

The Court of Appeal's ruling in favour of a tabloid newspaper in the case of a €900,000 award against it has given new hope for campaigners for press freedom, writes **Dan Buckley**



Jury remains out on libel awards by juries

“DON'T believe that we are ever going to have first amendment protection like in the US,” lamented RTE's director general Noel Curran to an Oireachtas committee last year. We may, though, be getting a little closer to American style freedom of the press. Last week's decision by our new Court of Appeal is anything to go by. Curran was addressing the Oireachtas Committee on Transport and Communications about RTE's financial settlement in the wake of the so-called Panigate affair. RTE paid out €85,000 to five people over defamation claims that followed remarks made by entertainer and gay rights activist Panti Bliss on *The Saturday Night Show*. Like many media organisations before and since, RTE were minded to settle rather than fight the defamation allegations. They also aired an apology, prompting hundreds of complaints, a Dail debate and an address by MEP Paul Murphy at the European Parliament for doing so. It was not a good day for freedom of the press.

Monday, October 19, was somewhat better when the Court of Appeal overturned a €900,000 damages award against the *Sunday World* which a judge described as “perverse”. It concerned a case taken in the High Court in 2008 by Martin McDonagh, a member of the Travelling community, against the newspaper for calling him a drug king. The appeal would normally have been heard by the Supreme Court but went to the new Court of Appeal instead. The unanimous decision of the three-judge court was to set aside the jury award.

In the judgement last Monday, the appeal court – comprising Mr Justice Peter Kelly, Ms Justice Mary Irvine and Mr Justice Gerard Hogan – unanimously allowed the appeal of the newspaper.

It found the allegation of drug dealing was substantiated and dismissed that part of his claim. However, it decided that there should be a re-trial in relation to a second allegation of loan sharking.

Delivering the decision of the court, Mr Justice Hogan said it was clear the jury verdict, so far as it concerned the drug dealing allegation, could not be allowed stand.

“Viewed objectively, the evidence overwhelmingly pointed to the conclusion the plaintiff [McDonagh] was, indeed, a drug dealer associated with the drugs seizure in Tubercurry,” he said.

If the allegation was correct, he said, the newspaper had a constitutional right to publish this, and that right could not be compromised by a jury verdict “which was, in essence, perverse”.

That is very strong language from the Bench. In the first instance, describing the jury's decision as “perverse” is unheard of, but, more importantly, explicit judicial recognition of a constitutional right to publish a well founded allegation in a case.

NewsBrands Ireland, the voice of our newspaper industry, welcomed the decision but cautioned that it, once again, highlighted the inadequacies of our defamation laws and the urgent need for further reform, following such awards in the 2000s.

It noted that the *Sunday World* article first appeared in 1999, which meant that the newspaper had been fighting the defamation case in legal limbo for another - for almost 16 years.

“Such a delay does not benefit either the plaintiff or the newspaper and re-



Martin McDonagh arrives at the Four Courts for a Court of Appeal hearing of his defamation award against the 'Sunday World'.

Picture: Courts Collins

fects poorly on our legal system,” said NewsBrands Ireland, in a statement.

“Defamation law in Ireland presents a huge challenge to freedom of expression. The retention of the jury system creates delays and also a lack of certainty for publishers who have no way to ascertain the extent of their potential liability.”

“Ireland is the only country in Europe where defamation actions are heard before a jury. In Britain, trials are held without a jury unless the court orders otherwise.” It also pointed out the disparity between awards for defamation and those given for personal injury.

“To put the case in perspective, the jury award of €900,000 to Mr McDonagh is a multiple of the level of awards in extremely serious personal injury cases,” said NewsBrands Ireland.

Such high jury awards are not uncommon in Ireland and the fact is that even a single judgement involving hundreds of thousands of euro against a

newspaper or other media organisation may be enough to force it to shut its doors, potentially putting hundreds of people out of work.

The original decision in the McDonagh case is a small proportion of that given to a businessman awarded €10 million in November 2010.

The award was made to Donald Kinsella, who sued his former employer, Kenmare Resources, over a press release it sent out concerning an incident where he had sleep-walked while on company business in Africa.

The amount of the award was so staggering that it prompted the judge to remark: “Correct me if I'm mistaken... but you have awarded compensatory damages of €9 million and aggravated damages of €1 million.” It was - and still is - the highest libel award in the history of the state. Counsel for the defendants, Kennmare Resources, described the total of €10m as “off the Richter scale”.

Yet Ireland has, for years, played host to some of the highest libel awards in the world. Prior to the Kinsella case, the most compensation was the €1.87 million won by PR consultant Monica Leech over a series of articles in the *Evening Herald* in 2004 which falsely suggested that she had had an affair with a government minister. Independent Newspapers characterised the award as a glaring example of the need for the review of Ireland's defamation laws.

Legislative changes happened the same year but, despite improvements under the current regime, high awards remain the rule rather than the exception. Along with that, there is still no requirement that actual loss to business or personal reputation has to be proven. All the plaintiff has to do is make the claim.

This is in stark contrast to the UK, where someone suing for libel has to actually prove that there was “serious harm” to their reputation as a result of the publication and where the maximum award for such a proven

claim is £200,000 (€280,000).

It is also an uncomfortable truth that, in the Irish civil courts, a bruised ego is a far more valuable commodity than a missing limb – or worse.

The case of Alan O'Gorman illustrates this well. At the age of 21, Alan, from Co Meath, had his stomach needlessly removed by surgeons at St Vincent's Hospital in Dublin who incorrectly diagnosed him with cancer.

While Martin McDonagh's good name had been deemed worthy of €900,000, O'Gorman was awarded just €450,000 - half that amount.

Other high awards for libel include the €750,000 given to billionaire businessman Denis O'Brien in 2006 against Mirror Group Newspapers. The O'Brien award had originally been IRE250,000 but MGN appealed it on the grounds that the award was excessive.

The matter was sent for retrial on the issue of damages only for a new jury – who knew nothing about the previous award – to multiply it.

For years Ireland gave unlimited discretion to juries in assessing damages. Such was the level of disproportionate jury awards and the exorbitant costs of libel actions that a new defamation regime was introduced in 2009 to shepherd, in the words of one Irish law firm, “the wandering sheep” sitting on Irish juries.

The new act introduced a new remedy into defamation law. This permits a plaintiff, instead of suing for damages, to seek an order in the Circuit Court that the publication publish an apology, correction or retraction and desist from republishing the defamatory material. The action is heard without a jury.

In cases heard by a jury, the new act also instructs a judge to direct the jury as to the amount of compensation they may award. It had been expected that this would lead to a reduction in the level of damages awarded in the future.

But - considering awards made under the new legislation - the jury is still out on that.

Only a strong EU can avert Schäuble's gathering storm

EUROPE'S crisis is poised to enter its most dangerous phase. After forcing Greece to accept another “extend-and-pretend” bailout agreement, fresh battle lines are being drawn. And, with the refugees pouring across the damage caused by divergent economic prospects and sky-high youth unemployment in Europe's periphery, the ramifications are ominous. Recent statements by three European politicians - Italian Prime Minister Matteo Renzi, French Economy Minister Emmanuel Macron, and German Finance Minister Wolfgang Schäuble - have made clear.

Renzi has come close to demolishing, at least rhetorically, the fiscal rules that Germany has defended for so long. In a remarkable act of defiance, he announced that the European Commission rejected Italy's budget, he would re-submit it without change.

This was not the first time Renzi had alienated Germany's leaders. And it was no accident that his statement followed a month's-long effort by his own finance minister, Pier Carlo Padoa-Schioppa, to demonstrate Italy's commitment to the eurozone's German-backed “rules.”

Renzi understands that adherence to German-inspired rules is leading Italy's economy and public finances into deeper stagnation, accompanied by further deterioration of the debt-to-GDP ratio. A consummate politician, Renzi knows that this is a short path to electoral disaster.

Macron is very different from Renzi

Yanis Varoufakis looks at a plan that will see a limited political union established to support the euro at a time of crisis, and asks if it is enough or if much more is needed



in both style and substance. A banker-turned-politician, he is President François Hollande's only minister who combines an understanding of France's and Europe's macroeconomic challenges with a reputation in Germany as a reformer and skillful interlocutor. So when he speaks of an impending religious war in Europe, between the Calvin-

ist German-dominated northeast and the largely Catholic periphery, it is time to take notice.

Schäuble's recent statements about the European economy's current trajectory similarly highlight Europe's cul-de-sac. For years, Schäuble has played a long game to realise his vision of the optimal architecture Europe can

manage within the political and cultural constraints that he takes as given. The “Schäuble plan”, as I have dubbed it, calls for a limited political union to support the euro. In brief, Schäuble favours a formalised Eurogroup (composed of the eurozone's finance ministers), presided over by a president who wields veto power - legitimised by a Euro Chamber comprising parliamentarians from the eurozone member states - over national budgets. In exchange for forfeiting control over their budgets, Schäuble offers France and Italy the promise of a small eurozone-wide common budget that would partly fund unemployment and deposit-insurance schemes.

Such a disciplinary, minimalist political union does not go down well in France, where elites have always resisted forfeiting sovereignty. While politicians like Macron have moved a long way toward accepting the need to transfer powers over national budgets to the “center,” they fear that Schäuble's plan asks too much and offers too little: severe limits on France's fiscal space and a macroeconomically insignificant common budget.



Germany's Minister of Finance Wolfgang Schäuble, who favours a formalised Eurogroup presided over by a president who wields veto power over national budgets.

But even if Macron could persuade Hollande to accept Schäuble's plan, it is not clear whether German Chancellor Angela Merkel would consent to it. Schäuble's ideas have so far failed to persuade her or, indeed, the Bundesbank.

Caught between a reluctant German chancellor and an indisposed France,

Schäuble imagined that the turbulence caused by a Greek exit from the eurozone would help persuade the French, as well as his cabinet colleagues, of his plan's necessity.

Now, while waiting for the current Greek “program” to collapse under the weight of its inherent contradictions, Germany's finance ministry is

preparing for the battles ahead.

In September, Schäuble distributed to his Eurogroup colleagues an outline of three proposals for preventing a new euro crisis. First, eurozone government bonds should include clauses that make it easy to “bail in” bondholders. Second, the European Central Bank's rules ought to be altered to prevent commercial banks from counting such bonds as ultra-safe, liquid assets. And, third, Europe should ditch the idea of common deposit insurance, replacing it with a commitment to let banks fail when they no longer fulfill ECB collateral rules.

Implementing these proposals in, say, 1999, might have limited the gush of capital to the periphery immediately following the single currency's introduction. Alas, in 2015, given the eurozone members' legacy public debts and banking losses, such a scheme would cause a deeper recession in the periphery and almost certainly lead to the monetary union's breakup.

The silver lining in the gathering storm cloud is that minimalist proposals for political union, like Schäuble's plan, are losing ground. Nothing short of macroeconomically significant institutional reforms will stabilise Europe. And only a pan-European democratic alliance of citizens can generate the grassroots needed for such reforms to take root.

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