



# How much is too much?

## Comment

Down the years, the willingness of juries to award large sums to libel plaintiffs has had dreadful implications for freedom of speech in Ireland, writes **James McDermott**

In Richard II, Shakespeare suggests that “the purest treasure mortal times afford is spotless reputation”, but placing a precise monetary value on this particular treasure is something which has perplexed our courts for decades. Now it is Strasbourg’s turn to grapple with the problem.

The European Court of Human Rights is being asked to rule on the largely untrammelled discretion enjoyed by Irish juries to award enormous sums in damages. The case itself concerns an award of €1.25 million made by the Irish Supreme Court to communications consultant Monica Leech, over a series of articles in the Evening Herald that falsely suggested that she was having an extramarital affair with a government minister.

At the original trial, the High Court jury awarded Leech €1.87 million, a sum that the Supreme Court found to be excessive. Such large awards are far from uncommon in Irish libel cases.

Judgment is awaited from the Court of Appeal in relation to an award of €900,000 made by a High Court jury against the Sunday World, for falsely claiming that Martin McDonagh was a drug dealer and a loan shark. The jury made the award despite being satisfied that the tabloid had successfully proved that McDonagh was both a tax evader and a criminal.

And then there was the €10 million in damages awarded to businessman Donal Kinsella, over a

press release issued by his employer which wrongly insinuated that he had made inappropriate advances to a female colleague during a naked sleepwalking incident.

No one is disputing that each of those cases involved very serious examples of defamation fully deserving of damages, but that does not mean that the size of the awards should be free from scrutiny.

It is not just in this country that this issue has created difficulties. In 1989, a London jury awarded Sonia Sutcliffe, the wife of the Yorkshire Ripper, the then astronomical sum of £600,000 against Private Eye, prompting its editor Ian Hislop to famously declare: “If this is justice, then I’m a banana.” Subsequent awards confirmed that Mr Hislop was indeed an edible yellow tropical fruit.

The generosity of these awards is evident when one studies the Injuries Board ‘Book of Quantum’, which suggests that a person who has lost both legs in an accident can expect to receive compensation of between €130,000 and €180,000.

In addition, the courts have indicated that the ceiling for damages for quadriplegia and paraplegia is approximately €450,000. And, of course, an award of damages in a personal injuries action cannot restore lost limbs – in contrast to a libel award, which often is very effective in restoring a person’s good name and reputation.

Traditionally, juries were not given any guidance by the presiding trial judge over how to determine

the amount of damages to award. This often led to bizarre results, exemplified by one case in which tycoon Denis O’Brien was awarded €250,000 against the Irish Mirror by a High Court jury, only to have the award overturned on appeal by the Supreme Court on the grounds that it was disproportionately high.

The case was then remitted back for reconsideration by a second High Court jury, who could not be given guidelines on damages, or even be told that the Supreme Court had set aside an earlier award of €250,000 for being disproportionately high. The second jury decided to award O’Brien €750,000.

Nowadays, in cases covered by the Defamation Act 2009, juries can be given some guidance by the trial judge as to which factors are relevant when calculating the quantum of damages.

However, such directions are limited, and the courts are still very reluctant to entertain comparisons with personal injuries actions. To date, the Act does not seem to have impacted on the chilling effect that large awards can have on the media’s freedom of expression.



**One possible way of resolving the issue is to remove the jury from the assessment of damages process entirely**

One possible way of resolving the issue is to remove the jury from the assessment of damages process entirely. In a criminal trial, the function of the jury is limited to deciding whether or not the accused is guilty of the offence charged, but it is the trial judge who decides on the appropriate sentence to be imposed.

A similar approach could be taken in defamation cases, so that the issue of whether or not the plaintiff has been libelled by the defendant is determined by the jury. The quantum of damages could be assessed by the presiding trial judge, whose legal expertise would enable him to produce a detailed written judgment outlining his reasons for making a particular award. This is far preferable to a jury simply announcing a figure it deems appropriate following secret deliberations.

An even more radical reform would be to remove the jury from the equation altogether and have High Court libel cases heard by a judge sitting alone, as currently happens in the Circuit Court.

After all, High Court judges make decisions in areas such as immigration, employment and family law which are of crucial importance to the parties concerned without the assistance of a jury.

Other than historical anomaly, it is hard to see why libel cases still require the input of a jury, particularly when one recalls that the Courts Act 1998 removed juries from the majority of tort actions precisely because of the indefensibility of the high awards being made by them.

For as long as the possibility of excessive jury awards remains, then any defendant who fights a big defamation case and loses faces what Edward II concisely summarised as “woe, destruction, ruin and decay”. Unless and until Strasbourg intervenes, this will continue to have serious implications for freedom of speech in this country.

*James McDermott is a barrister and lecturer in law at UCD*

times a year.

Sebastian Hamilton, group editor of the Irish Mail, agreed with Kierans that the libel laws were “outrageously repressive” and were used by the rich and powerful to stymie investigative reporting.

“Now that members of Dáil Éireann are

on the receiving end, the political establishment may wake up to the fact that this is not a good thing,” he said.

“Even Woodward and Bernstein got one story wrong. In Ireland, that one mistake would have shut down the Watergate investigation.”

Source: JNRS 2014/2015.



# Shoppers? We have them in the bag.

83% of shoppers are readers and 84% of adults in Ireland now have access to the Internet.

