⁷¹ [2017] ECHR 567 (App no. 28199/15).

Option 8: Require the plaintiff to explicitly set out the quantum of damage caused

Arguments in favour

- An obligation on the plaintiff to explicitly set out the quantum of damage caused might facilitate the settlement of disputes as the defendant would be in a position to determine whether to settle the case or to allow it to go to court.

Arguments against

- Section 6(5) of the 2009 Act provides that the tort of defamation is actionable without proof of special damage. This proposal would tend to undermine section 6(5).
- A defamatory statement is defined as “*a statement that tends to injure a person’s reputation in the eyes of reasonable members of society*”. It would therefore be very difficult for the plaintiff to specify in monetary terms the amount of damage caused.
- This recommendation would overlap with the recommendation to provide for the making of a tender by the defendant following receipt of a tender by the plaintiff which would be taken into account in determining costs.

Recommendations

The following options are recommended:

- Option 1: Clarify the situations where aggravated damages may be awarded;
- Option 2: Amend section 31 to set out in greater detail the issues to be taken into account in determining damages.

The following options are not recommended:

- Option 3: Provide for a cap on damages;
- Option 4: Draw up a book of quantum or guidelines;
- Option 7: Set out rules in relation to closing instructions to jury;
- Option 8: Require the plaintiff to explicitly set out the quantum of damage caused.

6.2 Lodgement of money in settlement of action

6.2.1 Current legal position

Section 29 of the 2009 Act provides that in any action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of money into court in satisfaction of the action when filing his/her defence to the action. Where a payment is made, the plaintiff may accept the payment (i) in accordance with the relevant rule of court,⁶⁷² or (ii) inform the court, on notice to the defendant, of his/her acceptance of the payment in full settlement of the action. The lodgement can be made without any admission of liability.

Order 22, rule (1A) of the Rules of the Superior Courts provides that in an action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of

⁶⁷² Such rule of court for the time being in force as provides for the payment into court of a sum of money in satisfaction of an action for damages for defamation.

money into court in satisfaction of the action in accordance with section 29 of the 2009 Act. Order 15, rule (9A) of the Circuit Court Rules makes similar provision for payment into court.

6.2.2 Main issues raised in course of review

The following amendments to section 29 were proposed in the course of the review:

- it should be possible to make a lodgement even if an offer to make amends has been made under section 23;⁶⁷³
- it should be possible to make a lodgement at any stage of the proceedings/the wording of the section should be clarified in relation to when and how a lodgement can properly be made;⁶⁷⁴
- cost orders should take into account the difference between the damages awarded and the amount lodged into court;⁶⁷⁵ a judge should be obliged to take into account the level of success of the plaintiff in beating the payment into court or persuading the court that aspects of the claim were not covered by the defence.⁶⁷⁶

6.2.3 Lessons from comparative jurisdictions

Defamation legislation in the UK, Australia, New Zealand and Ontario does not appear to include specific provisions in relation to payments/lodgements into court. It would appear therefore that this issue may be dealt with in procedural law or rules of court.

6.2.4 Options for reform

Based on the submissions received, the following options were identified:

- allow for the making of a lodgement where an offer of amends has been made;
- remove the requirement that a lodgement must be made when the defence is being provided so that the issue could be dealt with in rules of court.

Option 1: Allow for the making of a lodgement where an offer of amends has been made

Arguments in favour

- A defendant might be encouraged to make a reasonable lodgement and a plaintiff might be encouraged to accept such a lodgement in order to avoid costs, which would facilitate the early settlement of the case.

Arguments against

- There are no obvious arguments against this recommendation.

⁶⁷³ RTE.

⁶⁷⁴ MGM Ltd.

⁶⁷⁵ NewsBrands, MGM Ltd.

⁶⁷⁶ NewsBrands.

Option 2: Remove the requirement that a lodgement must be made when the defence is being provided so that the issue could be dealt with in rules of court

Arguments in favour

- This would be in line with Order 22 Rule 1(1) of the Superior Courts. (A lodgement in a defamation action is made under Order 22 Rule 1(1A)).⁶⁷⁷

Arguments against

- There are no obvious arguments against this proposal.

Recommendations

The following options for reform are recommended:

- Option 1: Allow for the making of a lodgement where an offer of amends has been made; and
- Option 2: Remove the requirement that a lodgement must be made when the defence is being provided so that the issue could be dealt with in rules of court.

6.3 Declaratory Order, Correction Order, Order Prohibiting Publication (Injunction) and Summary Disposal of Action

6.3.1 Current Legal position

Declaratory order

Section 28 of the Act provides that a person may apply to the Circuit Court for a declaratory order i.e. an order declaring that a statement was false and defamatory.

⁶⁷⁷ Rules of Superior Courts, Order 22, Rule (1), (1A) and (2) provide as follows: *1. (1) In any action for a debt or damages (other than an action to which Section 1(1) of the Courts Act 1988 applies) or in an admiralty action the defendant may—*

(a) at any time after he has entered an appearance in the action and

(i) before it is set down for trial or

(ii) in the case of proceedings subject to case management under Part II of Order 63C, within four weeks of the fixing of a trial date or

(b) at any later time by leave of the Court, upon notice to the plaintiff,

pay into Court a sum of money in satisfaction of the amount recoverable by the plaintiff from the defendant in the claim or (where several causes of action are joined in one action) in satisfaction of the amount recoverable by the plaintiff from the defendant in one or more of the causes of action.

(1A) In an action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of money into court in satisfaction of the action in accordance with section 29 of the Defamation Act 2009.

(2) A defendant may once, without leave, and upon notice to the plaintiff, pay into Court an additional sum of money as an increase in a payment made under paragraph (1) hereof. Such notice must be given and payment made at least three months before the date on which the action is first listed for hearing. Such increased lodgement shall thereupon become the sum paid into Court and the date of such increased payment the date of the payment into Court. If such notice is not given, and such payment not made as aforesaid the payment made, under paragraph (1) shall be deemed to be the only payment into Court and this Order shall be construed accordingly.

Before making such an order the court must be satisfied that:

- (a) the statement is defamatory and the respondent has no defence,
- (b) the applicant requested the respondent to make and publish an apology, correction or retraction of the statement, and
- (c) the respondent failed or refused to accede to that request or failed to give the apology, correction or retraction the same or similar prominence as was given to the offending statement.

An applicant who makes an application under this section is not entitled to bring any other proceedings arising out of the statement to which the application relates.

Damages cannot be awarded on foot of an application for a declaratory order; the court can however make a correction order and an order prohibiting further publication of the defamatory statement.

Correction order

Section 30 of the Act provides that where, in a defamation action, there is a finding that a statement was defamatory and the defendant has no defence, the court may, on the application of the plaintiff, make a correction order directing the defendant to publish a correction of the defamatory statement. This relief is available regardless of whether the plaintiff seeks declaratory relief, a prohibition order, or damages.

Order prohibiting publication or further publication (injunction)

Section 33 provides that the court may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of a statement if in its opinion the statement is defamatory and the defendant has no defence to the action that is likely to succeed. An order under this section does not prohibit the reporting of the making of the order provided that the reporting does not include the publication of the statement which the order relates. Such an order can be an interim, interlocutory or permanent order.

Summary Disposal of Action

Section 34 (subsection (1)) provides that the court may, on the application of the plaintiff, grant summary relief (i.e. grant either a correction order, or an order prohibiting further publication of the statement to which the action relates, without proceeding to a full hearing)⁶⁷⁸ if it is satisfied that -

- (a) the statement in respect of which the action was brought is defamatory, and
- (b) the defendant has no defence that is reasonably likely to succeed.

A plaintiff who makes such an application is not entitled to damages.

Similarly, section 34 (subsection (2)) provides that the court may, upon application of the defendant, dismiss the action summarily (without proceeding to a full hearing) if it is satisfied that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning.

⁶⁷⁸ Section 2.

6.3.2 Main issues raised in course of review

Declaratory order

In the submissions to the review, the following observations/suggestions were made in relation to section 28:

- section 28 is very useful, efficient and cost effective but applying for a declaratory order is risky for plaintiffs as in order to prevent a declaratory order being made a defendant only needs to show that he/she has an arguable defence. It can only therefore be used where success is effectively guaranteed thereby reducing its utility;⁶⁷⁹
- section 28 should be clarified to require a judge to explore the evidence, including oral evidence, to verify that a defendant has no defence of merit before making a declaratory order;⁶⁸⁰
- the fact that no other proceedings can be brought if the application fails is a deterrent to a plaintiff in availing of such an order;⁶⁸¹
- the defence is not effective as it is voluntary;⁶⁸²
- the Explanatory Memorandum on the Act states that section 28 is intended to provide an expeditious avenue of redress for a plaintiff where damages are not being sought (and cannot be awarded against the defendant). However, in *Lowry v Smyth*,⁶⁸³ it was held that in order to obtain summary judgment under section 34 of the Act it would be necessary for the plaintiff to satisfy the judge that the defendant has no defence with a reasonable chance of success. Therefore, if the defendant had merely an arguable case to suggest that his/her defence might be reasonably likely to succeed, then such an application would fail. The court added, albeit obiter, that there was an even higher burden of proof imposed on the plaintiff under section 28 i.e. he/she would have to prove that the defendant had no defence. This means that section 28 has very little utility as it would be almost impossible for a plaintiff to obtain a declaratory order and if he/she brings such an application but fails he/she cannot seek any other remedy.

Correction order

It was suggested that a correction order is not effective as it is voluntary.⁶⁸⁴

Basis for granting summary relief

The following proposals for amendments to section 34 were made in response to the review:

⁶⁷⁹ Johnsons Solicitors.

⁶⁸⁰ The Bar Council of Ireland.

⁶⁸¹ The Bar Council of Ireland; William Fry, Solicitors.

⁶⁸² Crowley Millar Solicitors.

⁶⁸³ *Lowry v Smyth* [2012] IR 400.

⁶⁸⁴ Crowley Millar Solicitors.

- some modest award of damages should be allowed on an application for summary relief which would make this procedure a more attractive option to try to achieve speedy and straightforward resolution of an action;⁶⁸⁵
- the requirement to prove that the defendant has no arguable case to suggest that the defence might be reasonably likely to succeed sets a very high bar so many plaintiffs will take their chances on bringing their case to trial;⁶⁸⁶
- consideration should be given to widening the grounds on which plaintiffs' claims may be dismissed in appropriate circumstances; there are no provisions in the Act for the dismissal of claims on the grounds of no 'real and substantial tort' e.g. an issue that arises frequently as regards on-line defamation, where only a small number of people in Ireland, if any, may have viewed the publication; there are few interlocutory measures available to encourage settlement or to enable unmeritorious claims to be dismissed;⁶⁸⁷
- the section should be amended to permit any party to the proceedings to apply for summary disposal at any stage.⁶⁸⁸

6.3.3 Symposium on Reform of Defamation Law

In his presentation to the Symposium on Reform of Defamation Law, Professor Neville Cox noted that the test for injunctive relief (section 33) and summary relief (section 34) is that the defendant has "no defence to the action that is reasonably likely to succeed" whereas a declaratory order (section 28) or a correction order (section 30) can only be made if there is "no defence".⁶⁸⁹ He pointed out that the absence of the words "*that is likely to succeed*" in the cases of declaratory relief and correction order would seem to imply that "*if there was a defence that was not reasonably likely to succeed – indeed a defence that was fanciful or specious – then relief could not be granted*". This greatly limits the potential relevance of these reliefs as they can, unless consented to, be resisted simply by the defendant putting forward any kind of defence, even one that is not likely to succeed. In *Lowry v. Smyth*,⁶⁹⁰ Kerins P. held that a plaintiff would have to satisfy the court that the defendant had no arguable case to suggest that his/her defence was reasonably likely to succeed in the case of summary relief or that the defendant had no defence for the purposes of a declaratory order. Professor Cox explained that this means that there are huge obstacles for a plaintiff seeking relief under sections 28, 30, 33 or 34. He also noted that the burden of proof in relation to the absence of a defence rests on the plaintiff. In *Gilroy & Byrne v. O'Leary*,⁶⁹¹ Allen J. concluded that notwithstanding the difference in wording, the tests under sections 28, 30, 33 and 34 are the same and, because of the seriousness of what was at stake, would necessarily entail the applicant demonstrating that the statement was defamatory and that the defendant had no defence. Allen J. also held that the threshold test for injunctive relief under the Act was the same as that which had previously existed under common law.

⁶⁸⁵ The Bar Council of Ireland.

⁶⁸⁶ William Fry.

⁶⁸⁷ McCann Fitzgerald.

⁶⁸⁸ MGM Ltd.

⁶⁸⁹ Prof. Neville Cox, (Trinity College Dublin), 'Irish defamation law: the 2009 Act and the need for reform'. (Download PDF) at Prof. Neville Cox, (Trinity College Dublin), 'Irish defamation law: the 2009 Act and the need for reform'. (Download PDF) at:

http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

⁶⁹⁰ [2012] IEHC 22.

⁶⁹¹ [2019] IEHC 52.

The above analysis led Professor Cox to suggest that the following issues might be examined as part of the review of the Act:

- the terminology differences between the four sections which has caused confusion, but may have no impact;
- the extremely high tests for all four forms of relief;
- the different approaches adopted in respect of plaintiffs and defendants under section 34; a plaintiff can obtain summary disposal of the action if he/she can show that the material is defamatory and the defendant has no defence that is reasonably likely to succeed. However, a defendant can only obtain summary disposal if he/she can show that the statement is not reasonably capable of being found to have a defamatory meaning. There is no provision for a defendant to obtain an order for summary disposal if he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if there is some defence that must, inevitably succeed. Furthermore, it is unclear how to reconcile the summary disposal power under section 34 as it benefits defendants with the court's inherent power to strike out an action as an abuse of process or as manifestly ill-founded.

6.3.4 Comparative Perspectives

In **England, Wales and Northern Ireland**,⁶⁹² sections 8 to 10 of the Defamation Act 1996 apply to summary disposal of defamation claims. The Act provides that the court may;

- dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried;
- give judgment for the plaintiff and grant summary relief if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and there is no other reason why the claim should be tried.

Summary relief is defined as a declaration that the statement was false and defamatory of the plaintiff; an order that the defendant publish or cause to be published a suitable correction and apology; damages not exceeding £10,000 or such other amount as may be prescribed; an order restraining the defendant from publishing or further publishing the matter complained of. The content of any correction and apology, and the time, manner, form and place of publication is a matter, in the first instance, for the parties but if they cannot agree on these issues the matter may be determined by the courts.

The 2016 report on *Reform of Defamation Law in Northern Ireland*⁶⁹³ does not propose any changes to sections 8 to 11 of the 1996 Act.

In **New Zealand**, section 26 of the Defamation Act 1992 provides that in any proceedings for defamation, the court may, on application by the plaintiff, make a recommendation that the defendant publish, or cause to be published, a correction of the matter that is the subject of the proceedings. Where the defendant complies with the recommendation, the court may award costs to the plaintiff, the plaintiff is entitled to no other relief or remedy against the defendant, and the proceedings are deemed to be finally determined. Where the defendant fails to comply

⁶⁹² In their application to Northern Ireland, sections 8 to 10 apply only to proceedings in the High Court (section 11).

⁶⁹³ Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance, Dr Andrew Scott, June 2016.

with the recommendation, if the court gives final judgment in favour of the plaintiff the failure to comply with the recommendation will be taken into account in assessing damages (if any) and the plaintiff is entitled to costs (unless the court otherwise orders).

In **Ontario**, the “rarest and clearest of cases” test applies to the granting of interlocutory injunctive relief. The rule prohibits such relief being granted unless the impugned words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. In recent decisions, the test has been characterised as a “*guiding principle ... that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases*”.⁶⁹⁴

6.3.5 Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- review sections 28, 30, 33 and 34 to ensure consistency in wording;
- extend the grounds on which a defendant can obtain summary relief to include where he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if the defendant has a defence that will succeed;
- remove the prohibition in section 28(4) on the taking of any other action;
- allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34;
- amend section 30 of the Act (‘Correction order’) to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

Option 1: Review wording of sections 28, 30, 33 and 34 with a view to clarifying any differences in wording

Arguments in favour

- The difference in wording used in these sections has been raised judicially as well as by a number of commentators.
- The implications of the different wording is not clear and has created confusion.

Arguments against

- There are no obvious arguments against this proposal.

Option 2: Extend the grounds on which a defendant can obtain summary relief to include where he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if the defendant has a defence that will succeed

Arguments in favour

- The grounds on which a defendant can seek to have an action dismissed under section 34(2) of the 2009 Act are currently very limited (i.e. that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory

⁶⁹⁴ *Defamation Law in the Internet Age*, Law Commission of Ontario, March 2020 at pp. 54 & 55.

meaning). Extending the grounds on which a case could be dismissed on the application of the defendant would add value to section 34(2).

Arguments against

- The courts already have jurisdiction to strike out pleadings which fail to disclose a reasonable cause of action or defence.⁶⁹⁵ Furthermore, a court may dismiss an action where it is of the view that it is frivolous or vexatious or bound to fail.⁶⁹⁶
- Extending the grounds on which a defendant may seek to have a case dismissed to include a situation where a defendant has a defence that will succeed may not be suitable for summary judgment.

Option 3: Remove the prohibition in section 28(4) on the taking of any other action

Arguments in favour

- The threshold for obtaining a declaratory order under section 28 is very high (the respondent has no defence); a plaintiff who fails to obtain such an order might still have an arguable case and should not be prevented from pursuing his/her case.
- The prohibition in subsection (4) means that no matter what information emerges during the course of the hearing e.g. information that would give rise to aggravated or punitive damages, the plaintiff cannot take any further proceedings based on the defamatory statement which may make plaintiffs reluctant to avail of this provision.⁶⁹⁷
- It appears that this section has been rarely used so removing this restriction might make the section more attractive.

Arguments against

- Section 28(5) already provides that an applicant may also obtain a correction order under section 30 and/or a prohibition order under section 33.
- It is open to a plaintiff who wishes to obtain alternative redress to seek it from the outset.
- Allowing an applicant who succeeds in obtaining a declaratory order to seek alternative redress (e.g. damages) could have the effect of prejudicing the outcome of the subsequent case.
- Allowing an applicant who fails to obtain summary relief to go on to seek other forms of relief would add to the costs associated with defamation actions.

Option 4: Allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34

⁶⁹⁵ Rules of Superior Courts, Order 19, rule 28.

⁶⁹⁶ Maher J., *The Law of Defamation*, 2nd edn., at p. 419.

⁶⁹⁷ Maher J., at p. 426.

Arguments in favour

- This would provide an incentive to avail of summary relief which should facilitate the early resolution of disputes.
- Summary relief can only be awarded under section 34 where the defendant has no defence to the action that is reasonably likely to succeed. Allowing for the awarding of limited damages in such cases should facilitate a person to vindicate his/her right to a good name where there is “no defence to the action that is reasonably likely to succeed” without incurring the expense and delay involved in a full trial.
- This objective could easily be achieved by amending the definition of “summary relief” to include an award of limited damages.⁶⁹⁸

Arguments against

- The legal implications of allowing for the award of damages without a hearing would need careful consideration.
- There is a danger that allowing for the award of up to €10,000 on the basis of summary proceedings could be seen as setting a benchmark for damages in non-serious cases which could militate against the settlement of less serious cases as plaintiffs may prefer to avail of the summary proceedings rather than settle their case.

Option 5: Amend section 30 of the Act (‘Correction order’) to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

Arguments in favour

- This would ensure the effectiveness of a correction of a defamatory statement.
- It would add to and reinforce the requirement under section 30 that a correction (unless the plaintiff otherwise requests) must be published in such manner as will ensure that it is communicated to all or substantially all of those persons whom the defamatory statement was published.

Arguments against

- The requirement under section 30 that a correction (unless the plaintiff otherwise requests) must be published in such manner as will ensure that it is communicated to all or substantially all of those persons whom the defamatory statement was published may be adequate.

Recommendations

⁶⁹⁸ Summary relief is currently defined in section 2 of the Act as follows:

“summary relief” means, in relation to a defamation action –

- (a) a correction order, or
- (b) an order prohibiting further publication of the statement to which the action relates.

The following options for reform are recommended:

- Option 1: review wording of sections 28, 30, 33 and 34 with a view to clarifying any differences in wording;
- Option 4: consider whether to allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34;
- Option 5: amend section 30 of the Act ('Correction order') to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

The following options for reform are not recommended:

- Option 2: Extend the grounds on which a defendant can obtain summary relief to include where he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if the defendant has a defence that will succeed;
- Option 3: Remove the prohibition in section 28(4) on the taking of any other action.

Chapter 7: Online defamation: special considerations

7.1 Overview

The Defamation Act 2009 expressly applies to a defamatory statement that is published on the internet, and also, much more broadly, to one published via electronic communications generally.

However, a number of stakeholders argued that the Act does not adequately address the rapid development, complexity and global reach of online communications – which throw up a number of issues and challenges for national and EU law regarding defamatory online statements.

Part 7.2 of this chapter identifies some specific aspects of online communication that raise particular issues or challenges for Irish defamation law.

Part 7.3 then outlines the main legal provisions relevant to online defamation - under the Defamation Act 2009, the EU e-Commerce Directive 2009, and the recent EU proposal for a ‘Digital Services Act’, a new EU Regulation to modernise and extend EU regulation of digital communication. It also considers a judgment of the European Court of Human Rights on the potential liability of online service providers for the content of user-generated material hosted on their sites.

Part 7.4 looks at the practical application of defamation law by Irish courts regarding online defamation, including the use of important remedies developed by the courts, such as the ‘*Norwich Pharmacal*’ order, for an online services provider to provide identifying details of an anonymous poster of defamatory material.

Part 7.5 briefly outlines parallel reform developments: the 2016 Law Reform Commission report on *Harmful Communications and Digital Safety*, and the publication in December 2020 of a revised and expanded General Scheme of the Online Safety and Media Regulation Bill.

(In January 2022, the Government published the Online Safety and Media Regulation Bill. It proposes to reform the regulatory structures for online media, including replacing the Broadcasting Authority of Ireland with a new Media Commission and Online Safety Commissioner (while retaining the ‘Right of Reply’ scheme).)

Part 7.6 then outlines relevant law reforms in other common law jurisdictions regarding online defamation.

Part 7.7 summarises stakeholders’ views and issues regarding online defamation, and Part 7.8 sets out options and recommendations for reform in this area.

7.2 *The special nature of online defamation*

In recent years, the media landscape has been transformed by the development, and rapid proliferation, of online publication. Some media organisations operate exclusively online, while even traditional news media now tend to publish their content online, as well as their traditional print or broadcast publication. More lately, there has been the development and rapid expansion of social media publication, which is done mainly through mobile phones and other personal communication devices, in parallel to the more conventional internet-based publication.

Defamation law also applies to online publication, but the new characteristics of these rapidly developing forms of communication throw up a number of questions and challenges. Both national and international defamation law, and judges charged with interpreting and applying the law, are still coming to terms with these. The challenges include:

7.2.1 **Ease and speed of online publication**

With modern internet communications, anyone with an internet connection is able to publish material, commentary and statements, which can then be replicated or disseminated widely across multiple platforms, irrespective of physical geography or borders. With modern web analytical technology and alt-metrics, it is often possible to quantify the impact of a particular article, webpage, blog post or social media statement, by counting the instances of access, clicks, downloads, shares or other engagement.⁶⁹⁹ However, the sheer speed and global reach of online communication means that a defamatory statement could potentially reach huge audiences across the world within hours. This greatly magnifies the potential damage caused to an individual plaintiff and the potential liability of defendants.

Moreover, online communication now allows for easy and cost-free linking, retweeting, re-posting or otherwise republishing by multiple users in different countries. That can make it extremely difficult, or impossible, to be sure that all instances of a defamatory publication have been identified and removed.

Professor Neville Cox noted, in his paper to the Symposium, that “*the fact that section 31 of the [Defamation] Act, in dealing with damages awards, specifically lists the extent of publication as a relevant factor in assessing quantum should, at least in theory, mean that concerns with the inherent breadth of internet publication would be covered*”⁷⁰⁰. However, a further concern for defamation plaintiffs regarding online publication is that since the material can be published online without any cost to the person posting it, a person defamed by the post may often find that they cannot in practice recover any damages, or even their legal costs, from the defendant.

In *Tansey v. Gill*,⁷⁰¹ Peart J. commented that:

“The internet has facilitated an inexpensive, easy, and instantaneous means whereby unscrupulous persons or ill motivated malcontents may give vent to their anger and their perceived grievances against any person, where the allegations are patently

⁶⁹⁹ See John Maher, *The Law of Defamation*, 2nd edition, 2018, p. 90-93

⁷⁰⁰ Prof. Neville Cox, (Trinity College Dublin), ‘*Irish defamation law: the 2009 Act and the need for reform*’ at http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf .

⁷⁰¹ *Tansey v. Gill* [2012] IEHC 42, [2012] 1 IR 380.

*untrue, or where no right thinking person would consider them to be reasonable or justified. By such means, anything can be said publicly about any person, and about any aspect of their life whether private or public, with relative impunity, and anonymously – whereby reputations can be instantly and permanently damaged, and where serious distress and damage may be caused to both the target, children and adults alike, leading in extreme cases to suicide. So serious is the mischief, so easily achieved, that in my view the Oireachtas should be asked to consider the creation of an appropriate offence under criminal law, with a penalty upon conviction sufficient to act as a real deterrent to the perpetrator. The civil remedies currently available have been recently demonstrated to be an inadequate means of prevention and redress.*⁷⁰²

7.2.2 Complexity of online publication

A defamatory statement published online may now involve one or more of many types of actors – for example, an internet platform provider, a search engine provider, website operator, news portal, blogger, social media poster, a sharer or re-sharer of social media content, or a poster in a ‘below the line’ comment sections.

The law is still working out how best to attribute liability for a defamatory statement that can involve such a range of different actors. International textbooks shared and debated, for instance, a Canadian judgment on whether a person who shares a link to a website should, or should not, be considered as having re-published a defamatory statement contained in the linked site (the Canadian Supreme Court held in this case that sharing a hyperlink did *not* constitute a defamatory re-publication)⁷⁰³.

However, it has also been argued that efforts to specify details and parameters of ‘secondary responsibility’ for internet publication run a risk of fast becoming obsolete and unpredictable, given the rapid development of digital technology.⁷⁰⁴

7.2.3 Liability of online service providers for user-generated content

One question which received relatively early attention is the question of how far providers of online services (such as search engines, social media platforms, and operators or hosts of websites) may be liable for content which is created and posted online by users through the provider’s platform. Given the enormous volumes of material that are posted every few minutes on huge platforms such as Facebook, or apps such as Twitter, major providers contend that they cannot be aware of the content, at least unless specifically notified.

The EU e-Commerce Directive⁷⁰⁵ already, in 2000, provided an exemption from liability for such providers, subject to certain conditions (see section 7.3.2). However, the liability of digital service providers, and their obligations to users, are now also addressed by the

⁷⁰² *Tansey v. Gill* [2012] IEHC 42, para 25. In this case, anonymous allegations of criminality and unprofessional conduct had been posted anonymously about a solicitor on a website entitled ‘rate-my-solicitor.ie’. After considering the evidence offered by the defendants, the court was satisfied that the material was seriously defamatory. See Maher, *The Law of Defamation*, 2nd edition, paras 11.78-11.82.

⁷⁰³ *Crookes v. Newton*, Supreme Court of Canada, [2011] SCC 47

⁷⁰⁴ Prof. Neville Cox, *Defamation Law and the 2009 Defamation Act*, paper to the Defamation Symposium 2019, http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

⁷⁰⁵ Directive 2000/13/EC, transposed in Ireland by the e-Commerce Regulations, S.I. No. 68 of 2003.

proposal for a new EU Regulation (the ‘Digital Services Act’), discussed at section 7.3.3, which aims to modernise and extend EU regulation of digital communication..

Conversely, Professor Cox argues, in his paper to the Symposium on Reform of Defamation Law in 2019 that the ‘standout issue’ regarding online defamation and Irish law is that the e-Commerce Directive and Regulations do not protect “*multiple other kinds of entity that are involved in the publication process online, but have no realistic control over material posted by others.*”⁷⁰⁶ For instance, a private individual, on whose Facebook page another person posts a defamatory comment. Other possible examples would include where an individual posts defamatory material on a community group page, or forum.

The defence of ‘innocent publication’, under section 27 of the 2009 Act, has been seen as a potential shield both for mainstream providers of online services, and for those responsible for community group pages of this sort. However, Professor Cox argues that “*the application of this defence to the issue of online publication poses huge interpretative difficulties*” and considers the pros and cons of amending the 2009 Act, instead, along the lines of the general defence in England and Wales for ‘operators of websites’ contained at section 5 of their Defamation Act 2013⁷⁰⁷.

7.2.4 Anonymous online statements

Online communication has made it easy for individuals to publish material online, either anonymously, or using a user-name which does not reveal their identity to the public.

The person’s identity, however, will normally be accessible to the website operator or other digital intermediary. As a result, defamation plaintiffs may be obliged to apply to a reluctant third party - the service provider- to obtain the poster’s identity.

The courts have developed a remedy to meet these situations (known as a ‘Norwich Pharmacal’ order, after a copyright case where it was first used) but some problems and issues remain: they are discussed in part 7.4 of this chapter.

7.2.5 Multiple jurisdictions

The potential of online communication for rapid global reach also raises complex procedural issues, if defamatory material is generated or accessed in more than one country.

This was already possible for traditional hard copy publication, for instance of newspapers, but such cases were rare, and generally involved a very limited potential readership. The nature of online publication, and the increasing globalisation of family, social and business networks, have transformed that picture. For example, defamatory online comments might be posted and published in one country, by a user who is resident in another, on a website or platform that is hosted in a third, before being accessed and extensively re-published in a fourth.⁷⁰⁸ In which country’s courts is the defamed person to apply for orders restraining further publication, or asking for identification of the anonymous author?

⁷⁰⁶ Cox, 2019, *Defamation Law and the 2009 Defamation Act*, http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

⁷⁰⁷ Cox, *Defamation Law and the 2009 Defamation Act*, above.

⁷⁰⁸ Maher J, *The Law of Defamation*, 2nd edition, p. 83-90.

There are EU rules governing the choice of jurisdiction in civil proceedings (including defamation) with a cross-border dimension, as between EU Member States. The position may be more complicated if some of the countries are not in the EU. In either case, a plaintiff or defendant may have to take proceedings in more than one jurisdiction, potentially at significant cost. (See chapter 4.5 of this Report for a detailed discussion on this aspect.)

It is worth noting that some major online intermediaries with an Irish base may stipulate a contractual term, for any service users not based in North America, that any litigation about the service will be taken in the Irish courts. This was the case, for instance, in *Muwema v Facebook*, where both the plaintiff and the defendant were based in Uganda, but the defamation proceedings were decided by the Irish courts because the statements in question were published via a Facebook account.⁷⁰⁹

7.2.6 EU law dimension

Defamation is not, in general, a matter for EU law, if it arises from traditional publication via a book or a newspaper article.

However, aspects of online defamation do have a specific EU law dimension: see sections 7.3.2 and 7.3.3 of this chapter. This is due to the e-Commerce Directive, which exempts certain providers of online services from liability for user-generated content (subject to conditions): see also the proposal for a new EU ‘Digital Services Act’.

7.3 The legal framework

7.3.1 The Defamation Act 2009

Application to online publication

The Defamation Act 2009 does expressly include defamatory statements that are published via electronic communications, including internet-based publication, at section 2.

However, the extent of online communication has expanded very considerably since 2009, and the Act did not address the issue of online defamation in any great detail.

Section 2 of the Act defines a (defamatory) ‘statement’ as including “*a statement published on the internet*”, and “*an electronic communication*”.

Section 2 also defines an “*electronic communication*”, as including “*a communication of information in the form of data, text, images or sound (or any combination of these) by means of guided or unguided electromagnetic energy, or both*”.

A “periodical” is defined as “*any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates, in the State at regular or substantially regular intervals and includes any version thereof published on the internet or by other electronic means*”.

⁷⁰⁹ [2016] IEHC 519.

"Publication" means "*the publication, by any means, of a defamatory statement ... to one or more than one person*", other than the person concerned by the statement⁷¹⁰. The general position in Irish defamation law is that publication takes place at the point in time, and in the place, where the statement is received, and read, by that other person⁷¹¹. Thus, posting a defamatory statement online does not in itself constitute publication: "*a defamatory statement will not become actionable until the moment it is seen, heard or otherwise brought to the attention of a person other than the plaintiff.*"⁷¹²

Relevant defences

The 'innocent publication' defence under section 27 of the Defamation Act is often argued to have particular relevance for online service providers, who may contend that given the huge volume of material posted on their platforms, they cannot be aware of the nature of all of its content – at least till notified in a specific instance. (See also, however, part 7.2 of this chapter on questions raised regarding the effectiveness of this defence in practice in the digital context⁷¹³.)

The section⁷¹⁴ provides for the defence of innocent publication, where the defendant proves that it:

- was not the author, editor or publisher of the statement complained of,
- took reasonable care in relation to its publication, and
- did not know, and had no reason to believe, that what it did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.

The terms "author", "editor" or "publisher" are not defined, but section 27(2) describes a series of functions and activities that are excluded from their scope.⁷¹⁵

⁷¹⁰ Section 6(2) Defamation Act 2009. However, there is no publication if a defamatory statement is published to the person to whom it relates and to another person, where (a) it was not intended that the statement would be published to the other person, and (b) it was not reasonably foreseeable that publication of the statement to the first person would result in it being published to the other person (section 6(4)).

⁷¹¹ Maher, *The Law of Defamation*, 2nd edition, para 3.29.

⁷¹² Maher, *The Law of Defamation*, 2nd edition, para 3.04.

⁷¹³ Cox, *Defamation Law and the 2009 Defamation Act*, paper to the Defamation Symposium 2019, http://www.justice.ie/en/JELR/NCox_Paper_Defamation.pdf/Files/NCox_Paper_Defamation.pdf

⁷¹⁴ Section 27(1) provides:

'It shall be a defence (to be known as the 'defence of innocent publication') to a defamation action for the defendant to prove that –

- (c) he or she was not the author, editor or publisher of the statement to which the action relates,*
- (d) he or she took reasonable care in relation to its publication, and he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.'*

⁷¹⁵ Section 27(2) provides:

'A person shall not, for the purposes of this section, be considered to be an author, editor or publisher of a statement if -

- (a) in relation to printed material containing the statement, he or she was responsible for the printing, production, distribution or selling only of the printed material,*
- (b) in relation to a film or sound recording containing the statement, he or she was responsible for the processing, copying, distribution, exhibition or selling only of the film or sound recording,*
- (c) in relation to any electronic medium on which the statement is recorded or stored, he or she was responsible for the processing, copying, distribution or selling only of the electronic medium or was*

Section 27(3) sets out factors to which the court must have regard, when determining whether a person took reasonable care, or had reason to believe that what he/she did caused or contributed to the publication of a defamatory statement.⁷¹⁶

Date of publication for purposes of limitation of actions

Section 38 of the Act defines the date of publication, in an internet-based communication, in the context of the limitation of actions:

“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.”⁷¹⁷

7.3.2 The e-Commerce Directive 2000

Overview

The e-Commerce Directive⁷¹⁸, adopted in 2000, seeks to facilitate free movement of ‘information society services’ between EU Member States. It does so by establishing important common minimum rules, which in effect regulate the liability and responsibilities in Ireland and in other EU Member States of online service providers (including ‘Big Tech’ providers such as Google or Facebook) for the content of defamatory material posted by users of their online services.

The Directive was implemented in Ireland by the European Communities (Directive 2000/31/EC) Regulations 2003.⁷¹⁹

The relevant provisions of the Directive are in Part 4, comprising Articles 12 to 15, which deal with the liability of ‘intermediary service providers’ for any illegal content that they transmit and/or store for users of their services.

(Under the proposed Digital Services Act⁷²⁰, Articles 12 to 15 of the Directive are largely reproduced, respectively, as Articles 3, 4, 5 and 7 of the Digital Services Act. Under Article 71

responsible for the operation or provision only of any equipment, system or service or means of which the statement would be capable of being retrieved, copied, distributed or made available.’

⁷¹⁶ Section 27(3) provides:

‘The court shall, for the purposes of determining whether a person took reasonable care, or had reason to believe that what he or she did caused or contributed to the publication of a defamatory statement, have regard to –

(d) the extent of the person’s responsibility for the content of the statement or the decision to publish it,

(e) the nature or circumstances of the publication, and

(f) the previous conduct or character of the person.’

⁷¹⁷ *“A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of one year, or such longer period as the court may direct not exceeding 2 years, from the date on which the cause of action accrued.”*

⁷¹⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN>

⁷¹⁹ S.I. No. 68/2003 - European Communities (Directive 2000/31/EC) Regulations 2003:

<http://www.irishstatutebook.ie/eli/2003/si/68/made/en/print>

⁷²⁰ References to the text of the Digital Services Act proposal are provisional: the text is still subject to negotiation.

of the Act, Articles 12 to 15 are then deleted, and references to those Articles are to be construed as references respectively to Articles 3, 4, 5 and 7 of the Digital Services Act.)

In relation to online defamation, the e-Commerce Directive focused on limiting the possible liability of ‘information society services’ providers for the content of any user-generated material that was transmitted or accessed using their services, subject to certain conditions.

At the same time, the Directive prohibited Member States from imposing on the service providers any ‘general obligation to monitor’ the content of user-generated material transmitted using their services.

In summary, Part 4 of the Directive:

- prohibits Member States from imposing any general obligation on an online services provider to monitor the information that they transmit and store (Article 15.1);
- sets out specific rules that exempt online service providers from legal liability for the content held on their websites, if the provider has no actual knowledge of the nature of that content or of any illegality (Articles 12-14);
- specifies three different levels of exemption, at Articles 12-14, depending on whether the service provider is hosting, caching, or is a “mere conduit” for, the content concerned⁷²¹;
- specifies graduated conditions at Articles 12-14 for each of these three levels of exemption – for example, the exemption for a provider of hosting services applies only if the provider complies with a “notice and takedown” regime: if a hosting service provider is informed of illegal content on its website, it must “*act expeditiously to remove or to disable access to the information*”; and
- specifies that the Directive does not affect the possibility of a court in a Member State requiring a service provider to terminate or to prevent an infringement, in accordance with the national legal system⁷²².

These provisions also establish the context for online service providers in Ireland complying with orders of national courts, such as take-down orders or “*Norwich Pharmacal*” orders, as discussed later in this chapter.

Another key element of the e-Commerce Directive is the ‘country of origin’ clause, under which a provider of online services is subject to the law of the Member State in which it is established, rather than of the Member State in which the service is accessed.

Article 3.1 of the Directive provides that:

⁷²¹ ‘*Mere conduit*’ services focus on passive transmission of large volumes of data (e.g. a traditional internet access provider). ‘*Caching*’ services store large volumes of data temporarily for onward transmission: e.g. a proxy server. ‘*Hosting*’ services provide a platform on which users can upload, store, and transact with their own data (e.g. a web-hosting company.)

⁷²² At Articles 12.3, 13.2 and 14.3.

“Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field [of the Internal Market].”⁷²³

Online services providers and publication

Articles 12 to 15 of the e-Commerce Directive provide for what is often described as a “safe haven” regime, under which three types of service providers are exempt from liability for the content of the material they hold, under certain conditions.

The approach taken was not to deny that the service provider’s work and functions involved publication, but to provide them with a specific range of defences, dependant on the level of responsibility for publication/awareness of the content of the material that a relevant service provider could reasonably be said to have.⁷²⁴

The exemption from liability is conditional on it being, in fact, the case that the service provider is merely an ‘intermediary’, with an essentially ‘passive’ role as regards the content of the material. However, the level of passivity required differs according to the three categories of service providers.

The three categories of providers

The three types of providers, the relevant Article and the conditions attached, are as follows⁷²⁵:

"Mere conduit" service providers (Article 12)

These providers deliver either network access services, or network transmission services. The typical ‘mere conduit’ service are traditional internet access providers, and backbone operators.

Both types of service providers transmit enormous amounts of data at the request of their subscribers (whom they may not even know), and are therefore envisaged as having a strictly passive role. This liability exemption applies when the service provider is only passively involved in the transmission of data. If the service provider were involved in decisions on selecting, transmitting or modifying the data, or selecting the recipients, the exemption would not apply.

"Caching" providers" (Article 13)

These providers temporarily and automatically store data, in order to make the onward transmission of this information more efficient. The typical service envisaged by Article 13 is a so-called "proxy server", which stores local copies of websites accessed by a customer. When the same website is subsequently accessed again, the proxy server can deliver the

⁷²³ See also Recital 22 of the Directive, which explains that ‘*Information society services should be supervised at the source of the activity ...*’.

⁷²⁴ Cox N. and McCullough, E., *Defamation Law and Practice*, Clarus Press, 2014, p. 372-3.

⁷²⁵ See: *EU study on the Legal analysis of a Single Market for the Information Society. New rules for a new age? Liability of online intermediaries:*

https://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835

locally stored copy of the website, which avoids needing to contact the original web server again: this reduces network traffic, and speeds up the delivery process.

Caching providers can be more actively involved with their users. Article 13 permits the caching provider to select the data or the recipient of the service, as it may want to restrict the access to its services, or to filter the information made available to its users.

However, the Article does not permit the provider to modify the local copy of the data that it stores. As information is locally stored by the caching provider during a certain period of time — which, depending on the configuration of the servers and websites involved, can be up to several months — various conditions need to be met by the caching provider in order to benefit from the liability exemption. The most important conditions are that the local copy must be identical to the original information, and that the service provider must comply with the access conditions associated with the locally stored information. Furthermore, the service provider must update the copy in the manner specified by the original website.

Article 13(1)(e) requires a caching provider to take down illegal content - but only where it has *actual* knowledge of the illegality, and only where the original data has already been taken down or its takedown has been ordered by a court. The provider shall:

“act expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.”

“Hosting providers” (Article 14)⁷²⁶

These providers store data provided by their users. The data being stored is specifically selected and uploaded by a user of the service, and is intended to be stored ("hosted") for an unlimited amount of time. The typical service envisaged by Article 14 is a webhosting company, which provides web space to its customers, on which they can upload content to be published on a website.

The required level of passivity is the lowest for hosting providers. Under Article 14, they are permitted to select and modify the data they store, as well as to select the recipient of the data. However, the liability exemption would not apply if the service user was acting under the authority or control of the hosting provider.

Hosting providers can only benefit from the liability exemption when they are "*not aware of facts or circumstances from which the illegal activity or information is apparent*" (in relation to civil claims for damages) or they "*do not have actual knowledge of illegal activity or information*" (in relation to other claims).⁷²⁷

A further condition that is specific to Article 14 and to hosting providers is that once a hosting provider is on notice that specific content is illegal, it is obliged to "*act expeditiously to remove or to disable access to*" the content concerned.

⁷²⁶ Cox and McCullough, 2014, p. 371-379; Gatley 2017, p. 243-246; Maher, 2018, p. 320-324

⁷²⁷ See for example *Google v Louis Vuitton & others*, Joined Cases C-236/08 to C-238/08; *L'Oréal v eBay*, Case C-324/09.

Article 14 is seen as the basis for the development of ‘notice and take down’ procedures in relation to illegal and harmful information. The Directive does not itself set out any procedural obligations for ‘notice and takedown’, providing instead at Article 14.3 that:

“This Article shall not affect ... the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

No general obligation to monitor

Article 15.1 of the e-Commerce Directive provides that:

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicting illegal activity.”

Article 15.2 provides an exception to that general principle: Member States may ‘establish obligations’ requiring providers to inform the relevant public authorities promptly of possible illegal activities or information, or to provide the authorities on request with information on the identity of service recipients.

The prohibition on *general* monitoring has been upheld by the EU Court of Justice on several occasions.⁷²⁸

An example is *Scarlet Extended*,⁷²⁹ where Scarlet was an internet service provider which provided its customers with access to the internet without offering other services such as downloading or file sharing. The Belgian courts upheld SABAM’s complaint that Scarlet’s service users were downloading music in SABAM’s catalogue from the internet, without permission and without paying royalties, by means of peer-to-peer networks. SABAM sought an order compelling Scarlet to install a filtering system to prevent this recurring.

The Belgian court sought guidance from the Court of Justice, which held that:

“ ... it is common ground that implementation of that filtering system would require:

- first, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic;*
- secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual property rights claim to hold rights;*
- thirdly, that it determine which of those files are being shared unlawfully; and*
- fourthly, that it block file sharing that it considers to be unlawful.*

Preventive monitoring of this kind would thus require active observation of all electronic communications conducted on the network of the ISP concerned and, consequently, would encompass all information to be transmitted and all customers using that network.

In the light of the foregoing, it must be held that the injunction imposed on the ISP concerned requiring it to install the contested filtering system would oblige it to actively

⁷²⁸ SABAM v Netlog NV (Case C-360/10); *Scarlet Extended SA v SABAM* (C-70/10).

⁷²⁹ *Scarlet Extended SA v SABAM* (C-70/10).

*monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual property rights. It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.”*⁷³⁰

Court intervention in specific cases, however, remains permitted

However, Article 15.1’s prohibition on Member States imposing a *general* monitoring obligation on hosting providers in relation to illegal content does not prevent national courts from imposing such obligations on them *in a specific case*.⁷³¹

The Court referred, in this context, to Recital 47 of the Directive, which explains that:

“Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.”

In October 2019, the Court of Justice handed down an important judgment in *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*⁷³². This was seen as a landmark decision on the limits of Article 15’s prohibition of general monitoring obligations⁷³³, and it referred specifically to the publication of defamatory material.

In this case, a Facebook user had shared on their personal Facebook page an article published in an Austrian online newspaper, entitled ‘*Greens: Minimum income for refugees should stay*’, which included publication of a photo of Ms Glawischnig-Piesczek, the Austrian federal spokesperson for the Green Party. The user added a comment which the Austrian courts held to be insulting and defamatory of Ms Glawischnig-Piesczek. The post could be accessed by any Facebook user.⁷³⁴

Ms Glawischnig-Piesczek applied to the Vienna Commercial Court, which issued an interim order directing Facebook to cease immediately publishing or disseminating photographs showing the applicant, if they were accompanied by text that contained the defamatory comment (either verbatim, or in equivalent wording.) In response, Facebook disabled access to the original post, but appealed other aspects of the ruling.

The appeal court in Vienna upheld the order extending to other *identical* text, but held that it should only apply to *equivalently worded* text if that text was notified to Facebook (by Ms Glawischnig-Piesczek, a third party, or otherwise). Both parties appealed against the appeal ruling. The Austrian Supreme Court referred the question to the Court of Justice, stating that

⁷³⁰ *Scarlet Extended SA v SABAM* (C-70/10), at paras 38-40.

⁷³¹ *Eva Glawischnig-Piesczek v Facebook Ireland Ltd* (C-18/18), at para 34.

⁷³² *Glawischnig-Piesczek v Facebook Ireland* (C-18/18)

⁷³³ Court of Justice of the European Union PRESS RELEASE No 128/19:

<https://curia.europa.eu/jcms/upload/docs/app.lication/pdf/2019-10/cp190128en.pdf> ;

‘Facebook can be forced to remove content worldwide after landmark EU court ruling’:

<https://www.rte.ie/news/business/2019/1003/1080941-facebook-can-be-forced-to-remove-content-worldwide/> ;

‘Facebook to be subject to tougher controls after EU court ruling’:

<https://www.theguardian.com/technology/2019/oct/03/facebook-faces-tougher-controls-after-eu-ruling> ;

⁷³⁴ At para 12 of the Court’s judgment.

according to its own case-law, such a takedown order was proportionate, if the host provider was aware that the applicant's interests had already been harmed at least by the original post, and the risk of other infringements had thus been demonstrated.

The Court of Justice held that the Directive, and in particular Article 15(1), does not preclude a court of a Member State ordering a host provider to remove (or block access to) content that it stores which is:

- *identical* to content previously declared unlawful, or
- *equivalent* to content previously declared unlawful, provided that the provider is only being required to monitor and search for information that:
 - “convey[s] a message the content of which remains essentially unchanged” compared to the unlawful content,
 - contains the elements specified in the court's injunction, and
 - does not differ in wording from the unlawful content to an extent that requires the provider to carry out an independent assessment of the content.

Nor, the Court added, did the Directive, and in particular Article 15(1), preclude a Member State court ordering the hosting provider to remove, or block access to, information covered by its injunction *on a world-wide basis* - provided that this is done within the framework of relevant international law.

The Court did refer particularly to the fact that the hosting service was a social media company, as a relevant factor:

*“Such a specific case [as is mentioned in Recital 47] may, in particular, be found in a particular piece of information stored by the host provider concerned at the request of certain user of its social network [which was determined to be illegal by the national court]. Given that a social network facilitates the swift flow of information stored by the host provider between its different users, there is a genuine risk that information which was held to be illegal is subsequently reproduced and shared by another user of the network.”*⁷³⁵

This judgment – and particularly, its conclusion that the Directive permits a Member State court to order hosting platforms to filter out specified unlawful content *on a worldwide basis* in an individual case - was seen as a landmark decision on the limits of Article 15's prohibition of general monitoring obligations^{736 737}. However, it has also been pointed out

⁷³⁵ *Glawischnig-Piesczek v Facebook Ireland* (C-18/18), paras 35-36.

⁷³⁶ Court of Justice of the European Union PRESS RELEASE No 128/19:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190128en.pdf> ;

‘Facebook can be forced to remove content worldwide after landmark EU court ruling’:

<https://www.rte.ie/news/business/2019/1003/1080941-facebook-can-be-forced-to-remove-content-worldwide/> ;

‘Facebook to be subject to tougher controls after EU court ruling’:

<https://www.theguardian.com/technology/2019/oct/03/facebook-faces-tougher-controls-after-eu-ruling> ;

⁷³⁷ ‘Monitoring online content: the impact of *Eva Glawischnig-Piesczek v Facebook Ireland Limited*’,

that the ruling does not explore in any detail which kinds of injunctions or filtering technologies may be permissible, nor does it specify considerations for fundamental rights when courts are asked to order platforms to monitor users. It was also suggested that the Court's reservation where the equivalent wording is sufficiently different to require an 'independent assessment' may make it difficult for courts to devise injunctions that both follow the CJEU's guidance under the e-Commerce Directive, and meet the requirements of fundamental rights.⁷³⁸

Assessment

Over twenty years on from its adoption, there has been a clear sense that despite the important principles which it established, the e-Commerce Directive has become somewhat outdated in its terminology, and risks lagging behind a digital economy that has continued to transform and reinvent itself with remarkable speed.

A report on the EU liability regime for online intermediaries, prepared for the European Parliament in 2020, noted that:

*"... numerous studies have shown that the way the E-commerce Directive has been implemented across the EU varies greatly and that national jurisprudence on online liability today remains very fragmented".*⁷³⁹

The report concluded that the e-Commerce Directive is limited in several respects:

- *It remains unclear to what extent the new type of online services, such as social media companies that have appeared since the adoption of the e-Commerce Directive, fall within the definition of 'information society services' providers that can benefit from the liability exemption.*
- *The 'safe harbour' conditions and 'notice-and-take down' obligations are unclear essentially because the underlying notions which are used to trigger the liability exemption, such as the distinction between 'passive' role and 'active' and the meaning of 'illegal activities', lack a proper definition. There are also considerable differences both with regard to the definition and the functioning of notice-and-take down, throughout the EU.*
- *It is becoming difficult to differentiate between prohibited 'general' content monitoring and acceptable 'specific' content monitoring, while automatic filtering mechanisms are increasingly used to detect illegal content.*

<https://www.reedsmith.com/en/perspectives/2019/11/monitoring-online-content-the-impact-of-eva-glawischnig-piesczek-v-facebook> ; 'Facebook Responsible for Worldwide Removal of Defamatory Comments', <https://www.mccannfitzgerald.com/knowledge/disputes/facebook-responsible-for-worldwide-removal-of-defamatory-comments>

⁷³⁸ Keller, Daphne (2020), 'Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling', in GRUR International, Volume 69, Issue 6, June 2020, 616–623: <https://doi.org/10.1093/grurint/ikaa047>

⁷³⁹ 'Reform of the EU liability regime for online intermediaries', European Parliamentary Research Service, May 2020, p. 1 Executive summary.

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf?fbclid=IwAR3LDz1RRGtSeB88ZORuwW20HuB9rV9tp97nzbEfuhVqeCpLN-yXhqqy1c](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf?fbclid=IwAR3LDz1RRGtSeB88ZORuwW20HuB9rV9tp97nzbEfuhVqeCpLN-yXhqqy1c)

Against this overall background, the European Commission signalled its intention to revise the liability and enforcement regimes for online intermediaries, through its proposal for a new EU Regulation (the ‘Digital Services Act’).

7.3.3 Proposed EU Digital Services Act

Overview

On 15 December 2020, the European Commission published two important new legislative proposals: the proposed “Digital Services Act”⁷⁴⁰ and the proposed “Digital Markets Act”⁷⁴¹, describing the package as:

“an ambitious reform of the digital space, a comprehensive set of new rules for all digital services, including social media, online market places, and other online platforms that operate in the European Union.”

The complementary proposals aim to establish a clearer, much more modern and more comprehensive EU regulatory framework, applying the same framework of rules to a wider range of digital service providers.

The Commission added that:

“Under the Digital Services Act, binding EU-wide obligations will apply to all digital services that connect consumers to goods, services, or content, including new procedures for faster removal of illegal content as well as comprehensive protection for users' fundamental rights online. The new framework will rebalance the rights and responsibilities of users, intermediary platforms, and public authorities and is based on European values - including the respect of human rights, freedom, democracy, equality and the rule of law.”⁷⁴²

The legislative proposal for the Digital Services Act first needs to be considered by the European Council (the representatives of the Member States) and the European Parliament, before coming into effect. Under the EU legislative process, the proposal may be amended by each of these institutions, and the final text must be approved by both.⁷⁴³

The Council reached an agreement of all Member States (a ‘common position’) on an amended text of the Digital Services Act, and published its amended text on 25 November 2021⁷⁴⁴ and the European Parliament published its proposed amendments on 20 January 2022. Trilogue

⁷⁴⁰ Text of the Digital Services Act proposal at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>

⁷⁴¹ Text of the Digital Markets Act proposal at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>.

The DMA proposal seeks to strengthen the competition law framework for digital services provision: it will apply only to major players (so-called ‘gatekeepers’). It sets out harmonised rules to define and prohibit anti-competitive and unfair practices by gatekeepers, and provides an enforcement mechanism based on market investigations.

⁷⁴² https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347

⁷⁴³ Accordingly, references below to the text of the Digital Services Act proposal are provisional: the text is still subject to negotiation.

⁷⁴⁴ <https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/what-is-illegal-offline-should-be-illegal-online-council-agrees-on-position-on-the-digital-services-act/>

negotiations between the Commission, European Council and European Parliament are currently ongoing. The DSA proposal provides that it will take effect in Member States 18 months after adoption and publication.

Despite their names, the proposals are for EU Regulations (not for ‘Acts’ as the term is understood in national legislation). If adopted at EU level, the final text will have binding legal force in all EU Member States after the agreed transition period. (As amended by the Council, the DSA proposal provides at Article 74 that it will take effect in Member States 18 months after adoption and publication.)

Relevant provisions of e-Commerce Directive

Under the proposed Digital Services Act, the relevant provisions of the e-Commerce Directive will effectively be subsumed into the Act.

Articles 12 to 15 of the Directive are largely reproduced, respectively, as Articles 3, 4, 5 and 7 of the Digital Services Act. Under Article 71 of the Act, Articles 12 to 15 are then deleted, and references to those Articles are to be construed as references respectively to Articles 3, 4, 5 and 7 of the Digital Services Act.

Definition of illegal content

The Digital Services Act covers content which is unlawful under either national or EU law. Article 2(g) defines “illegal content” as “*any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law*”.

‘Country of origin’ principle

Article 44a of the Common Position (formerly Article 40) provides that the Member State in which the main establishment of the intermediary services provider is located shall have exclusive powers for the supervision and enforcement by Digital Services Coordinators, subject to certain exceptions in relation to very large online platforms or very large search engines (reserved to the European Commission).

Modernised, clearer scope

The Digital Services Act proposal covers a wider range of digital services providers more clearly than the e-Commerce Directive. It refers generally to ‘intermediary services providers’, which includes the three main categories regulated by the e-Commerce Directive (‘mere conduit’, caching and hosting services): the Council Common Position adds search engines within that category (Article 2).

The Commission indicates that the Digital Services Act will apply binding obligations to all digital services that connect consumers to goods, services, or content⁷⁴⁵. Intermediary services providers will include:

- internet access providers,
- domain name registrars,
- cloud and webhosting services,

⁷⁴⁵ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#new-obligations

- online platforms bringing together sellers and consumers (online marketplaces, app stores, collaborative economy platforms), and
- social media platforms.

New obligations on service providers regarding unlawful content

The Digital Services Act proposal lays down additional obligations regarding unlawful content for *all* intermediary service providers, and introduces higher levels of obligations for two new categories of provider: *large online platforms* (LOPs) and *very large online platforms* (VLOPs).

A VLOP is a platform providing services that reach 45 million, or more, EU service recipients per month on average (Article 25). They are considered by the Commission proposal as posing particular risks, due to their scale, in the dissemination of illegal content and societal harms.

These new graduated additional obligations for intermediary service providers (ISPs) under the proposal include:

- *Any ISP* that receives an order of a national court directing it to act regarding unlawful content must inform the court without undue delay of the action it has taken, and when, in response. (Article 8)
- *Any ISP that is a hosting service or an online platform* must set up a user-friendly process to facilitate any service user (or ‘trusted flagger’) notifying it of content the user believes to be illegal: must process and decide such notifications in a timely manner; and must inform the notifier promptly of their decision. (Article 14: Article 19))
- *Any online platform* (other than a SME) must also provide a free, user-friendly internal complaints process, if the notifier is not satisfied with its decision; consider and decide the complaint in a timely and objective manner; and inform the complainant promptly of their decision. (Article 17)
- *An online platform* is also obliged, if the complainant is dissatisfied with the decision on the complaint, to engage in good faith in an independent out of court resolution process. That process is to be conducted by an impartial dispute settlement body with relevant expertise, selected by the complainant from those certified for this purpose by the national Digital Services Coordinator (see below). (Article 18)
- *Any very large online platform* is also obliged to:
 - conduct annual assessments of how its systems and services risk disseminating illegal content, with particular attention to potential negative impact on fundamental rights (Article 26);
 - put in place proportionate and effective mitigation measures to address those risks (Article 27); and
 - undergo an independent annual audit on compliance with their DSA obligations, at its own expense (Article 28).

A significantly strengthened enforcement framework

The Digital Services Act proposal establishes a significantly strengthened enforcement framework - both at national and at EU level - for intermediary services providers' obligations regarding unlawful content. It includes the following:

- Each Member State must designate a competent authority to act as its impartial and independent national *Digital Services Coordinator* (DSC), and ensure that they are adequately resourced (Articles 38, 39);
- The DSC is responsible at national level for effective supervision and enforcement of the Digital Services Act within their Member State, with a range of specific legal powers under the DSA (Articles 38, 41);
- The DSA provides for 'effective, proportionate and dissuasive' fines and financial penalties for infringements of its requirements (Article 42);
- There is provision for extensive cross-border cooperation between DSCs in different Member States (Article 45);
- A *European Board for Digital Services*, chaired by the Commission and composed of national DSCs, will support national DSCs in the supervision of Very Large Online Platforms (VLOPs) (Article 47);
- The *European Commission* will also have specific supervision and enforcement powers, in relation to VLOPs (Article 50).

7.3.4 European Convention on Human Rights

Online defamation also has a specific ECHR case-law dimension, arising from *Delfi v. Estonia*⁷⁴⁶ in 2015. In that case, the European Court of Human Rights held that it was not contrary to freedom of expression rights, under Article 10 of the Convention, for national legislation to impose liability for defamation on the owners of a news portal for (largely anonymous) defamatory comments uploaded by third parties.

The Court found that the newspaper had editorial control over the third-party comments' section on its news site and should have prevented unlawful comments from being published, even though Delfi had taken down the offensive comments immediately upon being notified of them.

However, the Court seems to have nuanced this approach in subsequent judgments⁷⁴⁷, by underlining that the offensive material amounted to hate speech.

⁷⁴⁶ [2015] EMLR 26 (App no. 64569/09).

[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-155105%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155105%22]})

⁷⁴⁷ insert reference

7.4 Application in practice – redress in the online defamation context

Given the specific features of online defamation as outlined above, the main court orders sought by plaintiffs are likely to be:

- a ‘take-down order’, to restrain continuing or further publication; and
- if defamatory material has been posted anonymously, a ‘Norwich Pharmacal’ order.

7.4.1 Orders against continuing or future publication

The Defamation Act 2009 provides for the Court to make an order prohibiting further publication of defamatory material. Section 33(1) provides that:

“The High Court, or, where defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if, in its opinion –

- (a) the statement is defamatory, and*
- (b) the defendant has no defence to the action that is reasonably likely to succeed.”*

Subsection 33(3) specifies that the order may be interim, interlocutory or permanent.

However, the standard of proof required is considered quite strict: for example, the court must consider that the statement is defamatory.

In *Philpott v. Irish Examiner*⁷⁴⁸, the High Court commented that:

*“At common law, for injunctive relief to be granted, the court had to be satisfied that the material complained of was unarguably defamatory. If anything, this Court would note, the position appears even stronger under s.33. Under that provision, the court must be of the opinion that an impugned statement “is defamatory”, not that it is arguably or even unarguably so, but that, in the court’s opinion, it “is” so. This is a high threshold for a plaintiff to satisfy”.*⁷⁴⁹

In 2016, in *Muwema v. Facebook Ireland Ltd*⁷⁵⁰ the plaintiff (a well-known lawyer in Uganda) sought an order under section 33 of the 2009 Act against Facebook in the Irish courts, prohibiting further publication on the Facebook page of an anonymous user of articles accusing the plaintiff of accepting bribes and seeking to frustrate an election.

In accordance with section 33 of the 2009 Act, an order can be made under that section only where the defendant has no defence that is likely to succeed. The High Court held that the defence of innocent publication under section 27 of the 2009 Act was likely to be available to the defendant, and on that basis an order under section 33 of the Act could not be made.

⁷⁴⁸ *Philpott v. Irish Examiner Ltd* [2016] IEHC 62.

⁷⁴⁹ *ibid* para 27.

⁷⁵⁰ [2016] IEHC 519.

The Court also noted that Regulation 18 of the e-Commerce Regulations⁷⁵¹ appears to envisage the granting of injunctive relief to safeguard legal rights but that this provision is, in the case of an allegedly defamatory statement, subject to the limitations set out in section 33 of the 2009 Act.

Furthermore, the Court considered that the application should be refused as it would serve no useful purpose because of the availability of material containing the same or similar damaging allegations elsewhere on the internet. The Court observed that this decision means that a person who has been defamed by an internet posting may be left without any remedy, unless the author of the material is identified and amenable to the court.⁷⁵²

In *Gilroy & another v O'Leary*⁷⁵³, Mr Justice Allen noted that different sections of the 2009 Act use different language – for example, section 28 (declaratory orders) provides that a court must be “satisfied” that a statement is defamatory and section 30 (correction orders) says that there must be a “finding” that a statement is defamatory, while section 33 (prohibition orders) says that the court must be of the “opinion” that a statement is defamatory. He ultimately concluded that “*there is no difference between an “opinion” and a “finding” or the court being “satisfied”*”:

*“It seems to me that the key to understanding what the test in section 33 is, is that the same test is applicable to interim, interlocutory, and permanent orders. The jurisdiction of the court to make prior restraint orders is as delicate post 2010 as it previously was. I cannot conceive that the court would permanently interfere with free speech or the free expression of opinion unless in a case where it was satisfied and/or had made a finding that the statement was defamatory of the plaintiff and that the defendant had no defence”.*⁷⁵⁴

The Law Reform Commission Report on ‘*Harmful Communications and Digital Safety*’, discussed below at part 7.5 of this chapter, considered the effectiveness in practice of available remedies for online defamation.⁷⁵⁵

The Report stated that in online defamation cases, plaintiffs generally prioritise removing the content over an award of damages - because the speed and ease with which content can spread online increases the urgency to have it removed. As a result, the Report saw injunctions as an important remedy in this context, yet also noted that ensuring their effectiveness is an ongoing challenge.⁷⁵⁶

⁷⁵¹ European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003)

⁷⁵² Maher, *The Law of Defamation*, 2nd edition, p. 410-412.

⁷⁵³ *Gilroy & another v O'Leary* [2019] IEHC 52: [https://www.courts.ie/acc/alfresco/cbcf6502-3a04-449b-b27f-8244606b49bf/2019 IEHC 52 1.pdf/pdf](https://www.courts.ie/acc/alfresco/cbcf6502-3a04-449b-b27f-8244606b49bf/2019%20IEHC%2052%201.pdf/pdf) ; *Ben Gilroy fails in bid for injunction in defamation case*: <https://www.irishtimes.com/news/crime-and-law/courts/high-court/ben-gilroy-fails-in-bid-for-injunction-in-defamation-case-1.3779090>

⁷⁵⁴ *Gilroy & anor v O'Leary* [2019] IEHC 52: <https://www.courts.ie/acc/alfresco/cbcf6502-3a04-449b-b27f-8244606b49bf/2019 IEHC 52 1.pdf/pdf>

⁷⁵⁵ Law Reform Commission Report *Harmful Communications And Digital Safety*, (2016), (LRC 116 - 2016), available at: https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf

⁷⁵⁶ *Harmful Communications And Digital Safety*, (2016), 126

As an example of a more successful case, it cited *Tansey v Gill*,⁷⁵⁷ where the plaintiff was granted interlocutory injunctions restraining the publication of any further material, ordering the removal of the defamatory material and ordering the termination of the website upon which the material was posted. In *Tansey*, Peart J stated that damages are an empty remedy in the context of online defamation - as the harm caused can be so serious and irreversible. This is because the “*inexpensive, easy and instantaneous*” nature of internet publication allows individuals to make very serious allegations with “*relative impunity and anonymously*” “*whereby reputations can be instantly and permanently damaged and where serious distress and damage*” can be caused. Peart J thus suggested that interlocutory injunctions should be granted more readily in cases of online defamation.⁷⁵⁸

However, the Report also noted that injunctions can also be ineffective in the context of internet communications, citing *McKeogh v John Doe*⁷⁵⁹ as in that case, despite an interim order, the plaintiff’s name continued to be published by newspaper coverage of the case. That case also illustrated the potentially large cost of civil proceedings, with the plaintiff reportedly left with a significant legal bill.⁷⁶⁰

In that case, the plaintiff was defamed by an anonymous YouTube user who wrongly identified him as a person who ran from a taxi without paying. In addition, the plaintiff received “vitriolic messages” on Facebook calling him, amongst other things, a “scumbag” and a “thief.” This abuse continued even after the plaintiff obtained interim injunctions to prohibit such messages. The falsity of this claim was not at issue, because the plaintiff could show that at the time of the incident he was in Japan. The High Court accepted that the incorrect identification amounted to defamation. However, the interim orders granted were not effective, because newspapers continued to name the plaintiff in reports about the video; and in some cases, did not report the plaintiff’s statements that he could not have been the taxi fare evader.

The Report commented that a further difficulty with injunctions, in the context of online communications, is that often the material ordered to be removed can spread beyond the control of the individual ordered to remove the content, such as in *Kelly v National University of Ireland*.⁷⁶¹

In that case, the plaintiff was ordered to remove content from the internet. At a subsequent hearing, the defendant claimed that this order had been breached as the plaintiff had redirected visitors to his site to other websites where the material could be found. The High Court granted a second order requiring the removal from any website, whether controlled by the plaintiff or otherwise, of references to the information specified in the previous order, but the plaintiff said that he would be unable to remove anything from websites which he did not control. The Court held that if the plaintiff had no knowledge, either actual, constructive or implied, he would not breach the order. However, were he to pass on the material to another who then published it, or were he to redirect visitors to his website to other websites publishing the material, then he would be in breach.

⁷⁵⁷ [2012] IEHC 42.

⁷⁵⁸ Law Reform Commission Report *Harmful Communications And Digital Safety*, (2016), p. 127.

⁷⁵⁹ *McKeogh v John Doe 1 (username Daithii4U)* [2012] IEHC 95.

⁷⁶⁰ *Harmful Communications And Digital Safety*, (2016), 127

⁷⁶¹ [2010] IEHC 48 *Harmful Communications And Digital Safety*, (2016), p. 127-128.

7.4.2 Notice and takedown requirements

Article 14 of the e-Commerce Directive provides that hosting service providers are exempted from liability for hosting third-party illegal content if they do not have ‘actual knowledge’ of the activity or information and if, upon obtaining such knowledge, they ‘expeditiously’ remove the content, once a national court has directed them to do so. In order for ‘hosts’ and ‘intermediary service providers’ to be eligible for protection, the service provider must play a neutral role, in the sense that its conduct is merely technical, automatic and passive and that it has no knowledge or control over the data it stores.

Similarly under the ‘innocent publication’ defence to secondary publication, at section 27 of the Act, an online services provider is required to act expeditiously once notified of defamatory content, to remove it.

This has been described as a ‘notice and take-down regime’ for online service providers.

However, recent case law from both the European Court of Justice and the European Court of Human Rights (ECHR) has created some uncertainty around the extent of the hosting defence in the e-Commerce Directive for internet service providers.

Following the judgement of the European Court of Human Rights in *Delfi AS v. Estonia*⁷⁶², discussed above, the Court of Justice issued a somewhat similar judgement.

In Case C-291/13 *Papasavvas*⁷⁶³ the limitations of civil liability specified in Articles 12 to 14 of the e-Commerce Directive were held not to apply to a newspaper publishing company

“which operates a website on which the online version of a newspaper is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has knowledge of the information posted and exercises control over that information, whether or not access to that website is free of charge.”

7.4.3 ‘Norwich Pharmacal’ orders

A ‘*Norwich Pharmacal order*’ is a particular type of disclosure order developed by the courts. It essentially compels a defendant who has become mixed up in the alleged wrongdoing of a third party, whether knowingly or innocently, to disclose information that would assist the applicant in identifying this third party wrongdoer.⁷⁶⁴

In defamation cases, a ‘*Norwich Pharmacal*’ order is typically issued by the court to an online service provider who hosts a platform for user-generated content, directing the provider to provide identifying details of an anonymous poster/account holder who has posted defamatory material, so that he or she can be served with proceedings or court orders. In general, the online services provider will be prepared to provide the identifying details, if so required by a court.

⁷⁶² *Delfi AS v. Estonia* - 64569/09: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-8960%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-8960%22]})

⁷⁶³ Case C-291/13 *Papasavvas*: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0291>

⁷⁶⁴ David Culleton, *The Law Relating to Norwich Pharmacal Orders*, 2021 Irish Judicial Studies Journal vol. 5(1).

Norwich Pharmacal orders are not expressly provided for under court rules or legislation in this jurisdiction, and can only be granted by the superior courts.

As the poster is rarely a party to the proceedings, and these orders could potentially breach privacy rights and data protection concerns, the courts have indicated that orders will only be granted “sparingly”: they tend to take a restrictive view of information which will be made available, usually confining it to details relating to the identity of the wrongdoer.⁷⁶⁵

The traditional test is that to obtain a Norwich Pharmacal order, the applicant must prove that they have suffered a legal wrong. The Supreme Court (*Doyle v The Commissioner An Garda Síochána*⁷⁶⁶) has stressed that this type of relief is not akin to an interlocutory motion for discovery, which can rely on assertions or hearsay. In the absence of concrete evidence of a legal wrong, Norwich Pharmacal relief will not be granted.⁷⁶⁷

In some cases however a prima facie case has been sufficient and there are English precedents for a more flexible approach – although these may instead follow a proportionality test (see Culleton, below.)

In *Muwema v. Facebook Ireland Ltd*⁷⁶⁸ the plaintiff (a well-known lawyer in Uganda) objected to articles published on the Facebook page of an anonymous activist under the pseudonym TVO. The articles accused Mr Muwema of accepting bribes and seeking to frustrate an election. The applicant issued proceedings in Dublin against Facebook, seeking a section 33 order against further publication, and a Norwich Pharmacal order requiring Facebook to disclose any details they had in relation to the identity and location of TVO. The Court was satisfied that the articles were likely to be defamatory and made the Norwich Pharmacal order, while refusing the section 33 order for reasons discussed above.

Unusually, based on new evidence provided by Facebook that TVO was in fact a political activist whose identification to the Ugandan authorities was likely to put him at risk of imprisonment and possible ill-treatment, the High Court then declined to proceed with the Norwich Pharmacal order that TVO be identified to the applicant. Instead the Court⁷⁶⁹ directed Facebook to contact TVO and to notify him forthwith that unless the offending postings were removed within 14 days, the plaintiff would be entitled to renew his application for Norwich Pharmacal relief which would be granted.

This decision was appealed to the Court of Appeal⁷⁷⁰, which dismissed the appeal. The Court held that it was a matter for the trial judge to be satisfied that the evidence established to the necessary level of cogency, and on the balance of probabilities, that there was a real risk posed to the life and/or bodily integrity of TVO if their identity was disclosed. There was no error in law in the trial judge’s conclusion that he was so satisfied.

⁷⁶⁵ <https://www.mccannfitzgerald.com/knowledge/disputes/a-rare-example-of-norwich-pharmacal-relief-in-ireland>

⁷⁶⁶ [1999] 1 IR 249

⁷⁶⁷ <https://www.mhc.ie/latest/insights/norwich-pharmacal-relief-uncovering-the-anonymous-wrongdoer>

⁷⁶⁸ [2016] IEHC 519.

⁷⁶⁹ [2017] IEHC 69.

⁷⁷⁰ [2018] IECA 104.

Even where possible, Norwich Pharmacal orders can be costly for a plaintiff, who is usually expected to bear the costs of the service provider as well as their own, and the length of time taken for them to be obtained and enforced reduces their overall effectiveness.⁷⁷¹

Suggested reforms⁷⁷² include a greater focus by the courts on seeking to contact the anonymous poster before an order is made, and extending a Norwich Pharmacal jurisdiction to the Circuit Court, where most defamation cases are heard, in order to reduce costs.

7.5 Harmful Communications and Online Safety – proposals

7.5.1 The Law Reform Commission Report (2016)

In 2016, the Law Reform Commission published a report '*Harmful Communications and Digital Safety*' on some online communications and behaviour that cause harm to others.⁷⁷³ While the Report found that existing criminal law in Ireland already addressed some harmful communications, it nevertheless highlighted certain other gaps which required reform.

The Report proposed that existing criminal law, together with the proposals intended to deal with new forms of harmful communications, could be consolidated into a single piece of legislation and included a draft '*Harmful Communications and Digital Safety Bill*'. The Report recommended that this could be done under a proposed Office of the Digital Safety Commissioner of Ireland, modelled on comparable offices in Australia and New Zealand.

The proposed Commissioner, while having a general oversight and monitoring role, could also oversee and monitor an efficient and effective "take down" system enabling harmful communications to be removed as quickly as possible, such as from social media sites. This could include the publication of a statutory code of practice on take down procedures and associated national standards, which would build on existing non-statutory take down procedures and industry standards already developed by the online and digital sector.

The proposed statutory model envisaged that applications for take down of harmful communications could initially be made to the relevant digital or online service provider, with the Commissioner becoming involved by way of appeal, if the take down procedure did not operate in accordance with the statutory standards.⁷⁷⁴

During the Law Reform Commission's consultations with stakeholders, it was suggested that the absence of an adequate, speedy and standardised takedown procedure for online communications is a significant problem.⁷⁷⁵ The Report also noted that among difficulties of obtaining takedown is the exemption of internet intermediaries under the e-Commerce

⁷⁷¹ 'A Rare Example of Norwich Pharmacal Relief in Ireland':

<https://www.mccannfitzgerald.com/knowledge/disputes/a-rare-example-of-norwich-pharmacal-relief-in-ireland> ;

'Norwich Pharmacal Relief: Uncovering the Anonymous Wrongdoer':

<https://www.mhc.ie/latest/insights/norwich-pharmacal-relief-uncovering-the-anonymous-wrongdoer>

⁷⁷² Culleton, above

⁷⁷³ Law Reform Commission Report *Harmful Communications And Digital Safety*, (2016), (LRC 116 - 2016).

⁷⁷⁴ *Harmful Communications and Digital Safety*, (2016), 1-2.

⁷⁷⁵ *Harmful Communications and Digital Safety*, (2016), p. 128.

Directive - the requirements for notice and takedown under that Directive were seen as unclear.⁷⁷⁶

Some of the Report's recommendations on '*Takedown Procedure and Civil Law*' are of interest in the context of online defamation.⁷⁷⁷ These include:

- that an Office of a Digital Safety Commissioner should be established on a statutory basis to promote digital and online safety and to oversee and regulate a system of "take down" orders for harmful digital communications. [paragraph 3.82]
- that the Digital Safety Commissioner should have responsibility for overseeing and regulating a wide group of digital service undertakings including an intermediary service provider, an internet service provider, an internet intermediary, an online intermediary, an online service provider, a search engine, a social media platform, a social media site, or a telecommunications undertaking. [paragraph 3.83]
- that the general functions of the Digital Safety Commissioner should include ensuring the oversight and regulation of a timely and efficient take down procedure for digital service undertakings to remove harmful digital communications (the "take down procedure"), and that the take down procedure is made available to all affected individual persons by digital service undertakings free of charge; and that the Digital Safety Commissioner should prepare and publish, in an easily accessible form, a Code of Practice on Take Down Procedure for Harmful Communications. [paragraph 3.85]
- that the Digital Safety Commissioner should have jurisdiction to hear an appeal by an individual who has sought to have specified communications concerning him or her removed using the complaints scheme and take down procedure of a digital service undertaking. [paragraph 3.90]
- where a digital service undertaking refuses to comply with a direction issued by the Commissioner, the Commissioner should be empowered to apply to the Circuit Court for an injunction requiring compliance with the direction. [paragraph 3.91]
- that the jurisdiction to grant Norwich Pharmacal orders be placed on a statutory basis and that both the High Court and the Circuit Court should be empowered to make such an Order. [paragraph 3.112]
- that a one-step procedure be adopted for such orders whereby only one application would be required which would apply, in the online context, to the website and the telecoms company. [paragraph 3.113]
- that the person alleged to have posted the harmful communications should be given the opportunity of appearing and making representations to the court before the court makes a Norwich Pharmacal order. [paragraph 3.114]

⁷⁷⁶ *Harmful Communications and Digital Safety*, (2016), p. 126. See section 7.3.2 of this chapter. <https://ec.europa.eu/digital-single-market/en/e-commerce-directive>

⁷⁷⁷ *Harmful Communications and Digital Safety*, (2016), p. 157-159.

- that the provisions concerning the Office of the Digital Safety Commissioner and concerning Norwich Pharmacal orders should apply to harmful communications, where:
 - a) such harmful communications affect an Irish citizen or a person ordinarily resident in the State, and the means of communication used in connection with such harmful communications are within the control of an undertaking or company established under the law of the State, and
 - b) such harmful communications affect an Irish citizen or a person ordinarily resident in the State and where the means of communication used in connection with such harmful communications are within the control to any extent of an undertaking established under the law of another State and where a court established in the State would have jurisdiction to give notice of service outside the State in respect of civil proceedings to which harmful communications refer. [paragraph 3.121].

7.5.2 The Online Safety and Media Regulation Bill

In January 2020, the Government approved the General Scheme of the Online Safety and Media Regulation Bill, for formal drafting. That Bill does not cover online defamation as such, but it proposes to reform the regulatory structures for online media, including replacing the Broadcasting Authority of Ireland with a new Media Commission and Online Safety Commissioner.

A revised and expanded General Scheme was published in December 2020, and forwarded by the Department of Media, Tourism, Arts, Culture, Sports, and the Gaeltacht to the Office of the Attorney General, to continue detailed drafting of the Bill. The expanded General Scheme was also referred for pre-legislative scrutiny to the Joint Oireachtas Committee on Tourism, Culture, Arts, Sport and Media: their Report, with a number of detailed recommendations, was published on 2 November 2021⁷⁷⁸. The Online Safety and Media Regulation Bill 2022 was published on 25 January 2022.

The Bill⁷⁷⁹ is intended to develop a regulatory framework in Ireland to tackle the spread of harmful online content, as well as transposing into Irish law the requirements of the revised EU Audiovisual Media Services Directive of 6 November 2018⁷⁸⁰.

Several elements of the Law Reform Commission's Report have been included in the Bill, particularly the creation, powers and remit of an Office of the Online Safety Commissioner. However, where the Report envisaged a dual oversight role over criminal and civil aspects of

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https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/reports/2021/2021-11-02_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-online-safety-and-media-regulation-bill_en.pdf

⁷⁷⁹ <https://www.oireachtas.ie/en/bills/bill/2022/6/>.

⁷⁸⁰ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, amending Directive 2010/13/EU concerning the provision of audiovisual media services.

online harms (including takedown orders and Norwich Pharmacal orders) the scope of the Bill does not include civil law or defamation matters⁷⁸¹.

The Bill provides for the appointment of an Online Safety Commissioner as part of a wider Media Commission to oversee the new regulatory framework for online safety. The Commissioner will govern this new framework through binding online safety codes and robust compliance, enforcement and sanction powers. Online safety codes will deal with a wide range of issues, including measures to be taken by online services to tackle the availability of harmful online content. The Media Commission will replace the Broadcasting Authority of Ireland, and will also take on the role of regulating the audiovisual sector.

7.6 Comparative Perspectives

In the **United Kingdom**, the Government has stated that, after the end of the Brexit transition period, it will not provide for continued application of the e-Commerce Directive's rules to UK-based online service providers. The intention is to fully remove the Directive's 'country of origin' principle from legislation in the UK.⁷⁸²

In **England and Wales**, section 5 of the Defamation Act 2013 makes specific provision exempting 'Operators of websites', in certain circumstances, in respect of a defamatory statement posted on the website.⁷⁸³

It has been suggested that the section is of interest for Ireland, as it is capable of applying to smaller website operators who would not be protected by the e-Commerce Directive⁷⁸⁴.

"5. Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.*
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.*
- (3) The defence is defeated if the claimant shows that-*
 - (a) it was not possible for the claimant to identify the person who posted the statement,*
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and*
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.*

⁷⁸¹ Recommendation 7 of the Oireachtas pre-legislative scrutiny Report (above, at page 12) is that "the Bill be altered to remove exclusions of defamatory content, as well as of violations of data protection, privacy, consumer protection and copyright law."

⁷⁸² 'The E-Commerce Directive after the transition period', <https://www.gov.uk/guidance/ecommerce-directive-what-online-service-providers-in-the-uk-should-do-to-get-ready-for-brex-it> ; 'E-Commerce Directive – changes at the end of the transition period', <https://www.fca.org.uk/brexit/e-commerce-directive-changes-end-transition-period> .

⁷⁸³ <https://www.legislation.gov.uk/ukpga/2013/26/section/5/enacted>

⁷⁸⁴ Neville Cox, paper to Symposium on Reform of Defamation Law, above; see also the two possible caveats to such an approach, set out in his paper.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may-

- (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);*
- (b) make provision specifying a time limit for the taking of any such action;*
- (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;*
- (d) make any other provision for the purposes of this section.*

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which-

- (a) specifies the complainant's name,*
- (b) sets out the statement concerned and explains why it is defamatory of the complainant,*
- (c) specifies where on the website the statement was posted, and*
- (d) contains such other information as may be specified in regulations.*

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section-

- (a) may make different provision for different circumstances;*
- (b) are to be made by statutory instrument.*

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section "regulations" means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others."

The Defamation (Operators of Websites) Regulations 2013⁷⁸⁵ make further provision regarding:

- specified information to be included in a notice of complaint,

⁷⁸⁵ See the Defamation (Operators of Websites) Regulations 2013:
<https://www.legislation.gov.uk/ukdsi/2013/9780111104620>

- the action which must be taken by a website operator in response to a notice of complaint, and
- a time limit for taking any such action.

Section 13 of the Defamation Act 2013 provides for an:

“ Order to remove statement or cease distribution

(1) *Where a court gives judgment for the claimant in an action for defamation the court may order—*

- (a) *the operator of a website on which the defamatory statement is posted to remove the statement, or*
- (b) *any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.”*

In **Northern Ireland**, the Scott Report on Reform of Defamation Law⁷⁸⁶ discussed the many issues involved in relation to defamation and online intermediaries, online publication, and balancing reputation and online free speech⁷⁸⁷.

It noted that all of the respondents to its public consultation considered it desirable to provide defences as set out in section 5 (‘Operators of websites’) and section 10 (‘Action against a person who was not the author, editor’) of the Defamation Act 2013 in England and Wales. Similarly, respondents who commented specifically on section 10 unanimously took the view that this was an important reform. Both provisions were thought to be consistent with the policy approach that “*it is not for website hosts to police content on the internet*”, and that instead it is appropriate for responsibility to be laid upon the primary makers of allegations.⁷⁸⁸

Section 10 of the draft Bill attached to the Report detailed an “*Action against a person who was not the author, editor etc.*”, whereby a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of; with the meanings of “author”, “editor” and “publisher” defined.

It also specifies that a person shall not be considered the author, editor or publisher of a statement if he is only involved—

- in printing, producing, distributing or selling printed material containing the statement;
- in processing, making copies of, distributing, exhibiting or selling a film or sound recording containing the statement;
- in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

⁷⁸⁶ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, 2016: https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law_0.pdf

⁷⁸⁷ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, 2016, 2.50-2.59.

⁷⁸⁸ *Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance*, 2016, 2.50

- as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control;
- as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control;
- in the moderation of statements posted on a website by others.

It also provides for Regulations that may—

- define a category of persons who, while not being an author, editor or publisher as defined in subsections (2) and (3), will nonetheless be treated as a publisher for the purposes of defamation law generally;
- make provision for an appropriate defence of innocent dissemination, applicable to any person who is treated as a publisher in accordance with Regulations made under this subsection;
- section 14 of the draft Bill attached to the Report also makes provision for a Court Order to remove statement or cease distribution. Where a court gives judgment for the claimant in an action for defamation, the court may order:
the operator of a website on which the defamatory statement is posted to remove the statement, or
any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

In **Scotland**, the Defamation and Malicious Publication (Scotland) Act 2021⁷⁸⁹, contains several provisions of note in relation to online aspects, which take influence from elements of the draft Northern Irish Bill (above). Section 3 of the Act⁷⁹⁰, “*Restriction on proceedings against secondary publishers*”, limits the circumstances in which an action can be brought against parties who are not the primary publisher of an allegedly defamatory statement. It specifies that no defamation proceedings may be brought against a person unless that person is the author, editor or publisher of the statement that is complained about, or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it.

- “author” is defined as “the person from whom the statement originated, but does not include a person who did not intend the statement to be published”,
- “editor” is defined as “a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it”,
- “publisher” is defined as “a commercial publisher (that is to say, a person whose business is issuing material to the public or to a section of the public) who issues material containing the statement in the course of that business”.

Section 3 also specifies certain activities and actions that are not to be taken as constituting editing, in the specific context of statements in electronic form. This is intended to cover

⁷⁸⁹ Defamation and Malicious Publication (Scotland) Act 2021:

<https://www.legislation.gov.uk/asp/2021/10/enacted>

⁷⁹⁰ <https://www.legislation.gov.uk/asp/2021/10/section/3/enacted>

instances such as someone providing links to content containing an allegedly defamatory statement by way of, CD/DVD, removable flash memory card, email, retweeting such a statement or a hyperlink to it, “liking” or “disliking” an article containing such a statement, or posting another similar online “reaction” or “emoji” on republishing the statement. In all circumstances, for a person to avoid being considered the editor of the statement, the statement itself must remain unaltered.

It also sets out the further qualification that the persons publishing or marking interaction must not materially increase the harm caused by the original statement.

It sets out a list of activities that are not to be taken as placing a person in the category of an author, editor, or publisher. These include moderating and processing the material in relation to which proceedings are brought, making copies, and operating equipment. Moderating may involve performing functions offline, such as in relation to letters to the editor in hard copy newspapers and magazines, as well as online functions.

Section 4 of the Act,⁷⁹¹ “*Power to specify persons to be treated as publishers*” gives Ministers powers to make regulations specifying categories of persons who are to be treated as publishers of a statement, for the purposes of the bringing of defamation proceedings, despite not being persons who would be classed as authors, editors or publishers by virtue of section 3. This is designed to cater for a future scenario in which a new category of publisher emerges and is actively facilitating the causing of harm. The section also makes provision for further regulations for a defence to defamation proceedings, for persons who are treated as publishers under those regulations, but who did not know, and could not reasonably be expected to have known, that the material which they disseminated contained a defamatory statement and who satisfy any further conditions.

Section 30 of the Act⁷⁹², “*Power of court to require removal of a statement*”, provides that in defamation proceedings, a court may order the operator of a website on which the statement complained of is posted:

- to include on the website a prominent notice that the statement is subject to the proceedings, or
- to remove the statement, or
- any person who was not the author, editor or publisher of the statement to stop distributing, selling or exhibiting material containing the statement.

For a notice to be deemed prominent, it must be in a place or form that ensures that a person accessing the statement is made aware of the notice every time that the person accesses the statement.

In **Ontario**, the Law Commission Report on *Defamation Law in the Internet Age* contains a series of recommendations in relation to online aspects:⁷⁹³

⁷⁹¹ <https://www.legislation.gov.uk/asp/2021/10/section/3/enacted>; Defamation and Malicious Publication (Scotland) Bill Explanatory Notes: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/explanatory-notes-defamation-and-malicious-publication-scotland-bill.pdf>

⁷⁹² <https://www.legislation.gov.uk/asp/2021/10/section/30/enacted>; Defamation and Malicious Publication (Scotland) Bill Explanatory Notes: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/explanatory-notes-defamation-and-malicious-publication-scotland-bill.pdf>

⁷⁹³ *Defamation Law in the Internet Age, Final Report*, March, 2020.

Definition of Publication

The new Defamation Act should provide that a defamation action may only be brought against a publisher of the expression complained of. “Publisher” should be defined to require an intentional act of communicating a specific expression. The Act should also provide that a publisher of a defamatory expression should not be liable for republication of the expression by a third party unless the publisher intended the republication.

Online Complaints

Notice to Publisher – A person claiming that a publication is defamatory shall serve a prescribed notice of complaint on the publisher where it is reasonably possible to do so. For online publications, service may be made by sending the notice to an intermediary platform hosting the publication.

Contact Information – Intermediary platforms hosting third party content shall be required to post their contact information for the purpose of receiving notices of complaint in a conspicuous location on their platform.

Intermediary Platform Obligations

Forwarding a Notice – An intermediary platform receiving a notice of complaint that meets the content requirements shall make all reasonable efforts to forward the notice to the publisher of the allegedly defamatory content expeditiously.

No Assessment of Merits – Intermediary platforms shall not assess the merits of a notice of complaint.

Administrative Fee – Intermediary platforms may charge an administrative fee to the complainant for passing on notice in an amount to be established by regulation.

Retain Records – An intermediary platform receiving a notice of complaint meeting the content requirements shall retain records of information identifying the publisher for a reasonable period of time to allow the complainant to obtain a court order requiring the release of the information.

Applicable to intermediary platforms only – The notice obligation should apply to intermediary platforms hosting third party content made available to users. Internet service providers, search engines and other intermediaries not directly hosting user content should have no responsibility to pass on notice.

Online Dispute Resolution

The government should explore the potential for an online dispute resolution mechanism to improve access to justice in online defamation disputes. This review should take into account the possibility that, in the future, social media councils or other regulatory models may play a similar role to online dispute resolution, in informally resolving online defamation disputes.

Interlocutory Takedown Motions

The new Defamation Act should provide that, on motion by a plaintiff, the court in a defamation action may issue an interlocutory takedown or de-indexing order against any person having control over a publication, requiring its removal or otherwise restricting its accessibility pending judgment in the action, where:

- there is strong *prima facie* evidence that defamation has occurred and there are no valid defences; and
- the harm likely to be or have been suffered by the plaintiff as a result of the publication is sufficiently serious that the public interest in taking down the publication outweighs the public interest in the defendant's right to free expression.

Takedown Process

The new Defamation Act should provide for a takedown obligation on intermediary platforms hosting third party content. This takedown obligation shall operate in conjunction with the integrated notice regime above and should contain the following elements:

- Response – A publisher who receives a notice of complaint from an intermediary platform may send a response to the platform within two days after receipt of the complaint. A response must be written but need not be in any particular format. Where the intermediary platform receives a response within the deadline, it shall forward the response to the complainant (maintaining anonymity where necessary) and take no further action.
- Anonymity – Where a publisher is anonymous, the intermediary platform shall maintain that anonymity in regards to the complainant.
- No Assessment of Merits – Intermediary platforms shall not assess the merits of a response to a complaint.
- Takedown – Where an intermediary platform is unable to forward the complaint to the publisher or does not receive a written response from the publisher within two days after forwarding the complaint, it shall take down the allegedly defamatory content expeditiously.
- Content to be Taken Down – Intermediary platforms shall only take down the specific language that is alleged to be defamatory in the complaint.
- Put-Back – An intermediary platform taking down content shall provide notice of the takedown to the publisher and complainant. If a publisher requests put-back, the intermediary platform shall repost the content where there is evidence that the publisher failed to receive the notice or unintentionally missed the deadline and where it is technologically reasonable to do so.
- Administrative Fee – Intermediary platforms shall be entitled to charge an administrative fee to the complainant for these services, the amount to be determined by regulation.
- Statutory Damages – Failure by an intermediary platform to comply with its notice and takedown duties will entitle complainants to an award of statutory damages, the amount to be determined in the discretion of the court.
- Applicable to Intermediary Platforms only – The takedown obligation shall apply to intermediary platforms hosting user content. Internet service providers, search engines and other intermediaries not directly hosting user content shall have no responsibilities under this legislation.
- Information Resources – Intermediary platforms hosting user content available in Ontario shall post in a conspicuous location plain language information resources developed by the Ontario government on making a defamation complaint and the notice and takedown process.
- Abuse – A person filing a notice of complaint in bad faith or without a reasonable belief that the impugned content is defamatory shall be liable for statutory damages in an action brought by the publisher where the notice results in takedown, the amount to be determined in the discretion of the court.

Final Takedown Orders

The new Defamation Act should provide that, where a court gives judgment for the plaintiff in an online defamation action, the court may order any person having control over the defamatory publication to take it down or otherwise restrict its accessibility.

In **Australia**, the Model Defamation Amendment Provisions 2020⁷⁹⁴ contain the following provisions in relation to electronic aspects:

Content of offer to make amends

Section 15 makes provision for an offer to make amends that may include any other kind of offer, or particulars of any other action taken by the publisher to redress the harm sustained by the aggrieved person. The list of particulars include an offer to remove the matter from the website or location, if the matter has been published on a website or any other electronically accessible location.

Defence of innocent dissemination

Section 32 provides for a defence of innocent dissemination and includes

- a provider of services consisting of the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded;
- the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form;
- an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control;
- a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

Single publication rule

Schedule 4, 1A introduces a single publication rule based on the 2013 England and Wales Defamation Act. It also provides for the commencement of the limitation period in relation to electronic publications to be determined by reference to when the publisher uploads it for access or sends it electronically rather than by reference to when it is downloaded or received. This is limited to determining the commencement of the limitation period. Consequently, it does not change the law concerning when the elements for a cause of action for defamation are established or the choice of law for determining that cause of action.

Concerns Notice

Part 3 “Resolution of civil disputes without litigation” makes provision for a ‘Concerns notice’ from an applicant to a publisher in writing, specifying the location where the matter in question can be accessed (e.g. a webpage address), and informing the publisher of the defamatory imputations. An aggrieved person cannot commence defamation proceedings unless:

- the person has given the proposed defendant a concerns notice in respect of the matter concerned, and
- the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice, and
- the applicable period for an offer to make amends has elapsed.

⁷⁹⁴ https://www.pcc.gov.au/uniform/2020/Consolidated_Model_Defamation_Provisions.pdf

7.7 Issues raised in submissions

Online and offline parity

Several respondents expressed the view that any regulations and thresholds for defamation should apply to all media content, irrespective of the mode of publication. They argued that there should be no new differentiation between offline and online defamatory conduct.⁷⁹⁵ It was also argued that the requirements for proving publication in online defamation cases needs further clarification particularly in the case of false and defamatory material on the social networking sites.⁷⁹⁶

Innocent/Secondary Publication, and defence for website operators

Several respondents expressed the view that the 2009 Act does not adequately address online defamation, and in particular, the question of secondary publication. They proposed that the section 27 defence of innocent publication should be maintained, and extended to operators of websites, citing the example provided in sections 5 and 10 of the Defamation Act 2013 in England and Wales.⁷⁹⁷ In the event of such an extension, it was proposed that such defences be restricted to ISPs that follow statutory defamation complaints guidelines.⁷⁹⁸ Submissions also proposed that section 27 be reviewed, following the High Court judgment in *Muwema v. Facebook Ireland Ltd*⁷⁹⁹ in light of the European Court of Human Rights' general principles on freedom of expression and defamation.⁸⁰⁰

Third party online content/ User-Generated Content

Third party online content, User-Generated Content (UGC), or User-Created Content (UCC), includes any form of content (such as images, videos, text, and audio) that has been posted by users of online platforms such as social media sites, blogs or comment sections of websites - as opposed to content posted by the owners and operators of same.

Several respondents stated that greater clarity in relation to the responsibilities and liabilities of internet intermediaries regarding user-generated content was required;⁸⁰¹ and that greater protections were needed for online hosts with respect to alleged defamatory user-generated content on their sites.⁸⁰²

⁷⁹⁵ Technology Ireland, Law Society, Irish Times, Yahoo.

⁷⁹⁶ Law Society.

⁷⁹⁷ Automattic, DCU, Journal, McCann Fitzgerald, Google, Technology Ireland,

⁷⁹⁸ Public Relations Institute of Ireland: "Statutory guidelines on how complaints are to be made could include: the timeline for resolution of complaints; how issues can be expedited in particular and defined circumstances; how an item will be removed, including any follow up or related material; the requirement for a named person responsible for dealing with such complaints".

Similar guidelines have since been proposed for online entities as part of the proposed EU Digital Services Act (Dec 2020),

<https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-european-parliament-and-council-single-market-digital-services-digital>

⁷⁹⁹ [2016] IEHC 519.

⁸⁰⁰ Tarlach McGonagle, Eoin O'Dell, Dublin Institute of Technology.

⁸⁰¹ The Journal, DCCAE.

⁸⁰² DIT, Automattic.

It was argued that providers of news websites are at risk of being held liable for user-generated commentary below the articles they put up, if such commentary is defamatory, and that greater protections for online hosts are needed, with respect to alleged defamatory user-generated content on their sites.⁸⁰³ It was also argued that such a differentiation placed some news websites at a disadvantage when compared to defences available to other similar websites who meet the requirements of the e-Commerce Directive to be considered Internet Service Providers and the defences available to such designates (e.g. Facebook).⁸⁰⁴

It was proposed that legislation be adopted, similar to section 5 of the England and Wales Defamation Act 2013, to provide specific protections to news websites for third party comments, regardless of whether they are pre-monitored or not.⁸⁰⁵

It was also argued that ‘good faith moderation’ of user-generated content should not deprive a defendant online service provider or host of the ‘hosting defence’ that would otherwise be available to it under EU and Irish law in its capacity as an online service provider (e.g. e-Commerce Regulations (S.I. No. 68 of 2003)/e-Commerce Directive (2000)).⁸⁰⁶

Notice/Take-down/Initial Remedies

One submission contended that a more efficient mechanism is required for obtaining take-down of user-generated comments from social media sites. It argued that applying for a Norwich Pharmacal Order is prohibitively costly for a plaintiff, and also too slow to mitigate any damage caused by the time the order could be obtained and enforced.⁸⁰⁷

A number of online services providers argued that they should not have the responsibility of policing or censoring content on the internet, particularly in alleged defamation cases, and that the role of arbiter of online speech should remain with the judiciary.⁸⁰⁸

It was proposed that a standardised procedure (similar to the Notice of Complaint process under section 5 of the Defamation Act 2013 in England and Wales) should be introduced, as well as a provision similar to section 13 outlining Court Orders to remove a third party statement or cease distribution etc.⁸⁰⁹ Twitter suggested that the US preliminary injunction process in cases of alleged defamation is a possible model.⁸¹⁰

Google proposed that any notice and takedown procedures envisaged should be compatible with those of the e-Commerce Directive and e-Commerce Regulations in addressing notifications of allegedly unlawful information.⁸¹¹

⁸⁰³ DIT, Automatic.

⁸⁰⁴ DIT.

⁸⁰⁵ Newsbrands, Yahoo!, INM, Technology Irl,

⁸⁰⁶ Local Ireland, NUJ.

⁸⁰⁷ William Fry.

⁸⁰⁸ Google, Yahoo!, Automatic, Twitter.

⁸⁰⁹ McCann Fitzgerald, Technology Irl, Eoin O’Dell, Yahoo!, Google.

⁸¹⁰ Twitter. The US preliminary injunction process enables a plaintiff to apply to a court for an initial ruling that a published statement is likely/capable of being found defamatory before their case enters a full litigation process. If the plaintiff receives such an order, platforms and online services can give due consideration to such an order and take action on content containing the statement where appropriate.

⁸¹¹ Google.

7.8 Options for Reform

The following options were identified:

- specify that any regulations and thresholds for defamation should apply to all media content irrespective of the mode of publication;
- clarify the requirements for proving online publication;
- extend the existing defence of ‘innocent publication’ to operators of websites;
- introduce standardised Notice of Complaint process and procedures;
- make specific statutory provision for courts to order an intermediary to remove a third-party statement or cease its distribution, or to do so while proceeding are ongoing;
- specify that moderation of user-generated content should not deprive an online service provider, or host, of the ‘hosting defence’ otherwise available under EU and Irish law; and
- provide a statutory jurisdiction for the High Court and the Circuit Court to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material).

Option 1: Specify that any regulations and thresholds for defamation should apply to all media content online, irrespective of the mode of publication

Arguments in favour

- Current law does not address publication and dissemination of defamatory material via ‘non-traditional’ media such as social networking sites, internet service providers and bloggers.
- Traditional media publishers face risk of defamation and legal burdens in the digital world, but non-traditional publishers, such as large ISPs, do not.
- All online publishers should be subject to the same degree of regulation as traditional media, given their shared capacity for rapid dissemination of content, and potential for reputational damage.

Arguments against

- Smaller websites, online entities and bloggers do not always operate along the same professional standards, publishing models or parameters as traditional media.
- Some persons and groups operating smaller websites, online entities and blogs are not always personally identifiable or readily contactable, and would not have the same level of editorial control as traditional media has over non-online content.
- In other jurisdictions, the emerging consensus on the issue of online liability is to define and differentiate between those who should ordinarily be considered ‘author’, ‘editor’ or ‘publisher’, and those who should not.
- Differing treatment and liabilities are already applied to certain types of Internet Service Providers under the EU e-Commerce Directive; and obligation proposals

under the EU Digital Services Act continue to make graduated distinctions between intermediary service providers according to their scale.

Based on the submissions received and the experience in other relevant jurisdictions, **it is not recommended** that the same regulations and thresholds for defamation should apply to all media content, irrespective of the mode of publication.

Such an approach would not reflect the many varying standards, publishing models or parameters in the modern media landscape. It would not reflect the current focus in other jurisdictions, which is to define and differentiate between those who should ordinarily be considered ‘author’, ‘editor’ or ‘publisher’, and those who should not. It would not reflect the varying treatment, liabilities and distinctions between information society service providers, already provided under the e-Commerce Directive. The proposed EU Digital Services Act continues to make similar graduated distinctions (and introduces additional ones, in the case of Very Large Online Platforms).

Option 2: Clarify the requirements for proving online publication

Arguments in favour

- Current law does not address the issue of online publication in any great detail, or in its own right.
- Current law only provides generic definitions for “electronic communications”, “periodicals” and “statements” ‘published on the internet’; and does not reflect the variety and nature of content uploaded to, or interacted with, on social media.
- The Defamation and Malicious Publication (Scotland) Act 2021 defines and distinguishes between ‘author’, ‘editor’ and commercial ‘publisher’; specifies certain activities and actions that are not to be taken to place a person in the category of an editor in the specific context of statements in electronic form; and makes provision for future regulations to classify further categories of persons who may be treated as publishers of a statement, for the purposes of the bringing of defamation proceedings.
- The Northern Ireland Report made similar recommendations regarding differentiation between author, editor and publisher.
- The Ontario Law Commission Report recommended that defamation actions should only be brought against a publisher of the expression complained of; that “publisher” should be defined to require an intentional act of communicating a specific expression; and that a publisher of a defamatory expression should not be liable for republication of the expression by a third party, unless the publisher intended the republication.

Arguments against

- The nature of publication versus dissemination on social media is complex, particularly given its potentially very high public visibility, potentially ephemeral nature, and the high risk of re-publication inherent in a social media context, particularly private groups and pages.

- Efforts to identify persons behind non transparent social media content are not always straightforward, and are complicated by user anonymity.
- Intermediary service providers are reluctant to divulge user data and details without a court order.
- Even if online publication is established, it may be difficult to measure its impact – given the varying levels of potential audience reach of different online media platforms and the difficulty of comparing the quantifiable alt-metrics of a social media post that is viewed by a large number of people, with the qualitative impact of a post that was viewed by a few.
- Establishing a unique electronic identifier, origin or initial publication point is not always straightforward, due to differing technological architecture in use by different social media platforms.⁸¹²

Based on the submissions received and the experience in other relevant jurisdictions, **it is recommended** that clarifying requirements in relation to online publication by providing definitions and/or thresholds would be beneficial.

Doing this would reflect the approaches and direction taken in other comparable jurisdictions. Clarifying liabilities and/or defences in relation to primary online ‘authors’, ‘editors’ or ‘publishers’ - as opposed to online ‘publication’ as an entity in itself - would help to avoid many technical complexities, infrastructure and issues regarding various social media platforms.

Option3: Extend existing defence of ‘innocent publication’ to operators of websites

Arguments in favour

- The Act does not address user-generated content (third-party comments).
- Responsibility for user-generated content and posts should lie with those who have created it. Internet intermediaries, in most cases, are not the publisher, editor or author of content, and should not be liable for such.
- The Act already contains the basis of such a defence of innocent publication.
- Conflicting case-law in recent years has created potential for stakeholder uncertainty on whether the hosting defence in the e-Commerce Directive is available regarding comments posted on websites.
- Such a defence already exists in England and Wales, and similar proposals have been made in Scotland, Northern Ireland, Australia and Ontario.
- The Legal Advisory Group on Defamation recommended a much more extensive defence of innocent publication than was ultimately enacted, involving an integration

⁸¹² <https://www.irishtimes.com/news/crime-and-law/courts/high-court/facebook-unable-to-find-allegedly-defamatory-post-about-td-1.4459670>

of defence of innocent publication and the operation of the e-Commerce Directive immunities and notice-and-takedown procedures.

Arguments against

- It is not always clear whether the e-Commerce Directive's exemptions from liability for intermediary service providers should apply, certain providers also perform editing functions, such as operators of websites which seek and host third-party reviews, opinions or feedback on goods and services (e.g. TripAdvisor, eBay, Amazon).

Based on the submissions received and the experience in other relevant jurisdictions, **it is recommended** that extending the existing defence of 'innocent publication' to operators of websites would be beneficial. The Act already contains the basis of such a defence of innocent publication. Doing so would reflect the approaches and direction taken in other comparable jurisdictions.

Option 4: Introduce standardised Notice of Complaint process and procedures

Arguments in favour

- Defamation in the online world can be immediate, and any potential remedies need to be faster.
- Current complaint and removal processes from social media platforms can be slow to access or communicate, involve administrative delays, and are not user friendly.
- There are a variety of notification procedures and practices among hosting service providers, who may process terms of service violations separately from legal requests, or have a single contact point. Notices are handled differently by each service provider.⁸¹³
- The proposed change would provide a more timely and efficient process of alerting internet intermediaries, hosts and platforms to potential defamatory content, than the existing legal route of seeking Norwich Pharmacal orders.
- In England and Wales, such a process is provided for, in the 2013 Act and Regulations.
- The Law Commission of Ontario Report recommends a new integrated notice regime applicable to all defamation complaints that:
 - is mandatory for complainants but does not preclude them from accessing the formal court process;
 - encourages parties to agree on a range of informal remedies appropriate to the internet era; and
 - operates consistently in respect of both offline and online publications.

⁸¹³ Overview of the legal framework of notice-and action procedures in Member States, SMART 2016/0039: <https://op.europa.eu/en/publication-detail/-/publication/c5fc48ac-2441-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-search>

The Ontario Report recommends a prescribed notice of complaint on the publisher, where possible; and for online publications, service may be made by sending the notice to an intermediary platform hosting the publication. Intermediary platforms hosting third party content shall be required to post their contact information for the purpose of receiving notices of complaint in a conspicuous location on their platform. It also recommends that a standardized form of notice be developed to make it easier for intermediary platforms to comply with their obligation to pass on notice. It expressed the view that a form of notice containing language modelling the elements of a defamation claim and possible defences would have the additional benefit of assisting complainants to “understand and diagnose their problem, and frame their complaint.

- In the Australian Model Defamation Provisions, defamation proceedings cannot be commenced without a ‘Concerns Notice’. Part 3 ‘Resolution of civil disputes without litigation’ makes provision for a ‘Concerns notice’ from an applicant to a publisher in writing, specifying the location where the matter in question can be accessed (e.g. a webpage address), and informing the publisher of the defamatory imputations. An aggrieved person cannot commence defamation proceedings unless:
 - the person has given the proposed defendant a concerns notice in respect of the matter concerned,
 - the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice, and
 - the applicable period for an offer to make amends has elapsed.
- In relation to the limitation of liability of providers of information society services, the e-Commerce Directive does not exclude possible procedures established for the purpose of notification at national level, and provides for the possibility of Member States’ “*establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information*”.⁸¹⁴

Arguments against

- Online intermediaries and service providers should not have the responsibility of policing defamation allegations or censoring content on the internet. The role of arbiter of online speech should remain with relevant judiciaries.
- In England and Wales, it has been reported that the take up of the section 5 procedure for responding to defamation complaints concerning third-party content has been very low, with no reported cases in which section 5 has been invoked at a hearing. The procedure is seen as complicated, and website operators are often able to rely on other substantive defences.⁸¹⁵
- The e-Commerce Directive does not provide common notice-and-action procedure, nor is there a common standard for minimum notice requirements.⁸¹⁶

⁸¹⁴ Recital 46, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&rid=5>

⁸¹⁵ <https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/>

⁸¹⁶ *Overview of the legal framework of notice and action procedures in Member States*, SMART 2016/0039: <https://op.europa.eu/en/publication-detail/-/publication/7779caca-2537-11e9-8d04-01aa75ed71a1/language-en>

- Similar procedures and complaint procedures are envisaged by the forthcoming EU Digital Services Act for information society providers in addressing notifications of allegedly unlawful information.⁸¹⁷ The Act proposes that online platforms and other providers of hosting services put mechanisms in place to allow any individual or entity to notify them of the presence on their service of alleged illegal content. These mechanisms must be easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means.

Based on the submissions received and the experience in other relevant jurisdictions, **it is recommended** to introduce a prescribed Notice of Complaint process, with time limits, such as that envisaged by Australia and Ontario, which incentivise parties to make contact at an early stage, use the intermediary role of internet platforms in connecting complainants and online publishers, and promote the possibility of swift resolution of defamation disputes without recourse to litigation.

Option 5: Make specific statutory provision for the court to order an intermediary to remove a third-party statement or cease its distribution (final order), or to do so while proceedings are ongoing (interlocutory order)

Regarding a final order:

Arguments in favour

- In England and Wales, section 13 of the Defamation Act 2013 makes provision for a court order to remove the statement or to cease its distribution. Where a court gives judgment for the claimant in a defamation action, the court may order the operator of a website on which the defamatory statement is posted to remove the statement, or order any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing it.
- The Ontario Law Commission Report recommended providing that where a court gives judgment for the plaintiff in an online defamation action, it may order any person having control over the defamatory publication to take it down or otherwise restrict its accessibility.
- A statutory provision empowering the court to order the removal of a specific statement would be beneficial in cases where the author has refused to do so, especially if a claimant has secured a final injunction to prevent publication, or has secured a judgment that it was defamatory.

Arguments against

- It has been argued that the decision of the Supreme Court in *Merck Sharp & Dohme v. Clonmel Healthcare Limited*⁸¹⁸ highlighted the question of the settled *Campus Oil*⁸¹⁹ test for determining injunctive relief, with the Court emphasising the need for essential

⁸¹⁷ Article 14, Notice and action mechanisms, and Article 17, Internal complaint-handling system; *Proposal for a regulation of the European parliament and of the Council, on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC:*

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en>

⁸¹⁸ [2019] IESC 65.

⁸¹⁹ See: *Campus Oil Ltd v Minister for Industry and Energy* [1984] ECR 2727.

and increased flexibility of the remedy going forward. This will likely apply to all injunction applications.⁸²⁰

- In England and Wales, there has been no reported case of a court making such an order under section 13 of the Defamation Act 2013.
- Many of the leading social media platforms tend to voluntarily remove material which is subject of a court order, even if the order does not touch upon them directly.

Regarding an order while proceedings are ongoing (interlocutory order):

Arguments in favour

- In Scotland, section 20 of the Defamation and Malicious Publication (Scotland) Act 2021 empowers the court to order the removal of material which is the subject of defamation proceedings from any website on which it appears, as well as to order a person who was not the author, editor, or publisher of the material to stop distributing, selling, or exhibiting material containing the statement. The exercise of the power is not dependant on the final outcome determined in proceedings, and as such, the court would be entitled in an appropriate case to grant such an order on an interim basis.
- The Ontario Law Commission Report made a series of recommendations for a takedown obligation on intermediary platforms hosting third party content in conjunction with an integrated notice regime, including:
 - that the takedown obligation shall apply to intermediary platforms hosting user content. Internet service providers, search engines and other intermediaries not directly hosting user content shall have no responsibilities under this legislation;
 - where an intermediary platform is unable to forward the complaint to the publisher or does not receive a written response from the publisher within two days after forwarding the complaint, it shall take down the allegedly defamatory content expeditiously;
 - intermediary platforms shall only take down the specific language that is alleged to be defamatory in the complaint;
 - intermediary platforms shall be entitled to charge an administrative fee to the complainant for these services, the amount to be determined by regulation;
 - failure by an intermediary platform to comply with its notice and takedown duties will entitle complainants to an award of statutory damages, the amount to be determined in the discretion of the court;
 - a person filing a notice of complaint in bad faith, or without a reasonable belief that the impugned content is defamatory, shall be liable for statutory damages in an action brought by the publisher where the notice results in takedown, the amount to be determined at in the court's discretion.

Arguments against

- Interlocutory injunctions are already available in the Irish courts.

⁸²⁰ ‘Joanne Ryan: *Interlocutory injunctions and the fallout from Merck Sharpe & Dohme*’: <https://www.irishlegal.com/article/joanne-ryan-interlocutory-injunctions-and-the-fallout-from-merck-sharpe-dohme>; ‘*Tipping the Balance: Interlocutory Injunctions in Ireland Refreshed*’: <https://www.lexology.com/library/detail.aspx?g=9431f3c4-7b6d-45d2-81a2-ff024ee5c27b>

- Need to strike the appropriate balance between the rights of the multiple parties, access to justice and freedom of expression.
- May be utilised in SLAPP actions to chill free speech, legitimate criticism, healthy debate, and genuine investigative journalism.
- Strong preference by internet intermediaries for leaving content accessible to users, in its original form, until a court process determines whether the material should be left up or taken down on a proper evaluation of the evidence.
- May result in increase in vexatious allegations on dubious grounds, with an increase in applications to court and internet intermediaries being required to remove large amounts of content.
- Practical and technical considerations involved in content removal, and the ease with which content can be re-uploaded subsequently to other sites, may cause compliance difficulties for internet intermediaries.

Based on the submissions received and the experience in other relevant jurisdictions, **it is recommended** to make statutory provision for Courts to order an intermediary to remove a third-party statement or cease its distribution, or to do so while proceedings are ongoing.

While section 33 of the 2009 Act provides for a Court to make an interlocutory order prohibiting the publication of a defamatory statement, subsequent judgments have pointed to a disparity of language in the 2009 Act in relation to ‘orders’ and ‘opinion’, and confirmed that the threshold to obtain injunctive relief under the 2009 Act remains as high as that previously available at common law.

Introducing a faster mechanism for the court to rule on whether material appears defamatory, to enable online platforms to take down material quickly under protection of an initial court ruling, would provide a more effective and less expensive alternative.

Option 6: Provide that moderation of user-generated content should not deprive an online service provider or host of the ‘hosting defence’ otherwise available under EU and Irish law.

Arguments in favour

- It is next to impossible to check the factual basis of statements or the honesty of the opinion expressed in user-generated comments, given the volume of traffic, posts and 24-hour nature of websites.
- Automatic pre-moderation of user-generated content is regularly employed to filter out obscene language and attempted spam, but does not involve deliberate editorial selection of content.
- Such ‘good faith’ moderation and/or modification (both human and automated) of user-generated content by an online service provider should not deprive the provider of the defence that would otherwise be available to it, under EU and Irish law, in its capacity as an online service provider.

Arguments against

- The ‘hosting’ defence set out in the e-Commerce Regulations (S.I. No. 68 of 2003), implementing the e-Commerce Directive, already exempts an online service provider from liability for defamatory user-generated content, if the provider takes down the material expeditiously, once it is notified or otherwise becomes aware of its defamatory nature.
- To benefit from the liability exemption under Article 14 e-Commerce Directive, the hosting service provider must carry out an activity of a mere technical, automatic and passive nature, which requires that it does not have knowledge or control over the information stored (passive and neutral hosting service provider). The CJEU linked the liability exemption under Article 14 to Recital 42 of the e-Commerce Directive, which requires that the activity is ‘of a mere technical, automatic and passive nature’.
- Exemption from liability is thus available only to passive and neutral hosting service providers. The CJEU has provided some guidance, requiring that the hosting service provider must not have knowledge and control over the data stored. However, absence of knowledge or control must be evaluated in relation to each activity. Recent case-law indicates that hosting service providers may be neutral and passive for certain activities but active for others.
- According to the case-law reviewed, classification as an active hosting service provider stems mainly from the ‘human component’ in the categorisation of the uploaded content rather than an algorithm, or from advertising by means of support or promotion of offers, by way of "adopting" the third-party content, or from active promotion of sales through similar offer banners.⁸²¹

Based on the experience in other relevant jurisdictions, **it is not recommended** to make provision that ‘moderation’ of user-generated content should not deprive an online service provider or host of the ‘hosting defence’ otherwise available under EU and Irish law. The area is complex in terms of EU case-law, and is likely to be the subject of further guidance from the Court of Justice of the EU and of further provision under the EU Digital Services Act (when adopted).

Option 7: Provide a statutory jurisdiction for the High Court and the Circuit Court to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material)

Arguments in favour

- This option was among the recommendations made by the Law Reform Commission in its 2016 Report ‘*Harmful Communications and Digital Safety*’ (see section 7.5.1 of this chapter) and is particularly relevant in defamation cases.
- The Circuit Court has jurisdiction to hear and decide defamation cases (including online defamation), but no jurisdiction to make a Norwich Pharmacal order.

⁸²¹ *Overview of the legal framework of notice-and action procedures in Member States*, SMART 2016/0039: <https://op.europa.eu/en/publication-detail/-/publication/c5fc48ac-2441-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-search>

- Making a Norwich Pharmacal order available in the Circuit Court should also reduce the costs involved for all parties (and particularly for the plaintiff, who often has to pay the online services provider's legal costs, as well as their own) and ensure that such orders are more accessible in practice.

Arguments against

- No significant arguments against were identified.

Based on these considerations, it is recommended to provide a statutory power to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material), and that such orders could be granted by the Circuit Court (along the lines recommended by the Law Reform Commission in 2016) rather than only by the High Court, as at present.

Chapter 8: Recommendations

KEY RECOMMENDATIONS

Damages and juries

- Abolish the use of juries in High Court defamation cases: provide that all defamation cases will be heard by a judge alone, sitting without a jury. The judge will decide the nature and level of redress, including the amount of any damages, as well as whether defamation has occurred;

(As well as reducing the incidence of excessive or disproportionate awards, this change is expected to significantly reduce delays and legal costs, reduce the length of hearings, provide greater certainty which will facilitate earlier settlement, and ensure greater transparency on the reasoning behind decisions);

- Clarify (following the 2018 Supreme Court judgment in *Higgins v Irish Aviation Authority*) that where a defendant makes an offer of amends, the damages to be fixed by the court, in default of agreement between the parties, will be fixed by a judge sitting alone, not by a jury;
- It is not recommended to introduce a book of quantum for defamation damages;

(Superior court judgments have expressed the view that such an approach is very difficult to apply to the defamation context, where the injury is mainly intangible; the book of quantum was based on data from about 51,000 personal injuries cases with extensive specialised medical evidence on the extent and progression of the defendant's injuries, but there are far fewer defamation cases to generate a range of data and as High Court defamation cases are normally decided by a jury, no information is available on the reasons for the amount awarded);

- Allow a defendant to make a lodgement in court, by way of reasonable compensation offer, where it has made an offer of amends but the parties cannot agree on quantum of damages - in order to facilitate early settlement of proceedings;
- It is not recommended to introduce a cap on damages in defamation cases.

(This would give rise to difficult constitutional issues, which would need very careful consideration. Moreover, a statutory cap would also risk being too rigid. In England and Wales, there is no statutory cap for damages in defamation cases, and an informal judge-made maximum is used. This suggests that the guidance on proportionality and appropriate ranges for awards that is provided in judgments of the Supreme Court and Court of Appeal may similarly, in Ireland, prove more effective than a statutory cap.)

Taking defamation proceedings and court procedures

- To reduce delays and address the proliferation of stale claims, provide an express power for the court to dismiss a defamation claim that is not progressed by the plaintiff within 2 years of issue, unless special circumstances justify the plaintiff's delay;
- To address the perceived risk of international forum-shopping or 'defamation tourism' into Ireland: require the court to be satisfied that Ireland is 'clearly the most appropriate place' for action to be brought (as in England and Wales), in cases not falling under the rules of the Brussels I Recast Regulation or of the e-Commerce Directive;
- It is not recommended to abolish the presumption of falsity in defamation cases (i.e. to require that a person claiming defamation must prove that the defamatory statement is untrue, before the court will consider whether it is defamatory).

(The fairest approach is that the responsibility to proving the truth or untruth of a defamatory statement should lie with the person who chose to make that statement. To reverse that approach risks preventing the plaintiff from being able to vindicate their reputation - it may be very difficult to 'prove a negative' for example – and could raise constitutional difficulties.

However, keeping the presumption of falsity should be balanced by this Report's other recommendations (below) on introducing a 'serious harm' test in relation to certain 'transient defamation' claims, on strengthening the defence of fair and reasonable publication in the public interest, and on introducing an 'anti-SLAPP' summary dismissal mechanism.

The latter two recommendations also address the concern expressed, that an investigative journalist might be unable to prove that their article was true, if journalistic ethics prevented them identifying their sources.);

- It is not recommended to introduce a general requirement for a plaintiff to first prove a 'serious harm' test; however, this should be considered in the two instances below:
 - Consider introducing a 'serious harm' test for certain 'transient defamation' claims (claims regarding a statement made in non-permanent form, in the course of providing or refusing retail services) to prevent frivolous or vexatious actions;
 - Provide (as in other common law jurisdictions) that a body corporate may not sue for defamation of its reputation unless it first shows that the statement has caused or is likely to cause serious harm: in the case of a body that trades for profit, this means serious financial loss; consider whether small entities such as SMEs should be exempted from this requirement;
- Consider whether to provide (as in England, Wales and Scotland) that a public body is not entitled to sue for defamation of its own reputation (such a change would not prevent it from suing on behalf of one of its employees or officers, if they are defamed arising from their work);

- Introduce a new ‘anti-SLAPP’ mechanism, to allow a person to apply to court for summary dismissal of defamation proceedings that he/she believes are a SLAPP. *(SLAPP stands for ‘Strategic Lawsuit Against Public Participation’: the concept originated in North America in the 1990s, but is now widely used. Essentially, it refers to the strategic and abusive use by a powerful entity of vexatious litigation, to weaken and deter public interest discussion (and in particular, investigative journalism).*

A typical SLAPP is a groundless or grossly exaggerated lawsuit - typically issued by wealthy companies or individuals, against weaker parties who have engaged in criticism or debate that is uncomfortable to the litigant, on an issue of public interest. The purpose of the lawsuit is to censor, silence and intimidate the critics, by burdening them with deliberately maximised costs of legal defence until they abandon their criticism or opposition.

Many of the submissions to the Review echoed this concept, with media organisations in particular complaining of defamation proceedings, and maximised legal costs, being used by wealthy interests to threaten and silence investigative journalism.);

- Recommend removal of the blanket exclusion of defamation claims from eligibility for civil legal aid, under the Civil Legal Aid Act: this issue, together with the relative priority to be afforded to defamation cases, should be considered within the forthcoming overall review of civil legal aid;
- Encourage proactive judicial case management of defamation claims, in line with the Kelly Report, in order to reduce delays and costs;
- No increase in the limitation period to bring a defamation action (currently one year, exceptionally the court may authorise up to two).

Defences

- Simplify and clarify the defence of ‘fair and reasonable comment in the public interest’, on the lines applied in UK jurisdictions and in Canada, to provide a defence where a statement is on a matter of public interest, the publisher reasonably believed that its publication was in the public interest and the defendant acted responsibly in the circumstances regarding trying to verify the accuracy of the statement;

(This defence is particularly important for the media, but is available to any publisher of a statement);

- Amend the defence of innocent publication, as recommended by the Report of the Legal Advisory Group and proposed by NUJ, to exempt a broadcaster from liability for a defamatory statement made by a third party during a live broadcast, provided that it has taken reasonable precautions prior to the broadcast, and exercises reasonable care during the broadcast;
- Amend the defence of ‘honest opinion’ to remove the condition that the speaker must have believed the opinion to be true - as opinions are usually subjective, not factual.

Promoting ADR

- Provide a statutory obligation for parties to a defamation dispute to consider mediation (as under the General Scheme of the Online Safety and Media Regulation Bill 2020);
- Require solicitors representing clients in defamation cases to advise their clients, before issuing proceedings, of the availability of mediation under the Mediation Act 2017, the redress and mediation options provided by the Press Council and Press Ombudsman, and the right of reply scheme provided by the Broadcasting Authority of Ireland;
- Clarify that online publications by members of the Press Council, and online-only news sites who apply for membership of the Press Council, are included within its remit; consider also opening membership to online publications by broadcasters (which, unlike broadcasts, are not covered by the Broadcasting Act);
- Include participation by a party in alternative dispute resolution processes among the factors to be considered by a judge in assessing the redress to be awarded in defamation proceedings.

Special measures for digital or online defamation

- Provide for a statutory Notice of Complaint process, on the lines envisaged by the e-Commerce Regulations, recommended by the Law Commission of Ontario, and provided by the Australia Model Defamation Law - to make it easier, quicker and cheaper to notify an online publisher (including intermediary platforms) of defamatory content and request its takedown, or request identification of the poster; and define a timeframe for the required ‘expeditious’ removal of defamatory content, to provide clarity and support early and quick resolution of disputes;
- Provide that the defence of innocent publication applies to operators of websites (including non-commercial websites) in relation to user-generated comment, (as in UK jurisdictions, Australia and Ontario), subject to the obligation to take down content expeditiously, and/or identify the poster, if notified of defamatory content;
- Provide a statutory power to grant a ‘*Norwich Pharmacal*’ order (directing an intermediary services provider to disclose the identity of an anonymous poster of defamatory material), and that the Circuit Court, as well as the High Court, is empowered to make such an order, along the lines recommended by the Law Reform Commission in 2016.

Special measures for both online and non-online defamation

- Following recent court judgments, revise sections 28, 30, 33 and 34 of the Defamation Act 2009 to clarify the tests that must be satisfied for the court to make an order (including an interlocutory order) prohibiting further publication (a ‘take-down order’),

an order declaring that a statement is defamatory, a correction order, or an order for summary relief;

- Review the statutory requirement at section 33 of the Defamation Act for the plaintiff, having proved that the statement is defamatory, to also establish that the defendant has no defence likely to succeed, before the court can grant an interlocutory take-down order;
- Amend section 30 of the Act ('Correction order') to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

DETAILED RECOMMENDATIONS

Chapter 2: Bringing Defamation Proceedings

Options for reform: Presumption of falsity

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- abolish the presumption of falsity;
- reverse the burden of proof and make falsity an element of the tort to be proved by the plaintiff where the standards of responsible journalism outlined in section 26 of the Act have been followed;
- retain the presumption of falsity, but ensure that it is balanced by measures to protect investigative journalism, such as an effective defence of reasonable publication in the public interest;
- do nothing.

Recommendations

The following option is recommended:

- Option 3: Retain the presumption of falsity, but ensure that it is balanced by measures to protect investigative journalism and other public-interest debate, such as an effective defence of reasonable publication in the public interest (see chapter 3) and/or an anti-SLAPP mechanism.

The following options are not recommended:

- Option 1: Abolish the presumption of falsity;
- Option 2: Reverse the burden of proof and make falsity an element of the tort to be proved by the plaintiff where the standards of responsible journalism outlined in section 26 of the Act have been followed; and
- Option 4: Do nothing.

Options for reform: Serious harm

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- introduce a serious harm test;
- introduce a serious harm test in cases of limited publication in a non-permanent form during the provision of goods and services.

Recommendations

Provided that there are no constitutional constraints, the following option is recommended:

- Option 2: Consider introducing a serious harm test, limited to cases where the alleged defamation consists of limited publication in a non-permanent form during the provision of goods and services.

The following option is not recommended:

- Option 1: Introduce a serious harm test generally.

Options for reform: Defamation of a class of persons

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- limit the number of persons that can be in a class or group in order for an individual member to be able to take a defamation action;
- allow a class or group of persons to take an action.

Recommendations

It is recommended:

- that section 10 of the Defamation Act 2009 should not be amended; and
- that any question in relation to multi-party or class actions should be considered in the context of implementation of the Report on the 'Review of the Administration of Justice'.

Options for reform: Bodies corporate

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss;
- provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm ; in the case of a body that trades for profit, this means serious financial loss;
- do nothing.

Recommendations

The following option is recommended:

- Consider Option 2: Provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm; in the case of a body that trades for profit, this means serious financial loss; consider whether small entities such as SMEs should be exempt from this requirement.

The following options are not recommended:

- Option 1: Provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss; and
- Option 3: Do nothing.

Options for reform: Position of public bodies

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide for a limit on the amount of damages that can be awarded to a public sector/state body;
- provide for a limit on the amount of damages that can be awarded to a public authority;
- provide that a public authority is not entitled to bring a defamation action;
- do nothing.

Recommendations

The following option is recommended:

- Option 3: Consider whether to provide that a public authority is not entitled to bring a defamation action.

The following options are not recommended:

- Option 1: Provide for a limit on the amount of damages that can be awarded to a public sector/state body;
- Option 2: Provide for a limit on the amount of damages that can be awarded to a public authority; and
- Option 4: Do nothing.

Defamation of the Dead: Options for reform

Based on the submissions received and the experience in other relevant jurisdictions, the following option was identified:

- repeal section 39 of the Act (which provides for survival of a defamation on the death of the plaintiff).

Recommendation

The following option is not recommended:

- Repeal section 39 of the Act (which provides for survival of a defamation on the death of the plaintiff).

Chapter 3: Defences

Options for reform: Defence of truth

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- require the plaintiff to prove that the words complained of are untrue;
- amend section 16 to allow for the defence of truth where the defendant proves that the statement is true or substantially true;
- provide that pleading the defence of truth should not give rise to the award of aggravated damages;
- do nothing.

Recommendation

It is recommended that the defence of truth as set out in section 16 of the Act should not be amended.

Options for reform: Absolute privilege

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- extend the territorial scope of absolute privilege under section 17, to cover fair and accurate reports of public proceedings in certain international courts and in the courts of certain specified other States;
- amend the Act, as suggested in the Law Reform Commission Report, to clarify what is protected under section 17 as a ‘fair and accurate’ report of court proceedings in Ireland.

Recommendations

The following options are recommended:

- Option 1: Extend the territorial scope of absolute privilege under section 17 to cover fair and accurate reports of public proceedings in certain international courts and in the courts of certain specified other States; and
- Option 2: Amend the Act as suggested in the Law Reform Commission Report to clarify what is protected under section 17 as a ‘fair and accurate’ report of court proceedings in Ireland.

Options for reform: Qualified privilege

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- extend the territorial scope of qualified privilege under paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1, to protect fair and accurate reports of press releases and other documents published by courts, Government Departments, local authorities, and police commissioners, of certain countries other than Ireland, other EU Member States and the United Kingdom; and of proceedings of an association, a public meeting, a company general meeting or a meeting of a local authority or an equivalent body to the Health Service Executive, in certain countries other than Ireland, other EU Member States and the United Kingdom;
- extend qualified privilege to cover court reports that fall below the “fair and accurate” standard;
- provide for a defence of peer-reviewed statement in scientific or academic journals;
- specify that qualified privilege applies to responses to public consultations;

- amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the UK (or in certain countries to which the territorial scope is extended under the option above).

Recommendations

The following options are recommended:

- Option 1: Extend the territorial scope of qualified privilege under paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1, to protect fair and accurate reports of press releases and other documents published by courts, Government Departments, local authorities, and police commissioners, of certain countries other than Ireland, other EU Member States and the United Kingdom; and of proceedings of an association, a public meeting, a company general meeting or a meeting of a local authority or an equivalent body to the Health Service Executive, in certain countries other than Ireland, other EU Member States and the United Kingdom; and
- Option 5: Amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the UK (or in certain countries to which the territorial scope is extended under the option above).

The following options are not recommended:

- Option 2: Extend qualified privilege to cover court reports that fall below the “fair and accurate” standard;
- Option 3: Provide for a new defence of peer-reviewed statement in scientific or academic journals; and
- Option 4: Specify that qualified privilege applies to responses to public consultations.

Options for reform: Honest opinion

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- remove the requirement on the defendant to prove the truth of the opinion;
- remove the requirement that facts referred to in the statement be known, or might reasonably be expected to be known, by the persons to whom the statement was published;
- remove the requirement that the statement must relate to a matter of public interest;
- provide for an honest opinion defence along the lines of section 3 of the England and Wales Defamation Act 2013;
- provide for an honest opinion defence along the lines proposed in the report on the *Reform of Defamation Law in Northern Ireland*.

Recommendations

The following option is recommended:

- Option 1: Remove the requirement on the defendant to prove that the opinion was believed to be true.

The following options are not recommended:

- Option 2: Remove the requirement that facts referred to in the statement be known, or might reasonably be expected to be known, by the persons to whom the statement was published;
- Option 3: Remove the requirement that the statement must relate to a matter of public interest;
- Option 4: Provide for an honest opinion defence along the lines of section 3 of the England and Wales Defamation Act 2013; and
- Option 5: Provide for an honest opinion defence along the lines proposed in the report on the *Reform of Defamation Law in Northern Ireland*.

Options for reform: Offer of amends

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- amend section 23 to provide that the reference to the High Court (for the purposes of the assessment of damages under section 23(1)(c)) means a judge sitting without a jury;
- set out the discount procedure in section 23;
- allow for determination of damages by an alternative disputes resolution process without reference to the court, or for a stay pending ADR determination of any proceedings that had been issued, where the parties so agree;
- amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence;
- extend the scope of section 29 to cases where the defendant made an offer of amends.

Recommendations

The following options are recommended:

- Option 1: Amend section 23 to provide that the reference to the High Court [for the purposes of the assessment of damages under section 23(1)(c)] means a judge sitting without a jury (this recommendation will not be relevant if the recommendation to abolish juries is accepted); and
- Option 4: Amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence.

The following options are not recommended:

- Option 2: Set out the discount procedure in section 23; and
- Option 3: Allow for determination of damages by an alternative disputes resolution process without reference to the court, or for a stay pending ADR determination of any proceedings that had been issued, where the parties so agree.

Options for reform: Fair and reasonable publication on a matter of public interest

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada;
- amend section 26 to provide that weighing of factors under section 26 should expressly be reserved to the trial judge;

- require account to be taken of whether or not plaintiffs availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings
- do nothing.

Recommendations

The following option is recommended:

- Option 1: Amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada.

The following options are not recommended:

- Option 2: Amend section 26 to provide that weighing of factors under section 26 should expressly be reserved to the trial judge (this option will not be relevant if the recommendation to abolish juries is accepted);
- Option 3: Require account to be taken of whether or not a plaintiff availed of the services of the Press Ombudsman and Press Council before initiating legal proceedings; and
- Option 4: Do nothing.

Options for reform: Innocent publication

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control, provided that the broadcaster takes reasonable precautions in advance of the live broadcast and reasonable care during the broadcast;
- do nothing.

Recommendations

The following option is recommended:

- Option 1: Provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control, provided that the broadcaster takes reasonable precautions in advance of the live broadcast and reasonable care during the broadcast.

The following option is not recommended:

- Option 2: Do nothing.

Option for reform: New defence of satiric or comedic utterance

Based on the submissions received and the experience in other relevant jurisdictions, the following option was identified:

- provide for a statutory defence of satiric or comedic utterance.

Recommendation

The following option is not recommended:

- Provide for a statutory defence of satiric or comedic utterance.

Chapter 4: Court Jurisdictions and Procedures

Options for reform: Circuit Court and High Court jurisdictions

Based on the submissions received, the following options were identified:

- require all cases to be initiated in Circuit Court;
- provide that defamation actions should be initiated in the Circuit Court where the plaintiff has indicated a limit on the damages he/she is expecting;
- introduce a court-based summary disposal mechanism for lower-value defamation claims;
- provide for defamation actions where large amounts of damages are being sought to be dealt with in the Commercial Court Division of the High Court;
- provide that it should be possible to make an appeal from the Circuit Court to the High Court either on the question of defamation itself, or, on the amount of damages and that the judge should be able to vary the amount of damages awarded;
- provide for the establishment of a register of all defamation awards and settlements;
- introduce a statutory ban on any settlement term which inhibits or restricts future publication of certain matters.

Recommendations

Provided that there are no constitutional constraints, the following option is recommended:

- Option 3: Introduce a court-based summary disposal mechanism for lower-value defamation claims.

The following options are not recommended:

- Option 1: Require all cases to be initiated in Circuit Court;
- Option 2: Provide that defamation actions should be initiated in the Circuit Court where the plaintiff has indicated a limit on the damages he/she is expecting;
- Option 4: Provide for defamation actions where large amounts of damages are being sought to be dealt with in the Commercial Court Division of the High Court;
- Option 5: Provide that it should be possible to make an appeal from the Circuit Court to the High Court either on the question of defamation itself, or, on the amount of damages and that the judge should be able to vary the amount of damages awarded;
- Option 6: Provide for the establishment of a register of all defamation awards and settlements; and
- Option 7: Introduce a statutory ban on any settlement term which inhibits or restricts future publication of certain matters.

Options for reform: Jury trial

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- abolish juries in defamation cases;
- remove presumption of jury trials (subject to discretion of courts to order jury trial in appropriate cases);
- retain juries on questions of liability but remove juries from the decision on quantum of damages;
- make no change in relation to the role of juries in High Court actions.

Recommendations

The following option is recommended:

- Option 1: Abolish juries in defamation cases.

The following options are not recommended:

- Option 2: Remove presumption of jury trial (subject to discretion of courts to order jury trial in appropriate cases);
- Option 3: Retain juries on questions of liability but remove juries from the decision on quantum of damages; and
- Option 4: Make no change in relation to role of juries in High Court actions.

Options for reform: Time limits and delays by parties

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- increase the standard limitation period to two years;
- where parties engage in alternative dispute resolution mechanisms, increase the limitation period to take account of time devoted to such mechanisms;
- provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances;
- amend section 11(3B) of the Statute of Limitations to remove differences between off-line and online publication.

Recommendations

The following option is recommended:

- Option 3: Provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances.

The following options are not recommended:

- Option 1: Increase the standard limitation period to two years;
- Option 2: Where parties engage in alternative dispute resolution mechanisms, increase standard limitation period to take account of time devoted to such mechanisms; and
- Option 4: Amend section 11(3B) of the Statute of Limitations to remove differences between off-line and online publication.

Options for reform and recommendations: Case Management

Based on the submissions received, the following options for reform are recommended:

- The issue of civil procedure in the courts (including pre-action protocols, case management, etc.) was considered by the Review Group on the 'Review of the Administration of Civil Justice'.⁸²² It is recommended that these issues be considered in the context of the implementation of the recommendations of the Review Group.

⁸²² *Review of Administration of Civil Justice Report*, October 2020 (Chapter 5 – Civil Procedures in the Courts); http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

- Proactive judicial case management of defamation claims should be encouraged, in line with the Kelly Report, in order to reduce delays and costs.
- It is recommended that, as it already applies in personal injuries cases, provision be made for the making of a tender by the defendant following receipt of a tender by the plaintiff which would be taken into account in determining costs.

Options for reform: Choice of jurisdiction and ‘libel tourism’

Based on the submissions received and the experience in other jurisdictions, the following option was considered:

- threshold provision requiring a court to consider the appropriateness of Ireland as a forum for a defamation action, where the plaintiff has more substantial links with another jurisdiction.

Recommendation

The following option is recommended:

- Option 1: To address the perceived risk of international forum-shopping or ‘defamation tourism’ into Ireland: require the court to be satisfied that Ireland is ‘clearly the most appropriate place’ for the action to be brought (as in England and Wales), in cases not falling under the rules of the Brussels I Recast Regulation.

Options for reform: Costs and accessibility of defamation actions

The general issue of litigation costs has been considered by the Review Group on the ‘Review of the Administration of Civil Justice’ which made a number of recommendations.

Based on submissions received, the following options for reform specific to defamation actions were identified:

- remove the exclusion of defamation claims from the Civil Legal Aid Act 1995; this issue together with the relative priority to be afforded to defamation cases to be considered within the forthcoming overall review of civil legal aid;
- provide a dedicated legal aid programme for charities.

Recommendations

The following option is recommended:

- Option 1: Remove the exclusion of defamation from the Civil Legal Aid Act 1995; this issue together with the relative priority to be afforded to defamation cases to be considered within the forthcoming overall review of civil legal aid.

The following option is not recommended:

- Option 2: Provide a dedicated legal aid programme for charities.

Options for reform: Criminal offences relating to defamation

Based on the submissions received, the following options were identified:

- introduce an offence of “malicious injury to the reputation of another” or an offence of criminal libel;

- introduce a statutory penalty for malicious taking defamation proceedings.

Recommendations

The following options are not recommended:

- Option 1: Introduce an offence of “malicious injury to the reputation of another” or an offence of criminal libel; and
- Option 2: Introduce a statutory penalty for maliciously taking defamation proceedings.

Option for reform: Reference to a criminal conviction

Based on the submissions received, the following option was identified:

- amend section 43(2) of the Act to provide that proof of conviction of an offence shall be conclusive evidence that an individual committed the offence.

Recommendation

- It is recommended that further consideration be given to the implications of amending the evidential test set out in section 43(2) of the Act.

Option for reform: Measures to counter mis-use of defamation proceedings (‘SLAPP’ actions)

Based on the submissions received and the experience in other jurisdictions, the following option was considered:

- to introduce an ‘anti-SLAPP’ mechanism to allow a defendant to bring a motion to court seeking early dismissal of defamation proceedings against them which appear to be without merit and contrary to the public interest, using as a model the approach taken by Ontario’s Protection of Public Participation Act 2015.

Recommendations

The following option is recommended:

- to introduce an ‘anti-SLAPP’ mechanism to allow a defendant to bring a motion to court seeking early dismissal of defamation proceedings against them which appear to be without merit and contrary to the public interest.

Chapter 5: Alternative Dispute Resolution

Options for reform: Alternative dispute resolution

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- broaden the remit of the Press Council;
- require a person to have recourse to the Press Council before initiating legal proceedings;
- impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman or the BAI right of reply scheme before issuing proceedings;

- provide that the fact that a media organisation is a member of the Press Council and adheres to its rules should be taken into consideration in determining the quantum of damages;
- include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings;
- give the Press Council the power to levy fines;
- impose an obligation on parties to a dispute to consider mediation;
- establish a statutory body (with the power to grant redress, including compensation) to adjudicate on complaints of defamation;
- provide for a new defence of right to reply.

Recommendations

The following options are recommended:

- Option 1.1: Broaden the remit of the Press Council, by clarifying that online-only news sites fall within the definition of ‘periodical’;
- Option 1.2: Consider extending the remit of the Press Council to cover online publications by broadcasters;
- Option 3: Impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman or the BAI right of reply scheme before issuing proceedings;
- Option 5: Include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings;
- Option 7: Impose an obligation on parties to a dispute to consider mediation.

The following options are not recommended:

- Option 1.3: Broaden the remit of the Press Council to include individual journalists, bloggers, etc.;
- Option 2: Require a person to have recourse to the Press Council/ Press Ombudsman in before initiating legal proceedings;
- Option 4: Provide that the fact that a media organisation is a member of the Press Council and adheres to its rules should be taken into consideration in determining the quantum of damages;
- Option 6: Empower the Press Council to levy fines;
- Option 8: Establish a statutory body (with the power to grant redress, including compensation or to impose an administrative financial sanction) to adjudicate on complaints of defamation;
- Option 9: Provide for a new defence of right to reply.

Chapter 6: Remedies for Defamation

Options for reform: Damages

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- clarify the situations where aggravated damages may be awarded;
- amend section 31 to set out in greater detail the guidance to be given in relation to damages;
- provide for a cap on damages;

- draw up a book of quantum or guidelines;
- require all cases to be initiated in the Circuit Court;
- allow courts to award modest damages with summary reliefs;
- set out rules in relation to closing instructions to the jury;
- require the plaintiff to explicitly set out the quantum of damage caused.

Recommendations

The following options are recommended:

- Option 1: Clarify the situations where aggravated damages may be awarded; and
- Option 2: Amend section 31 to set out in greater detail the guidance to be given in relation to damages.

The following options are not recommended:

- Option 3: Provide for a cap on damages;
- Option 4: Draw up a book of quantum or guidelines; and
- Option 7: Set out rules in relation to closing instructions to jury.

Options for reform: Lodgement of money in settlement of action

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- allow for the making of a lodgement where an offer of amends has been made;
- remove the requirement that a lodgement must be made when defence is being provided.

Recommendations

The following options are recommended:

- Option 1: Allow for the making of a lodgement where an offer of amends has been made; and
- Option 2: Remove the requirement that a lodgement must be made when defence is being provided so that the issue could be dealt with in rules of court.

Options for reform: Declaratory Order (section 28), Correction Order (section 30), Order Prohibiting Publication (Injunction) (section 33) and Summary Relief (section 34)

Based on the submissions received and the experience in other relevant jurisdictions, the following options were identified:

- review sections 28, 30, 33 and 34 to ensure consistency in wording;
- extend the grounds on which a defendant can obtain summary relief to include where he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if the defendant has a defence that will succeed;
- remove the prohibition in section 28(4) on the taking of any other action;
- allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34;
- amend section 30 of the Act ('Correction order') to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

Recommendations

The following options are recommended:

- Option 1: Review wording of sections 28, 30, 33 and 34 with a view to clarifying any differences in wording;
- Option 4: Consider whether to allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34; and
- Option 5: Amend section 30 of the Act ('Correction order') to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.

The following options are not recommended:

- Option 2: Extend the grounds on which a defendant can obtain summary relief to include where he/she can show that the plaintiff was manifestly not identified, the statement was manifestly not published, or if the defendant has a defence that will succeed; and
- Option 3: Remove the prohibition in section 28(4) on the taking of any other action.

Chapter 7: Online Defamation

Options for Reform

The following options were identified:

- specify that any regulations and thresholds for defamation should apply to all media content, irrespective of the mode of publication;
- clarify the requirements for proving online publication;
- extend the existing defence of 'innocent publication' to operators of websites;
- introduce standardised Notice of Complaint process and procedures;
- make specific statutory provision for courts to order an intermediary to remove a third-party statement or cease its distribution, or to do so while proceeding are ongoing;
- specify that moderation of user-generated content should not deprive an online service provider, or host, of the 'hosting defence' otherwise available under EU and Irish law; and
- provide a statutory jurisdiction for the High Court and the Circuit Court to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material).

Recommendations

The following options for reform are recommended:

- Option 2: Clarify requirements for proving online publication;
- Option 3: Extend existing defence of 'innocent publication' to operators of websites;
- Option 4: Introduce standardised Notice of Complaint process and procedures;
- Option 5: Make specific statutory provision for courts to order an intermediary to remove a third-party statement or cease its distribution, or to do so while proceeding are ongoing; and
- Option 7: provide a statutory jurisdiction for the High Court and the Circuit Court to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material).

The following options for reform are not recommended:

- Option 1: Specify that any regulations and thresholds for defamation should apply to all media content online, irrespective of the mode of publication; and
- Option 6: Make provision that moderation of user generated content should not deprive an online service provider or host of the ‘hosting defence’ otherwise available under EU and Irish law.

APPENDIX 1: Main changes made by the Defamation Act 2009

The main features of the 2009 Act are as follows:-

- the torts of libel and slander cease to be so described and are now instead collectively described as the tort of defamation (section 6).
- plaintiffs and defendants in a defamation action are required to submit a sworn affidavit verifying assertions and allegations and to make themselves available for cross examination as a condition of bringing an action (section 8). It is an offence for a person to make a statement in an affidavit which is false or misleading in any material respect, or that he/she knows to be false or misleading.
- an offer of apology is not construed as an admission of liability (section 24).
- the defendant in defamation proceedings may lodge in court a sum of money without admission of liability (section 29).
- provision is made for new remedies which a court may grant in lieu of, or in addition to, damages:
 - a declaratory order, for which a plaintiff may apply, in lieu of damages, is intended to offer a speedy means of redress where the only issue is the wish of a plaintiff to have an acknowledgement that the matter in question was defamatory of him or her (section 28). This order may be sought in the Circuit Court, which reduces costs for plaintiffs who wish to seek this form of redress.
 - a correction order, which may direct the terms of any correction which a court orders to be made in favour of a plaintiff (section 30).
 - Summary relief: a correction order or an order prohibiting further publication of a defamatory statement (section 34).
 - A prohibition order (replaces injunctions), for which a plaintiff may apply for prohibition of the publication, or further publication, of a defamatory statement.
- a range of specified factors intended to guide the court in making an award of general damages (section 31).
- juries are retained for High Court defamation proceedings, but the trial judge is now required to give directions to the jury on the matter of damages. (The parties are also entitled to make submissions to the jury on damages.)
- aggravated and punitive damages are maintained, but are limited to specific instances (section 32).
- the defences available in defamation proceedings are rationalised and clarified (sections 15 to 27).
- a list of occasions where absolute privilege arises is provided (section 17).

- the defence of qualified privilege is refined and extended (section 18). It also attaches to the reports and decisions of the Press Council (recognised under section 44).
- the defence of *fair and reasonable publication on a matter of public interest* is provided for in statute form for the first time (section 26). The availability of the defence is dependent on membership of the Press Council and adherence to its decisions and Code of Standards (or proof that the defendant has an equivalent “fairness” regime in place).
- provisions for the recognition of an independent Press Council, set out in section 44.
- the conditions for making of an offer of amends are updated, along with the consequences for acceptance or non-acceptance of the offer (sections 22 and 23).
- the common law position with regard to the liability of distributors for defamatory material is given a statutory basis as “the defence of innocent publication”. The defence develops in a more comprehensive way the common law defence of innocent publication which has traditionally been available to distributors, in particular for such as internet service providers in recognition of the speed with which modern technology works. (section 27).
- A body corporate may sue for defamation, irrespective of whether it has sustained financial loss (section 12).
- a limitation period of one year applies for bringing defamation proceedings, save that where the interests of justice so require, a court may direct otherwise and may allow a period of up to two years in exceptional cases (section 38).
- a special jurisdiction limit for defamation actions in the Circuit Court of €50,000 is provided (section 41). (*note: This limit is currently set at €75,000, under section 17 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.*)
- the Act abolishes the former common law offences of defamatory libel, seditious libel and obscene libel (section 35).
- the Act provides that on the death of a person, a cause of action for defamation vested in him or her immediately before death will survive for the benefit of his/her estate only. Similarly, the Act provides that a cause of action in defamation subsisting against a person will survive their death and lie against their estate (section 39).
- Schedule 1 of the Act lists the types of statements which are protected by the defence of qualified privilege.
- Schedule 2 of the Act sets out minimum requirements for a body seeking recognition as the Press Council for the purposes of the Act. The Minister is required to satisfy himself or herself that these criteria are being met, before making an order recognising an applicant organisation as the Press Council for the purposes of the Act. (In April 2010, the Minister for Justice, Equality and Law Reform granted formal recognition to the Press Council under this procedure.)

- An order of recognition granted to the Press Council *may be amended or revoked*, should the Minister form the opinion that the Council no longer meets the minimum requirements set out in schedule 2. However, in that event, before the moving of any order to this effect the Press Council must be afforded the opportunity to address the issues of concern. The Schedule also provides for the Press Council to appoint a Press Ombudsman to investigate, hear and determine complaints made to the Press Council concerning the conduct of its members, and for the complaints procedure.

- Schedule 2 also outlines the potential scope of the Code of Standards to be adhered to, and the rules and practices to be complied with, by the members of the Press Council.

APPENDIX 2: Consultation Notice

REVIEW OF THE DEFAMATION ACT 2009 Public consultation: invitation for submissions

The Tánaiste and Minister for Justice and Equality is reviewing the operation of the Defamation Act 2009, following section 5 of that Act.

The Act can be viewed at: <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/print> and at: http://www.irishstatutebook.ie/eli/isbc/2009_31.html (updated text with information on amendments and secondary legislation up to 20 September 2016).

A key objective of defamation law in Ireland is to ensure 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 rights to freedom of expression under Article 10 of the European Convention on Human Rights, and to the protection of reputation under Article 8 of the Convention, are also relevant.

The Defamation Act 2009 effected a substantial consolidation and reform of Irish defamation law, which sought to strike an appropriate and effective balance between the rights just mentioned. The aim of this review is:

- to promote an exchange of views and experiences regarding the operation in practice of the changes made by the 2009 Act,
- to review recent reforms of defamation law in other relevant jurisdictions,
- to examine whether Irish defamation law, and in particular the Defamation Act 2009, remains appropriate and effective for securing its objectives: including in the light of any relevant developments since 2009,
- to explore and weigh the arguments (and evidence) for and against any proposed changes in Irish defamation law intended to better respond to its objectives, and
- to publish the outcomes of the review, with recommendations on appropriate follow-up measures.

The Department of Justice and Equality is now inviting contributions from members of the public to inform this review. Organisations or individuals wishing to contribute should send a submission by 31 December 2016:

- by email to defamationactreview@justice.ie, or
- by post to:

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

It would be helpful for submissions to set out the reasons for the views expressed, and to provide any available evidence on the need for proposed changes, and on their likely impact. Respondents are welcome to propose draft text for legislative amendments to give effect to their proposals.

Scope of the review

Find here a summary of the [main features of the Defamation Act 2009](#)

The following is an indicative list of some specific issues which may be considered under the review:

- Whether any change should be made to the matters which a plaintiff or a defendant is required to prove in a defamation case,
- Whether any change should be made to the persons currently entitled to bring an action for defamation,
- 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),
- The experience regarding the jurisdiction of the Circuit Court in defamation cases,
- Whether any change should be made to the respective roles of the judge and the jury in High Court defamation cases,
- 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,
- 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,
- Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications^[1],
- The experience in practice regarding the Act's provisions for an offer of amends, an apology, or lodgement of money in settlement,
- 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,
- The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman,
- 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.

The above list of issues is not closed. Respondents may make submissions on these and on other aspects of defamation law, and are invited to propose, with reasons, any further issues which they consider should be encompassed by the review.

Please note however that this review *excludes* sections 36 and 37 of the Defamation Act (defining a statutory offence of blasphemy and providing for seizure of blasphemous material). The reason is that the relevant Constitutional and statutory provisions have already been considered by the Sixth Report of the Constitutional Convention, and will be the subject of a constitutional referendum, as provided in the Programme for a Partnership Government.

Publication of Submissions

The Department will publish any submissions received on its website in due course, and may also receive requests for their disclosure under the Freedom of Information Act 2014.

It is therefore in the interests of respondents to highlight at the time of submission any information which they consider to be commercially sensitive, or to contain private or confidential material, and to specify the reasons for its sensitivity. The Department will consult

with respondents regarding information identified by them as sensitive, before making a decision on any Freedom of Information request, and will treat any personal information in accordance with the Data Protection Acts 1988 and 2003.

Published Submissions - A list of submissions received in relation to the review is available at the following link: [Review of the Defamation Act 2009 - Public consultation](#)

Any queries about the contents of this notice may be sent by email to defamationactreview@justice.ie.

1 November 2016

[1] The review will take into account any recommendations of the recent Report of the Law Reform Commission on Harmful Communications and Digital Safety, which are relevant to defamation law.

This consultation is closed.

APPENDIX 3: List of Submissions Received

Symposium on Reform of Defamation Law (14 November 2019)

The following supplementary submissions were received after the symposium (closing date 30 January 2020).

[Dialogue Ireland](#)
[Irish Council for Civil Liberties \(ICCL\)](#)
[Irish SME Association](#)
[McCann Fitzgerald Solicitors](#)
[Office of the Press Ombudsman](#)
[Prof John Horgan \(Academic\)](#)
[Twitter International Company](#)

Submissions made under the Public Consultation (closing date: 30 January 2017)

[Automattic Inc](#)
[Business Journalists' Association](#)
[Christian Morris](#)
[Council of the Bar of Ireland \(Bar Council\)](#)
[Crowley Millar Solicitors](#)
[David Reynolds](#)
[DCU Socio Legal Research Centre 2009](#)
[Denis Daly](#)
[Department of Communications, Climate Action & Environment](#)
[DIT Department of Journalism](#)
[Dr. Tarlach McGonagle](#)
[Eoin O'Dell](#)
[FLAC \(Free Legal Advice Centres\)](#)
[Google Inc.](#)
[Hugh O'Driscoll](#)
[Independent News and Media](#)
[Irish Times](#)
[ISPCC \(Irish Society for the Prevention of Cruelty to Children\)](#)
[Johnsons](#)
[Joint Committee on Justice and Equality](#)
[Journal Media](#)
[Kieran Fitzpatrick](#)
[Law Society](#)
[Lee Crowley](#)
[Local Ireland](#)
[McCann FitzGerald](#)
[MGN Ltd](#)
[Michael Williams](#)
[Name and address redacted by request](#)
[Name and address redacted by request 2](#)
[National Union of Journalists](#)
[NewsBrands Ireland](#)
[Press Council](#)
[Public Relations Institute of Ireland](#)
[Ronan Daly Jermyn](#)
[RTÉ](#)
[Technology Ireland](#)
[William Fry](#)
[Yahoo Ireland](#)

APPENDIX 4: Summary of main issues contained in written submissions

S. 2 Definition

- *In definition of “periodical”, clarify that online publications are periodicals in their own right.*

S. 5 Review of operation of Act

- *Provide for a legislative review of the Defamation Act every 3 years.*

S. 6 Defamation

- *Introduce a “serious harm” threshold for all potential defamation claimants as introduced in the Defamation Act 2013 (s.1) in England & Wales.*
- *Introduce a “serious financial harm” threshold for claims made by bodies that trade for profit as introduced in the Defamation Act 2013 (s.1) in England & Wales.*
- *Burden of proof should be placed on the plaintiff.*
- *Introduce a clear definition of ‘defamation’.*
- *Rationalise the abolition of the distinction between libel and slander.*
- *Introduce a pre-action protocol.*
- *The same rules and thresholds for defamation should apply to content regardless of where the act is committed.*

S. 8 Verifying affidavit

- *Presumption of falsity should be abolished and that to be defamatory, a matter should be required to be untrue.*
- *Add provision that plaintiffs seeking to defeat qualified privilege should swear an affidavit verifying alleged malice.*

S.10 Defamation of class of persons

- *Clarify the number of persons covered.*
- *No effective remedies available in respect of statements of a racist nature.*

S.12 Defamation of a body corporate

- *Bodies trading for profit bring actions for defamation should be subject to a statutory threshold of harm, i.e. serious financial loss.*
- *Corporate bodies with a governmental or regulatory function should not be allowed to bring a defamation case.*

S. 13 Appeals in defamation actions

- *Abolish juries in defamation cases.*
- *Adopt an opt-in jury system as in England.*
- *Remove from juries the decision on quantum.*

S.16 Truth

- *Plaintiffs should be required to prove these claims.*

S. 17 Absolute privilege

- *Extend the defence of absolute privilege to reports of court proceedings outside this jurisdiction.*

S.18 Qualified privilege

- *There should be no geographical restriction in this provision.*
- *Extend statutory qualified privilege to court reports.*

S. 20 Honest opinion

- *Amend this provision along the lines of the fair comment defence in s.23 of the 1961 Act.*
- *Remove the need to establish that, ‘the opinion related to a matter of public interest’.*

S.23 Effect of offer to make amends

- *Amend s.23(i) (c) to provide for the assessment of damages by a judge sitting alone.*
- *Plaintiff should have to prove that the defendant acted recklessly to defeat the offer of amends as a defence.*
- *Provide expressly for a discount procedure.*
- *Amend s. 23 (5) which rules out the use of any other defence if an action proceeds and the defendant pleads that he/she offered to make amends as a defence.*
- *The offer to make amends procedure in ss. 22 & 23 should apply in any case where the defendant has not acted with malice.*
- *Where an offer to make amends is to be made, a defendant should be entitled to make a lodgement.*
- *Amend s.23 (1)(c) to provide, where an offer to make amends is accepted but the parties fail to agree the amount, for a determination by an alternative dispute resolution process without reference to the court, or provide for a stay pending ADR determination of any proceeding that had been issued. The parties would not lose their right to litigate by participating in mediation.*

S.24 Apology

- *An offer of correction, clarification or apology should count in the publishers favour in court.*

S.26 Fair and reasonable publication on a matter of public interest

- *The question of whether a subject is one of public interest should be for a judge to decide.*
- *Redraft in order to simplify.*
- *Amend s.26(2)(f) & (g) to include online sites, and enhance the provision to make it a presumption that such a defence will normally prevail (rather than that the court “shall .. take it into account”).*
- *Repeal s. 26(3).*
- *Amend s.26(4) to remove the clause which states that a s.28 (Declaratory order) application shall not be regarded as a defamation action for the purposes of s.26.*

S. 27 Innocent publication

- *Adopt legislation similar to s.5 of the England and Wales Defamation Act 2013 regarding operators of websites.*
- *Introduce a provision equivalent to s.10 of the English Defamation Act 2013.*
- *The review of the Defamation Act should seek to provide clarity in relation to liability for user generated comment.*

Part 3 – Defences

- *Introduce defence of satiric or comedic utterance.*

S.28 Declaratory order

- *Amend.*

S. 29 Lodgement of money in settlement of action

- *It should be possible to make a lodgement under s. 29 even if an offer to make amends has been made under s. 23(d) and the parties do not reach agreement as to the level of damages that should be paid by the defendant.*
- *Change the lodgement procedure to limit the amount of costs recoverable after a lodgement so that where the sum awarded exceeds the sum lodged, the costs recoverable after the date of the lodgement should not exceed the difference between the amount of the lodgement and the award.*
- *Amend s.29 (1) which refers to “filing his or her defence to the action”.*

S. 30 Correction order

- *It was submitted that the correction order was voluntary and therefore not effective.*

S. 31 Damages

- *Split counsel’s closing submissions and the judge’s charge to the jury into two stages*
- *The Act should set out clearly the nature of the guidance to be provided to juries by the judge so that juries can assess damages at a reasonable and consistent level.*
- *Introduce a cap on damages.*
- *Introduce a book of quantum that specifies damages for different levels of offences.*
- *Introduce a requirement to consider whether parties took part in the Press Council complaints process when considering damages.*
- *Courts should be able to grant moderate damages along with summary relief orders*

S.32 Aggravated and punitive damages

- *A defendant should not be penalised with aggravated damages for offering a robust defence.*

S. 34 Summary disposal of action

- *Allow for some modest award of damages on an application for summary relief.*
- *Amend.*
- *Amend to permit any party to the proceedings to apply for summary disposal at any stage.*

S.38 Limitation of Actions

- *Insert an express statutory requirement that defamation plaintiffs must proceed with due expedition.*
- *The Act should include an express statutory jurisdiction to dismiss claims where there has been no proceeding within 2 years of issuing proceedings, unless there are special circumstances.*
- *Statutory bar of one year to start a case should be increased to two years.*
- *Amend s. 38(3B) 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].”*

S. 44 Press Council

- *Individual journalists and self-publishers should be able to become members of the Press Council and to subscribe to the standards of the Press Council Code of Conduct.*
- *The online publications of broadcasters should be regulated by the Press Council and broadcasters should be able to join the Press Council.*
- *Confirm that online only news sites are publications for purposes of this section.*
- *Enable public relations and communications professionals to be members of the Press Council, and enable one member of the Press Council to be a representative of such professionals.*
- *Enable the Press Council and the Press Ombudsman to levy fines of up to €25,000 with the option that such a fine would go to the complainant or to an agreed third party.*
- *The fact that a publisher signs up to the Press Ombudsman and adheres to its rules should be taken into consideration when the amount of damages is being considered.*

Miscellaneous recommendations

- *The Courts Service should publish online all documentation in relation to defamation cases, and all damages awards and associated legal costs outcomes.*
- *Introduce a proactive case management procedure.*
- *Right of Reply Scheme.*
- *New defence of “reasonable right to reply”.*
- *Introduce statutory penalty for malicious libel suits.*
- *Introduce provision for pre-action protocols for defamation cases.*
- *Introduce a provision to deal with libel tourism.*
- *Introduce a qualified privilege for peer-reviewed statements in scientific or academic journals.*
- *Remove the exclusion of defamation from the Civil Legal Aid Act 1995.*

APPENDIX 5: Recent Significant Judgments

In the intervening period since the announcement of the statutory review of the Defamation Act (November 2016), there have been a number of important judgments by the superior courts in the area of defamation law. The European Court of Human Rights has also considered the Irish law in this area in the case of *Independent Newspapers v. Ireland*⁸²³

Leech v. Independent Newspapers

In *Leech v. Independent Newspaper*⁸²⁴ the plaintiff brought proceedings seeking damages for libel arising out of a series of articles in the Evening Herald newspaper on the basis that the articles meant that she benefitted professionally from an extramarital affair with a Government Minister. The case was originally heard before a jury in the High Court who assessed the damages at €1,872,000.

The defendant appealed to the Supreme Court arguing that no reasonable jury could have made such an award, the award was disproportionate to the damage caused, and/or it amounted to an unlawful interference with their rights under the Constitution and the European Convention on Human Rights (ECHR). The Supreme Court set aside the jury award on the basis that it was excessive. It went on to consider what would be an appropriate award under the headings of the gravity of the libel, extent of publication, conduct of the defendant and impact of the defamation. The Supreme Court substituted the verdict of the jury on damages with an award of €1.25m.

Independent Newspapers (Ireland) v. Ireland

The outcome of the *Leech*⁸²⁵ case resulted in an application to the European Court of Human Rights (ECtHR) by Independent Newspapers (*Independent Newspapers (Ireland) v. Ireland*).⁸²⁶

The ECtHR judgment of 17 June 2017 held that Irish defamation law was pursuing the legitimate aim of protecting the individual's reputation and her right to private and family life. It accepted the Irish courts' findings regarding the gravity of the defamation in this case, which it described as 'a sustained and unusually salacious campaign'. However, the Court held that the procedural safeguards in place under the Defamation Act 1961 did not sufficiently protect against the risk of an excessive or disproportionate award of damages by a jury, and the Supreme Court judgment did not sufficiently explain its reasoning for the large amount of damages it substituted for the jury award. The Court noted that unpredictably large awards of damages in defamation cases are considered capable, in principle, of having a chilling effect on media's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), and therefore require particularly careful scrutiny. The Court also noted that the case was brought and decided under the Defamation Act 1961, which was reformed by the Defamation Act 2009.

⁸²³ [2017] ECHR 567 (App no. 28199/15)

⁸²⁴ *Leech v. Independent Newspapers* [2014] IESC 79.

⁸²⁵ [2014] IESC 79

⁸²⁶ [2017] ECHR 567 (App no. 28199/15).

The Court declined to award damages to Independent Newspapers, and directed the Government to pay an amount of €20,000 towards their legal costs and expenses⁸²⁷.

Ireland has fully complied with the judgment of the European Court⁸²⁸, most importantly by the judgment of the Supreme Court in July 2017 in a further defamation case, *McDonagh v. Sunday Newspapers Ltd* (see details below) which adopted principles set out by the European Court in the *Independent Newspapers*⁸²⁹ judgment, and responded to it by setting out guidelines for courts to ensure proportionality and transparency in awards of damages for defamation.

McDonagh v. Sunday Newspapers Ltd

*McDonagh v. Sunday Newspapers Ltd*⁸³⁰ originated in 1999 when the Sunday World published a front page article which the plaintiff alleged meant that he was a criminal, drug dealer, tax evader and loan shark. The newspaper pleaded justification and qualified privilege. The jury found that the defendant failed to prove that the plaintiff was a drug dealer or loan shark, although it did prove he was a tax evader and a criminal. The jury awarded the plaintiff €900,000 in damages.

The newspaper appealed the decision, and the Court of Appeal set aside the jury verdict that the plaintiff was not a drug dealer and found that as a fact he was a drug-dealer and that the jury's conclusion to the contrary was perverse. It remitted the issue as to whether he was a loan-shark for retrial.

The Court of Appeal's decision was appealed, and the Supreme Court agreed to hear the plaintiff's appeal against this decision. The Supreme Court reversed the order of the Court of Appeal setting aside the jury decision. Charleton J., with whom a majority of the Supreme Court agreed, noted that up to the Court of Appeal decision in this case, no appellate court had substituted its finding of fact (other than in relation to damages or the defamatory nature of words) for that of a jury in a defamation case. He noted that Article 34.4.3 of the Constitution conferred appellate jurisdiction on the Supreme Court (and now the Court of Appeal) but pointed out that this does not mean that "*any appellate court is entitled to substitute facts, precisely found by the trial judge or the broader swathe of what a jury accepts or rejects, with a view of the facts to which members of an appellate court might come to upon reading the transcript*". He stated:

"A jury verdict is only to be overturned where it is unsupported by evidence. In Barrett v Independent Newspapers Ltd [1986] 1 IR 13, Henchy J at page 23 stated that 'the community verdict of a jury' cannot be condemned 'merely because it does not accord with that of a judge.' Perversity in a verdict was to be found 'only when no jury of reasonable men, applying the law laid down for them by the judge and directing their minds to such facts as are reasonably open to them to find, could have reached the conclusion', ..."

Having examined relevant case-law, Charleton J. concluded:

⁸²⁷ The Government paid this sum to Independent News and Media in October 2017, in accordance with the judgment.

⁸²⁸ This case was closed by the Committee of Ministers of the Council of Europe, on 5 December 2019 (Resolution CM/ResDH (2019)312).

⁸²⁹ *Independent Newspapers (Ireland) Ltd v. Ireland* [2017] ECHR 567 (App no. 28199/15).

⁸³⁰ *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 46 and *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 59.

“... it can be stated that circumstances exist where it may be necessary to overturn a jury verdict in a defamation case because all of the evidence tendered at trial points in one direction, notwithstanding the respect that must generally be afforded to such verdicts. Such a decision will not be reached lightly and could only occur in exceptional circumstances. Such exceptional circumstances do not apply in this case.”

The Supreme Court also decided that counsel should be heard regarding (i) how the jury answered the questions on the issues paper, (ii) damages, and (iii) whether the High Court should rehear the case.⁸³¹

The action was settled shortly before the Supreme Court judges were to deliver their second judgment in this case. The judges decided to deliver their judgments, but did not indicate the amount of damages that should be awarded.

With regard to an unanswered question on the issues paper, Denham C.J. held that the award of damages was the jury’s answer to the question that was not specifically answered. McMenamin J. dissented and held that the case should be remitted for retrial.

With regard to damages, the majority held that it was appropriate for the Supreme Court to substitute its own figure for the jury award, which they determined was excessive. Denham C.J., taking account of the recent ECtHR judgment in *Independent Newspapers*⁸³², accepted that there was a concern that the direction given to the jury “was not such as to reliably guide a jury towards an assessment of damages bearing a reasonable relationship of proportionality to the injury sustained”⁸³³ by the plaintiff. She then went on to consider the award on the basis of the gravity of the libel, the effect on the plaintiff, the extent of the publication, the conduct of the newspaper, and sums awarded in previous defamation cases. Denham C.J. noted that the plaintiff had a criminal record, had evaded tax, and had entered a settlement with the Criminal Assets Bureau, as well as evidence in relation to him and drugs. O’Donnell J. made similar observations. Both Denham C.J. and O’Donnell J. therefore concluded that the plaintiff did not enjoy a good reputation; Denham C.J. noted that this did not give a licence to defame him. O’Donnell J. also noted that the fact that the plaintiff was not identified by name and that he was not well known to the public generally before the publication were relevant factors in determining damages.

The majority (Denham C.J., O’Donnell J. and Dunne J.) found that the Supreme Court should substitute its own award for that of the trial court, and suggested that the damages should be substantially reduced, or very substantially reduced. It was also suggested that the damages should be nearer or below the figure of €75,000 suggested by the newspaper.

MacMenamin J. dissented and favoured a new trial.

Kinsella v. Kenmare Resources plc & Anor

In *Kinsella v. Kenmare Resources plc & Anor*,⁸³⁴ a jury in the High Court found that a press release issued by the defendants was defamatory and awarded the plaintiff €10m in damages (€9m in general damages and €1m in aggravated damages). Execution of the judgment was

⁸³¹ *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 46.

⁸³² [2017] ECHR 567 (App no. 28199/15)

⁸³³ [2017] IESC 59 at para. 67.

⁸³⁴ *Kinsella v. Kenmare Resources plc & Anor* [2019] IECA 54

stayed upon Kenmare Resources placing €500,000 on account for Mr Kinsella to await an appeal.

On appeal, the Court of Appeal upheld the jury's verdict that the statement at issue was defamatory but set aside the €9m compensatory damages award on the basis that it was;

“disproportionate, unjust and unfair in circumstances where no reasonable jury could have considered that an award of that magnitude was necessary to compensate (the plaintiff) in respect of the injury which he sustained and in order that he might re-establish his reputation”.

It also set aside the €1m award of aggravated damages on the basis that *“the manner of Mr Kinsella's cross-examination did not justify the trial judge leaving open to the jury the possibility of an award of aggravated damages”*. It further held that even if the issue of aggravated damages fell to be considered by the jury, the award would *“have to be set aside as disproportionate, unjust and unfair”*.

Detailed consideration was given to the role of damages in defamation actions and the Court stated as follows:⁸³⁵

“An award of damages in a defamation action is intended to serve a different function to an award of damages in other types of litigation. Its primary function is to vindicate the plaintiff's reputation, but it is also intended to compensate for any injury sustained as a result of the defamation. The amount of compensation must be sufficiently large such that if disclosed to a bystander it would readily convince them of the baselessness of the allegation complained of. Furthermore, insofar as an injury to a person's reputation can be compensated for by an award of damages, the damages must be great enough to achieve that objective. In this regard, it is important to remember that damage to a plaintiff's reputation can have far-reaching consequences ...”

The Court also stated:

“Damages for defamation must be fair to the plaintiff and defendant and should not be excessive. An award should certainly not be too large to the point that it will not only have the effect of vindicating the plaintiff's good name, but also of restricting freedom of expression, particularly that enjoyed by the media as guaranteed by Article 40.6.1° of the Constitution.”

The Court examined the factors identified in the authorities as relevant to the assessment of damages in defamation actions namely – gravity of the defamation; effect on the plaintiff; extent of publication; conduct of defendant; and conduct of plaintiff. It conducted an analysis of defamation awards in other cases, in particular, *O'Brien v. Mirror Group Newspapers*,⁸³⁶ *McDonagh v. Sunday Newspapers Ltd*, *de Rossa v. Independent Newspapers*,⁸³⁷ and *Leech v. Independent Newspapers*⁸³⁸.

⁸³⁵ *ibid* at para. 121.

⁸³⁶ [2000] IESC 70, [2001] 1 IR 1.

⁸³⁷ [1999] IESC 63 [1999] 4 IR 432

⁸³⁸ [2014] IESC 79

The Court noted that the award was approximately seven times greater than any previous award of damages made or upheld by the Supreme Court in a defamation action; it was approximately 15 times more than might be awarded to a child born with a condition such as cerebral palsy as a result of negligence at the time of his/her birth; the allegation against the plaintiff was not remotely close to the top of the scale of inappropriate sexual allegations; the gravity of the libel and the effect on the plaintiff was nothing as grave as that perpetrated on the plaintiffs in *Leech, de Rossa* and *O'Brien*; the plaintiff was not a well-known public figure and the extent of publication was therefore far less damaging than would have been the case in *de Rossa* and *O'Brien*; and damages must be fair to each of the parties and must also have regard to constitutional and ECHR considerations.

The Court, therefore, set aside the jury's award and, having applied the factors noted above, determined that a just and fair award would be €250,000.

*Higgins -v- The Irish Aviation Authority; White -v- Sunday Newspapers Limited (High Court, 2018*⁸³⁹

Higgins v. The Irish Aviation Authority and *White v. Sunday Newspapers Ltd* (which were heard together), turned on the question of whether the plaintiffs were entitled to have damages assessed by a jury pursuant to the provisions of section 23(1)(c) of the 2009 Act rather than a judge alone. The defendant in each case made an offer of amends under section 22 of the Act which was accepted by the plaintiffs, however the parties were unable to agree terms of the offer of amends and therefore the plaintiffs sought a direction that the quantum of damages should be assessed by a jury.

The High Court found that the plaintiffs were entitled to have the quantum of damages assessed before a judge sitting with a jury which was affirmed by the Court of Appeal and Supreme Court.

In the Supreme Court, Dunne J. observed that the offer of amends procedure was introduced

“to facilitate early and speedy resolution of defamation proceedings” and, if possible, to avoid the necessity of court proceedings. However, she observed that the right to a trial by jury has long been a feature of defamation proceedings, even where liability is admitted. She concluded that, without the Oireachtas clearly indicating otherwise in the 2009 Act, it is difficult to see any basis for a difference of approach between an action compromised by an admission of liability but leaving over the assessment of damages to be determined by judge and jury, and a compromise of actual or potential defamation proceedings by the acceptance of an offer of amends. The judge found that it was reasonable to expect to see clear and express words used by the Oireachtas in the 2009 Act if it had intended to remove the core function of the determination of damages from the jury in cases involving an offer of amends. She also noted that “it would be desirable that consideration is given to setting out very clearly the mechanism envisaged and how it would function in a range of different circumstances”.

In the subsequent High Court action to determine damages in *Higgins*, counsel for both sides, and the trial judge, addressed the jury in relation to awards made in other defamation cases, and the kind of general damages usually awarded in catastrophic personal injuries actions. This is the first time that a jury was provided with information regarding exact figures awarded in

⁸³⁹ [2018] IESC 29 [2018] 3 IR 374.

other cases. The jury was however cautioned that no two defamation cases are the same, and that each case must be assessed on its own merits. The trial judge also stressed to the jury that the damages awarded should be fair to both sides, and that the award should be reasonable and proportionate to the damage to the plaintiff's reputation. The jury awarded the plaintiff €387,000 in damages; this reflected an initial assessment of €300,000 general damages and €130,000 aggravated damages which were reduced by 10% in light of the defendant's offer to make amends.

The defendant appealed the decision to the Court of Appeal⁸⁴⁰ on the grounds that the awards of both general and aggravated damages were unreasonable, excessive and disproportionate, and that the level of discount afforded to the defendant was deficient, in all the circumstances. The defendant also sought the substitution by the Court of Appeal of an appropriate award in respect of the damages and an appropriate percentage reduction of the award having regard to the offer of amends. The Court of Appeal noted that the first question to be considered was whether or not the award was, in all the circumstances, not just disproportionate to the defamation of the respondent's character but so disproportionate that no reasonable jury would have made the award in all the circumstances of the case. It held that in considering this issue, the Court must consider the nature and gravity of the defamatory material in the same light as the jury. The Court went on to consider the conduct of the appellant, the extent of publication and the impact on the respondent. With regard to the extent of publication, the Court noted that "*while limited circulation of defamatory material may operate to reduce the quantum of damages reasonably payable, this factor may to some extent be offset by the identity of the recipients of the material, and the importance of those persons in the life of the respondents.*"⁸⁴¹

As far as the impact on the respondent is concerned, the Court pointed out that "*damage to reputation is presumed once the defamatory nature of the publication is established*"⁸⁴² but found that the defamatory publications had no practical consequences for the respondent, other than the worry and distress they caused him (which the Court did not underestimate). It went on to find that the "*complete absence of consequences for the respondent arising from the E-mails is very significant*".⁸⁴³ The Court decided that it should substitute its own assessment of damages for that of the jury. It noted that the damage to the respondent's reputation did not result in adverse consequences for his career or personal life but held that the damages should reflect the acknowledged seriousness of the defamation. It decided that the sum of €70,000 was appropriate to compensate the respondent for damage to his reputation and the ensuing distress and upset caused by the publication of the e-mails which, while limited in distribution, occurred within a sector of crucial importance to the respondent's career. It also reduced the aggravated damages to €15,000 to reflect the conduct of the appellant between the publication of the defamatory statements and the making of the offer of amends. Finally, the Court affirmed that, having regard to all the circumstances of the case, the discount of 10% applied by the High Court jury was appropriate. Applying the discount, the Court therefore reduced the combined total of general and aggravated damages to €76,500.

Nolan v. Sunday Newspapers Limited

In *Nolan v. Sunday Newspapers Limited*,⁸⁴⁴ the plaintiff sought damages for defamation arising from two articles (including photographs) published in the Sunday World in 2012 and 2013

⁸⁴⁰ *Higgins v. The Irish Aviation Authority* [2020] IECA 157.

⁸⁴¹ *ibid* at para. 84.

⁸⁴² Para 88

⁸⁴³ Para 92.

⁸⁴⁴ [2017] IEHC 367 and [2019] IECA 141.

which, he claimed, meant that he was a major organiser of orgies and which contained a lurking tone of criminality. He also sought damages in respect of breaches of his constitutional right to privacy. The defendant argued (a) that the words and photographs did not bear, nor were they capable of bearing, the meaning ascribed to them by the plaintiff; and (b) that the articles and photographs were published on an occasion of privilege, namely that they were published in good faith as part of the defendant's lawful and legitimate reporting on matters of public interest. The defendant acknowledged during the trial that the plaintiff was not an organiser of the type of parties referred to in the articles, but argued that any damage to his reputation arose from attendance at the parties.

The case was determined in favour of the plaintiff by a judge sitting without a jury in the High Court. The judge held that the intrusion into the plaintiff's private life did not have any overriding consideration of public interest and could not therefore be defended on the basis of privilege. Furthermore, the Court did not accept that the damage to the plaintiff's reputation was caused by attendance at the parties in question rather than organising them. The plaintiff was awarded damages for defamation of €310,000 (€250,000 general damages, €30,000 aggravated damages, and €30,000 punitive damages). The judge held that the right to privacy was not engaged.

The defendant appealed the decision and the plaintiff cross-appealed in relation to breach of his constitutional right to privacy.

The Court of Appeal (Peart J.) held that the defendant failed to give any evidence to substantiate the defence of privilege and that this failure was sufficient to determine that it had not been made out by the defendant. The Court also held that the plaintiff was not a public figure so that that assertion could not be relied on to claim that the defendant was reporting on a matter of public interest. Furthermore, the Court accepted that it was the erroneous claim that the plaintiff organised sex parties with clearly implied undertones of criminality that caused injury to his reputation and good name. The Court also held that the plaintiff's constitutional right to privacy had been breached and that such breach should be recognised by a meaningful award of damages under that heading.

The Court upheld the awards for punitive and exemplary/aggravated damages but recalibrated the award of general damages by awarding €200,000 general damages for the defamation and €50,000 for breach of the plaintiff's constitutional right to privacy.

Christie v. TV3

In *Christie v. TV3*,⁸⁴⁵ the plaintiff solicitor represented the solicitor Thomas Byrne who was on trial for fraud. A television broadcast in relation to the trial referred to Mr Byrne but the accompanying nine second video clip showed only the plaintiff, Mr Christie. The defendant subsequently broadcast a correction and apology (but not in terms agreed with the plaintiff) and made an unqualified offer of amends including an offer to repeat the apology and an offer of compensation. The plaintiff accepted the offer of amends but the parties could not agree on the amount of damages that should be paid to the plaintiff. In the High Court, a judge sitting alone, found that the making of an unqualified offer of amends means that the defendant accepts that the plaintiff was defamed and that in general the defendant is bound by the meanings pleaded by the plaintiff. The judge also indicated that damages should be assessed based on the judge's own assessment of injury to reputation (not what a jury might have awarded). Taking

⁸⁴⁵ [2015] IEHC 694 and [2017] IECA 128

into account the offer of amends and the broadcast apology (but one with shortcomings from the plaintiff's perspective), as well as the failure of the defendant to accept clearly that there was in fact defamation, the judge awarded the plaintiff €200,000 in damages but discounted this by one third because of the offer of amends thus reducing the damages to €140,000. The defendants appealed the decision.

The appeal centred on how the court should assess damages in cases of unintentional defamation and the appropriate level of discount that should be applied where an offer of amends has been made under section 22 of the 2009 Act. In the Court of Appeal, Hogan J. held that the facts of the case (a once-off nine second broadcast, the fact that Mr Christie was not named, the absence of any animus towards the plaintiff and the fact that it was a case of mistaken identity) mitigate the otherwise very serious nature of the defamation. He held that damages of €60,000 would be the appropriate starting point and that the discount to be applied should be 40% thereby reducing the damages award to €36,000. Furthermore, the Court held that had the apology been more complete and fulsome, the level of discount would have been higher.

O'Brien v. Post Publications Ltd

In *O'Brien v. Post Publications Ltd*,⁸⁴⁶ a High Court jury found the materials complained of not to be defamatory. The case concerned an article published in the Sunday Business Post in 2015; the article was based on a 2008 report on the exposure of Irish banks and included a list of the banks' 22 biggest borrowers. The plaintiff claimed that the article maliciously implied that he was a member of a "gang" that was responsible for the destruction of the Irish banking system and took a defamation action seeking damages. The defendant claimed that the article did not have the imputed meaning and that the publication was protected under the defence of fair and reasonable publication on a matter of public interest provided for under section 26 of the 2009 Act. The jury decided that the article did not impart the meaning that the plaintiff claimed and was not defamatory. Barton J. dismissed the case and awarded costs against the plaintiff.

Muwema v. Facebook Ireland Ltd

In *Muwema v. Facebook Ireland Ltd*,⁸⁴⁷ the plaintiff (a well-known lawyer in Uganda) sought an order under section 33 of the 2009 Act prohibiting the publication, or further publication, of the Facebook page of a person using the pseudonym TVO and a number of articles published by TVO on Facebook accusing the plaintiff of accepting bribes and seeking to frustrate an election. The plaintiff also sought a Norwich Pharmacal order requiring Facebook to disclose any details they had in relation to the identity and location of TVO. In accordance with section 33 of the 2009 Act, an order can be made under that section only where the defendant has no defence that is likely to succeed. The High Court in a 2016 judgment held that the defence of innocent publication under section 27 of the 2009 Act was likely to be available to the defendant and on that basis an order under section 33 of the Act could not be made. The Court also noted that regulation 18 of the e-Commerce Regulations⁸⁴⁸ appears to envisage the granting of injunctive relief to safeguard legal rights but that this provision is, in the case of an allegedly defamatory statement, subject to the limitations set out in section 33 of the 2009 Act. Furthermore, the Court considered that the application should be refused as it would serve no

⁸⁴⁶ Denis O'Brien loses defamation case against Sunday Business Post, *The Irish Times*, 1 March 2019: <https://www.irishtimes.com/news/crime-and-law/courts/high-court/denis-o-brien-loses-defamation-case-against-sunday-business-post-1.3811041#>

⁸⁴⁷ [2016] IEHC 519.

⁸⁴⁸ European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003)

useful purpose because of the availability of material containing the same or similar damaging allegations elsewhere on the internet. The Court observed that this decision means that a person who has been defamed by an internet posting may be left without any remedy unless the author of the material is identified and amenable to the court. The court however granted the Norwich Pharmacal order.

In a subsequent decision in this case,⁸⁴⁹ the High Court (on the basis of new evidence produced by the defendant) refused the application for a Norwich Pharmacal order on a conditional basis, namely that the defendant had the means to communicate with TVO and that TVO be notified by the defendant forthwith that unless the offending postings were removed within 14 days, the plaintiff would be entitled to renew his application for Norwich Pharmacal relief which would be granted. This decision was appealed to the Court of Appeal⁸⁵⁰ which dismissed the appeal. The Court held that it was a matter for the trial judge to be satisfied that the evidence established to the necessary level of cogency and on the balance of probabilities that there was a real risk posed to the life and/or bodily integrity of TVO if their identity was disclosed. There was no error in law in the trial judge's conclusion that he was so satisfied.

Diop v. Transdev Dublin Light Rail & STT Risk Management Ltd

In *Diop v. Transdev Dublin Light Rail & STT Risk Management Ltd*,⁸⁵¹ the plaintiff claimed that while travelling on a Luas tram in 2016, he and his brother were defamed by the security guards. He alleged that they had been “racially profiled” and that they were unfairly selected by the security guards and asked to produce their tickets. He claimed that despite the plaintiff and his brother having valid tickets, one of the guards had repeatedly requested the plaintiff and his brother to step off the tram; these requests were accompanied by hand gestures. This request was countermanded by another guard, who said the brothers could remain on the tram. The plaintiff instituted proceedings in the Circuit Court where he lost and appealed to the High Court.

The High Court (Barr J.) upheld the appeal in relation to defamation, finding that the request to produce their tickets was covered by qualified privilege and was not defamatory, but that the plaintiff had been defamed by the request and accompanying hand gestures to leave the tram, because other passengers who may have overheard the remark, or who may have seen the accompanying hand gestures, which made it clear that the plaintiff was being told to leave the tram, would have concluded that the plaintiff was being told to leave the tram either because he didn't have a valid ticket or otherwise misbehaved. The Court considered that nominal damages were sufficient to vindicate the plaintiff's reputation and good name, as the defamation was almost immediately expunged, such that those present could not reasonably have formed any lasting adverse opinion of the plaintiff. The Court awarded the plaintiff nominal damages of €500 plus his costs in the Circuit and High Courts.

Jones v. Coolmore Stud

*Jones v. Coolmore Stud*⁸⁵² involved an appeal by Mr. William Jones from a decision of the High Court refusing declaration and interlocutory injunctions in proceedings against his former employers, Coolmore Stud (“Coolmore”). After he resigned from Coolmore, he wrote a book and privately published it. Coolmore's solicitors corresponded with distributors and booksellers endeavouring to prevent them disseminating the book. They first alleged, before

⁸⁴⁹ [2017] IEHC 69.

⁸⁵⁰ [2018] IECA 104.

⁸⁵¹ [2019] IEHC 849

⁸⁵² [2019] IEHC 652

they saw the book, that it might be defamatory or in breach of an agreement between the parties. When they read it, they confirmed those protests and also claimed that it infringed the good name and interests of the Stud and the rights of employees, clients and others. Coolmore did not, however, sue Mr. Jones for libel; he said that if it did, he would defend his book. Mr. Jones brought High Court proceedings seeking injunctions restraining Coolmore from adopting these measures to prevent or restrict dissemination of the book. He also wanted the court to declare that his book was not defamatory. His case was that Coolmore was not entitled to adopt those measures in relation to third parties when there had not been any determination of libel.

In the Court of Appeal, Ryan P. held that it is implicit in the defence of innocent publication under section 27 of the Defamation Act 2009 “*that a person who apprehends that a publication may contain defamatory material about him is entitled to communicate that to the distributor or seller or other person involved who is not the author, editor or publisher.*” Ryan P. concluded that that “*there is no valid objection in law to a person seeking to protect his good name by notifying a distributor or other secondary disseminator of his complaint of defamation with a view to preventing distribution*”. The protection afforded to a person for his reputation would be seriously reduced if he was not entitled to head-off publication or distribution by putting such person in the position of knowing the complainant’s allegations about the material. A distributor or seller or other person who receives correspondence alleging libel will have real difficulty in seeking to plead the defence of innocent publication if it later transpires in an action against him that the publication was defamatory as claimed by the injured party.

The fact that it has not been established in a court that the publication is defamatory is irrelevant. There is no obligation on a person claiming to have been defamed to sue any particular defendant. He can choose who to sue.

In a subsequent case (*Jones v. Coolmore Stud*⁸⁵³), the plaintiff issued further proceedings in respect of a further letter issued by the defendant’s solicitors to a publisher in relation to the same book. The defendant sought orders striking out the plaintiff’s claim on the grounds that it discloses no reasonable cause of action and/or is frivolous and/or vexatious, that it is an abuse of process and/or otherwise bound to fail. The main point of the defendant’s argument was that the High Court and Court of Appeal had previously found, in another action by the plaintiff that the plaintiff’s actions are not actionable in law. The Court accepted that the bar on an application to strike out a case such as the one involved in this case is a high one and that the jurisdiction to do so should be exercised sparingly and with great caution. It noted that in the earlier proceedings both the High Court and Court of Appeal had determined that the writing of such letters to book distributors was a legitimate legal purpose. It concluded that to the extent that the plaintiff sought to re-litigate the defendant’s entitlement in principle to write to distributors, it was vexatious. It also held that the plaintiff’s case was bound to fail in law and was therefore frivolous. Finally, the Court held that the plaintiff’s proceedings sought to revive and re-litigate issues which were finally and conclusively decided against him. It concluded that to allow it to proceed would be to expose the defendant to the trouble and expense of defending it, and would be a waste of court time. It therefore decided that it was vexatious. The High Court decision was appealed to the Court of Appeal which upheld the decision.⁸⁵⁴

⁸⁵³ [2019] IEHC 652

⁸⁵⁴ [2020] IECA 116.

Lidl Ireland GmbH v. Irish Farmers Association, Tim Cullinan and Brian Rushe

In *Lidl Ireland GmbH v. Irish Farmers Association, Tim Cullinan and Brian Rushe*,⁸⁵⁵ the plaintiff applied to the High Court for an interlocutory injunction pursuant to section 33 of the Defamation Act 2009 prohibiting the publication or further publication of two identified advertisements.

The plaintiff's case was that the advertisements were clearly and unquestionably defamatory and that the court should enjoin any re-publication. The defendants denied that the advertisements were defamatory and claimed that they had a good defence to the action.

Relying on *Gilroy v. O'Leary*,⁸⁵⁶ it was agreed by the Court (and both parties) that the threshold test for the exercise of the court's jurisdiction under section 33 of the 2009 Act is that the Court must be satisfied that the words clearly bear the pleaded defamatory meanings and that the defendants clearly have no defence that is reasonably likely to succeed. It was also agreed that even if those conditions are met, it does not follow that the court will automatically grant an injunction but must exercise its discretion in considering the balance of justice.

It was held that the "*meaning of the words complained of is quintessentially a matter for the jury*" While not saying that the words were not misleading, Allen J. held that it seemed "*that the defendants have a bona fide case to make that they are not*". He held that the onus was on the plaintiff to establish that the statements complained of were defamatory and that the defendants had no defence that was reasonably likely to succeed. Allen J. concluded that the plaintiff had not met the statutory threshold for the making of an order under section 33 of the 2009 Act and for that reason the application must be refused.

Beaumont Hospital Board & Anor v O'Doherty

In *Beaumont Hospital Board & Anor v O'Doherty*,⁸⁵⁷ the plaintiffs made an application for an interlocutory order pursuant to section 33 of the Defamation 2009 directing the removal, and restraining the further publication, of three videos which were posted on the defendant's website in June, 2021; and restraining the publication of any publication of or about the first plaintiff or its staff pending the trial of the action.

The meaning of the comments in the videos was not disputed. The plaintiffs argued that they included statements that were plainly and grossly defamatory of them and that the defendant had no defence to the action which was reasonably likely to succeed. The defendant's case was that the statements were based on truth.

The Court noted that in accordance with *Gilroy v. O'Leary*,⁸⁵⁸ the test under section 33 of the 2009 Act is the same as had applied at common law i.e. whether, firstly, the statement is defamatory and, if it is, whether the defendant has no defence to the action that is reasonably likely to succeed. It noted that, unlike *Gilroy*, in this case "*there is no issue that the words were defamatory and so the case turns on the application of the second leg*". The defendant put forward the defence of truth.

⁸⁵⁵ [2021] IEHC 381.

⁸⁵⁶ [2019] IEHC 52

⁸⁵⁷ [2021] IEHC 469

⁸⁵⁸ [2019] IEHC 52

Both parties referred to the judgment in *Reynolds v. Malocco*⁸⁵⁹ which considered the correct approach to be taken to an application for an interlocutory injunction which was resisted on the basis that the defendant would plead justification (defence of truth under the 2009 Act). In that case, the High Court held that freedom of speech should rarely be interfered with by a court. However, it also held that where a defendant expressed an intention to plead justification at the trial of the action, it was “*open to the court to examine the evidence adduced by the defendant in support of the justification plea so as to ascertain whether it has any substance or prospect of success*”.

The court pointed out that the importance of the right to free speech and freedom of expression of opinion:

“... is recognised by the law in the approach which is taken to applications for interlocutory injunctions. By contrast with the general rule, the jurisdiction of the court is not engaged by showing merely that there is an issue to be tried as to the defendant’s entitlement to have spoken or written the words complained of, or even that the plaintiff has shown that he has a strong case which is likely to succeed at trial. Rather the plaintiff must show that the words complained of are defamatory and that the defendant has no defence which is reasonably likely to succeed.”

But it pointed out that “*the right of free speech is not an absolute right*” and that the subject of a damaging statement has a right to his/her good name and reputation and “*a right to call upon the court to protect and vindicate that right*”. Moreover, it noted that often the only redress available is an award of damages following a trial but sometimes, “*in the clearest of cases, the court can be asked to intervene before the trial*”. The public interest in free speech “*does not apply where it can be shown that the damaging words are clearly untrue, or, put the other way round, where it can be shown that the publisher – although he may assert that the words are true – has no reasonable prospect of establishing that they are*”.

With regard to the defence of truth, the court noted that:

“...it is not sufficient for the defendant to simply assert that the words complained of are true. Rather the court must examine the evidence adduced in support of the plea of truth to assess whether that defence has any substance or prospect of success.”

The court held that, while the courts must be careful not to interfere with freedom of speech or the free expression of opinion and that orders under section 33 must be made only in the clearest cases and any doubt resolved against the plaintiff, a journalist is not entitled to “*wantonly or recklessly traduce reputations*” and a court would intervene in a case where statements had no reasonable basis. It concluded that there was no prospect of the truth of the allegedly defamatory statements being established at trial and it was not a defence that was reasonably likely to succeed.

With regard to the adequacy of damages, the court concluded that even if the defendant were in a position to meet an award of damages (which was doubtful), the court was satisfied that “*it would not be just that the plaintiffs should have to endure a repetition of the calumnies to which they have been subjected*” and made an order restraining the republication of the

⁸⁵⁹ [1999] IEHC 381

defamatory statements the subject of the action, but refused to make an order preventing the defendant from making any other comments about the plaintiffs into the future.

Michael Reilly v. Iconic Newspaper Limited

In *Michael Reilly v. Iconic Newspapers Limited*,⁸⁶⁰ the plaintiff claimed that an article by the defendant wrongly identified him as the Michael Reilly convicted before a Court on the basis that he was the only Michael Reilly residing in the place of residence in question, and that his reputation had consequently been damaged. The defendant denied that the plaintiff was the only Michael Reilly ordinarily resident at the place in question and/or that the article referred to the plaintiff as alleged in the claim.

The defendant applied at the conclusion of the evidence to have the case withdrawn from the jury on the basis that no reasonably minded jury, properly charged, could find that the article, the subject matter of the proceedings, was anything other than a fair and accurate report of the proceedings in the relevant District Court.

Relying on the provisions of section 17(2)(i) of the Defamation Act 2009, the defendant further contended that the article constituted a fair and accurate report of the proceedings held publicly in Court and that the words complained of were printed on an occasion of absolute privilege.

Relying on *Philpott v. Irish Examiner*,⁸⁶¹ Reynolds J. concluded that it is permissible for a court reporter to rely on the court records recording the outcome of proceedings and the conviction order. Moreover, she stated that the suggestion that “*there is some kind of investigative burden*” on a reporter or newspaper to include additional details, such as date of birth, in a report of court proceedings or to carry out “*‘background checks’ is simply untenable*”.

The plaintiff submitted that the issue of fact as to whether or not the address of the accused Michael Reilly was given in evidence, is one which falls solely within the domain of the jury. Citing Cox and McCullough,⁸⁶² Reynolds J. reaffirmed that:

“the question of whether the occasion upon which the publication was made was one of privilege is a question of law to be determined by the judge. However, if there are questions of fact upon which the question of law depended, then they are, prima facie, matters for the jury to determine.”

The court decided that the only issue of fact in dispute was not challenged in any meaningful way; therefore, there was no contrary evidence before the court.

The court concluded that the reporting of what happened was 100% accurate and accorded with the decision recorded in the Court minute book and conviction orders record and therefore concluded that there was no evidence upon which a jury, properly charged, could reasonably find that the report was not “fair and accurate”.

⁸⁶⁰ [2021] IEHC 490

⁸⁶¹ [2016] 3 IR 565

⁸⁶² Cox, N. and McCullough, E., *Defamation Law and Practice*, at paras. 14.178 and 179.

APPENDIX 6: Press Council Statistics

Details of Complaints received by Press Council/Press Ombudsman in 2020⁸⁶³

Total number of complaints received: 347

The 2020 complaints related to

- National newspapers (print and online) (204);
- Online only news publications (27);
- Local newspapers (print and online) (23);
- Student publications (2);
- Magazine (1);
- Non-member publications (23);
- Not specified (67).

Outcome of complaints

Of the complaints received in 2020,

- 25 were decided by the Press Ombudsman;
- 25 were resolved by the editor to the satisfaction of the complainant;
- consideration of 2 was postponed because they were the subject matter of ongoing court proceedings;
- 2 were not pursued following the editor's response;
- 1 was decided by the Press Council;
- 193 were not pursued beyond the preliminary stage (with the Office) by the complainant;⁸⁶⁴
- 20 were out of time;⁸⁶⁵
- 5 were made by unauthorised third parties;⁸⁶⁶
- 6 related to user generated content;
- 23 concerned publications not a member of Press Council;
- 15 were for other regulatory authorities;⁸⁶⁷
- 30 were classified as miscellaneous;
- 3 were live at end of 2020.

Appeals to Press Council

In 2020 the Press Council considered 14 appeals; 2 of the appeals were carried over from the previous year). Of the 14 appeals

- 3 were upheld; and
- 11 were rejected.

⁸⁶³ *Press Council of Ireland 2020 Annual Report:*

<https://www.presscouncil.ie/fileupload/Press%20Council%20Annual%20Report%202020.pdf>.

⁸⁶⁴ Some of these complaints may have been satisfactorily resolved following the submission of the complaint directly to the editor of the publication concerned.

⁸⁶⁵ Received outside the 3 month deadline for making a complaint.

⁸⁶⁶ Complaints made by individuals who were not personally affected by an article or who complained about an article written about another person, but without that person's permission to make a complaint.

⁸⁶⁷ Mainly for the Broadcasting Authority of Ireland or Advertising Standards Authority of Ireland.



An Roinn Dlí agus Cirt
Department of Justice