

NewsBrands Ireland

Submission on

REVIEW OF THE DEFAMATION ACT 2009

Introduction

NewsBrands Ireland, formerly National Newspapers of Ireland, represents sixteen national newspapers and their associated websites.

The organisation represents the industry on public policy matters. It promotes the essential role of the media in a democracy and the need for a free, vibrant and strong indigenous press to keep the public informed.

NewsBrands Ireland (“NewsBrands”), under its previous name of NNI, was instrumental in establishing the Office of Press Ombudsman and Press Council of Ireland to offer an independent and free form of redress for readers who wished to complain about a newspaper article. We fully support the work carried out by the Office.

We welcome the opportunity to contribute to the statutory review of the Defamation Act 2009 (“the Act”), announced by the Tánaiste and Minister for Justice and Equality on 1 November 2016.

Whilst our submission highlights the problems associated with the current defamation laws, we have aimed to offer practical solutions to these problems.

The reality is that the defamation regime imposes huge burdens on Irish newspapers and places Ireland wholly out of kilter with our neighbouring jurisdictions. Between 2010 and 2015, in excess of €30m was spent by NewsBrands members defending defamation actions. In an industry seriously challenged by declining circulations and advertising revenues, costs at this level are not sustainable and pose a very real risk to the industry and the ongoing viability of our members.

In addition to other matters of practical importance, NewsBrands wishes to highlight the following issues:

- 1. The introduction of “serious harm” threshold for the bringing of a defamation action**
- 2. Juries**
- 3. Damages**
- 4. Liability for user generated comment**

1. Serious harm test

The “serious harm” test introduced in the UK Defamation Act 2013 in the U.K. introduced provisions to prevent both libel tourism and unwarranted, but nonetheless expensive, claims.

These are major issues for Irish publications, especially those with an online presence. If, as is anticipated by several lawyers and as advocated by others, the Republic of Ireland becomes a ‘hub’ for defamation tourism, the damage to the country’s reputation as a liberal democracy and as a place in which technology companies and websites can carry on business relatively freely will be under threat.

Section 1 of the 2013 Act provides:

Serious harm

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

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

These are not onerous requirements for plaintiffs. Quite properly, they insist upon a connection by the plaintiff with this jurisdiction such as would justify putting the parties to the expense of a defamation action here. They will serve to filter out unmeritorious claims, where, under the present legal costs regime, defendants may feel forced economically to settle a claim as the prospects of recouping some or any of its costs from an impecunious plaintiff are slight to none. They will rebalance the outer reaches of the defamation spectrum, eliminating the very wealthy plaintiff with little connection to Ireland and the poor plaintiff, who has little financial risk when launching a ‘nuisance’ claim. That can only serve to meet our Constitutional and European legal obligations.

Reports from the UK indicate that the introduction of the “serious harm” test has contributed significantly to preventing frivolous libel actions from reaching the courts.

2. Juries

NewsBrands (previously National Newspapers of Ireland (NNI)) has been calling for the abolition of jury trials in defamation actions for over 30 years. It is our view, expanded further below, that they are unpredictable, time consuming, costly and of little benefit to plaintiff and defendant alike. A number of jury awards, including that of €10 million to a company executive, serve to bring the legal system into disrepute.

Defamation is virtually the only civil action that continues to be decided by juries. The vast majority of other civil claims, including personal injury cases, are heard by judges alone. There is an overwhelming argument that defamation cases are best decided by a judge alone. In the UK, defamation jury trials have effectively been abolished without complaint by or disadvantage to the parties involved.

Below we outline some of the issues associated with jury trials in defamation cases.

Unpredictability and extraordinarily high damages

The unpredictability of, and the extraordinarily high level of damages often awarded by juries, are the most cited problems. Both are of major concern for the member publications of NewsBrands in terms of financial planning and the harsh economic climate that persists for newspapers and periodicals. The presence of juries in defamation cases in the High Court acts as a major disincentive to defendants to run cases, even where they feel they have a strong case.

The absurdity of the jury award of €10 million in the *Kinsella* case and the €1.87 million in damages in the *Leech* case are two examples of the kind of outcome that deter defendants. These sums bear little or no relation to damages in other civil law areas such as personal injuries and are higher by multiples of between ten and one hundred of awards in other European jurisdictions, such as the U.K. The fact that they can be appealed, with the attendant additional costs, is of cold comfort.

The decision of the Supreme Court in the *Leech* case in December 2014 to reduce a jury award from €1.87 million to €1.25 million, while acknowledging that the defamation was not at the most serious end of the scale, is of little assistance and sets a very high benchmark, both in terms of direction to juries in post-2009 Act cases and also in terms of settlement negotiations. Those general damages are almost three times higher than could be obtained for the most grievous injuries in a personal injuries action. The decision has been appealed to the European Court of Human rights.

Lengthy trial period and increased costs

A trial before a jury lengthens considerably the time taken to run a case. This leads to increased legal costs (exacerbated by the ‘two senior’ rule, i.e. two senior counsel can properly be engaged on each side with the loser paying for four senior barristers as well as fees for junior counsel and solicitors). There is a concomitant major waste of court time, with trials often lasting more than double they would have taken before a judge alone.

The exchange of pleadings, the wait to have a date set for a hearing (as civil juries are only empaneled 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 hearing itself takes much longer, to allow sufficient time for the (often complex) law to be explained to the

jury, there is legal argument in its absence and there is the need for it to be addressed by both sides before being charged by the judge.

An example of the exceedingly long time periods that a defamation case can take is *McDonagh –v Sunday Newspapers* [2015] IECA 225. The article complained of was published in the *Sunday World* on 5 September 1999. The case came before a jury in the High Court on 28 February 2008, some eight and a half years later. The plaintiff was awarded €900,000 damages. Judgment in a successful appeal by the defendant newspaper was delivered on 19 October 2015. A further appeal to the Supreme Court

was heard on 14 November 2016, with a decision currently pending. Seventeen years after the article complained of, the litigation has not finally been disposed of and there remains the prospect that a retrial would be ordered. While most defamation cases are resolved in a somewhat shorter time period, this case is by no means unique.

Such a long time span cannot be said to do justice to plaintiffs, who, if genuinely defamed, should be entitled to have access to the court and to have their good name vindicated as early as possible. Neither can it be said to do justice to defendants, as delays and the threat of sizeable damages and legal costs, exert a chilling effect on the right to free speech. That in turn impacts on the fulfilment of the media's role in informing the public and the public's right to receive information and ideas from the media.

Difficulty for juries in determining and applying the law

Another example of the problems that arise with juries as decision-makers can be found in the case taken against the Sunday Times and its columnist Brenda Power by John McAuley. Ms Power had written an opinion piece about Mr McAuley. He had sued a midwife who asked him to stop filming the birth of his baby in a Dublin hospital. The defendants denied the claims and said the article was fair comment on a matter of public interest. However, despite clear directions from the judge on the defence, the jury had to be discharged after failing to reach a verdict (July 2013). The costs involved in such abortive trials – the McAuley case is by no means exceptional - are considerable. The case was, on any reasonable view, a relatively straight forward one. It is our view that it would more effectively and efficiently have been disposed of by a judge alone.

There were similar problems in *McDonagh*. The Court of Appeal decided that a jury award of €900,000 to a drug dealer was 'perverse', a determination that serves to reinforce the problems associated with juries determining modern defamation actions. (At the time of the preparation of this submission the *McDonagh* case had been argued before the Supreme Court and a decision was awaited)

Hogan, J. in the Court of Appeal referred to the fact that the "rightful liberty of expression" of the media is a key component of the right to freedom of expression in Article 40.6.1 of the Constitution. He added that 'as confirmed by the language of Article 40.6.1 itself, the Constitution ascribes a high value to the discussion by the media of matters concerning [in this instance] serious criminality'. He continued:

The right to educate and to influence public opinion is at the heart of the rightful liberty of expression protected by Article 40.6.1. A publication of the kind at issue in the present proceedings provides the public with further details of the Garda operation whereby high value illegal drugs were seized. It is, accordingly, through information provided in this manner that public opinion regarding matters such as the effectiveness of policing policy, the enforcement of our drugs laws, the level of organised crime in society and other related matters is ultimately formed. As I have just pointed out, this right does not, of course, permit the media to publish defamatory material, since this would breach the proper balance which must be struck between the (potentially competing) constitutional value of freedom of expression (Article 40.6.1) on the one hand and the protection of a good name (Article 40.3.2) on the other. (§60)

If it is clear that [sic] the article complained of is true in substance and fact, then the media's constitutional right to publish this material cannot be compromised by a jury verdict to the effect that it is defamatory of the plaintiff, the traditional near sanctity of such verdicts at common law notwithstanding.

The Court of Appeal concluded that the jury finding of defamation was not supported by the evidence, was therefore perverse and thus 'the defendant had a constitutional right by virtue of Article 40.6.1.i to publish this information concerning the plaintiff.'

Complexities of the law

The experience of practitioners is that several of the new defences provided for in the Act, such as that under section 26, while welcome, are simply too complex to be run effectively before juries.

This was evident from the case of *O'Brien v Irish Daily Mail* (15 February 2013), which is the only media action to have been fully argued to a verdict under the Act. The plaintiff, a well-known businessman, sued over a column about charity work he had engaged in in the aftermath of a devastating earthquake in Haiti. The jury determined that the opinions expressed by the columnist were honestly held but, as they lacked an appropriate factual basis, awarded Mr. O'Brien €150,000. Quite bizarrely, the jury also decided that, notwithstanding the plaintiff's position in Irish life and the worldwide significance of the earthquake and its aftermath, the article was not in the public interest.

Such jury decisions act as a deterrent to defendants running important but more complex lines of defence such as fair and reasonable publication on a matter of public interest. The defence provided under section 26 of the Act is difficult enough for legal practitioners. Seeking to explain it to a jury would lead to an extremely long and costly trial with no certainty that an untrained jury would fully grasp its details or import. This reluctance, in turn, leads to an increasing degree of pre-publication self-censorship, even when seeking to report on matters of major public interest. Defendants cannot feel secure that, even if they fully comply with the provisions of section 26, a jury will grasp that they have done so.

Absence of transparency

It is self-evident that the decision making process of a jury in a defamation action is not transparent. They do not have to explain how they come to reach a decision on liability, how they applied the considerations of the elements of a defence to the publication or how they assessed the level of an award. A reasoned decision by a judge, even one that a party may disagree with, provides certainty to the judicial process and is more likely to bring closure to a dispute.

Without a judgment, neither the plaintiff nor the defendant can be certain that the issues raised in the case have been addressed or fully understood by the jury. This is of particular concern where the evidence on its face appears to clearly support a particular

outcome (for example *McDonagh*). Not only was the award exceptionally high but the determination that the plaintiff's reputation had been tarnished was decided on appeal to be irrational.

An appeal necessarily means that the dispute remains unresolved pending determination. Further, even a successful appeal on liability may result in a retrial with all attendant costs.

Judgement by peers

Two arguments are made in favour of the retention of juries in defamation cases. First, they act as an arbiter of community standards on what is defamatory. Secondly, plaintiffs gain comfort from a vindication of their good names by their peers. Neither argument stands up to scrutiny. Neither can offset the damage caused to the constitutionally guaranteed right to freedom of expression by the unpredictability and increased cost of the use of juries.

It cannot seriously be suggested that a successful plaintiff, who seeks any of the alternative reliefs under the Act (e.g. declaratory or connection orders) is any less vindicated by a verdict from a senior judicial figure rather than by a jury. The fact that the legislature determined that claims for damages up to €75,000 could properly be heard by a judge alone in the Circuit Court shows that an appropriate and effective remedy is available to plaintiffs without recourse to a jury. Circuit Court and higher judges are just as capable at recognising community norms in defamation (and other civil actions) as a jury. The personal and professional reputations of parties are a significant factor in many other civil claims determined by a judge sitting alone but the successful parties do not believe that their vindication is any the less because it comes from a judge. Further, in contrast to a jury decision, successful parties before a judge have the benefit of a reasoned decision which supports their position.

NewsBrands has been consistent in its advocacy of the abolition of juries. That remains its firm position.

An opt-in position as in the U.K.

However, if juries are to be retained, an opt-in procedure similar to that in the UK, whereby non-jury hearings are the default position in defamation actions, is preferable to the current Irish system. In effect, there would only be a jury trial in a defamation action where the parties and the judge agree and where it is in the interests of justice.

NewsBrands believes that an opt-in jury system would be compatible with the constitutional protection of one's good name. It would still allow for jury hearings in certain cases but it would address, at least in part, some of the problems and drawbacks with the current procedure.

At the very least, if juries are retained, they should have no role in determining quantum.

In that way, the jury could determine whether material was defamatory and give a level of vindication to a plaintiff from his peers. However, with a judge determining quantum one layer of unpredictability would, hopefully, be stripped away.

Directions to juries (s.31)

While advocating the abolition of juries, NewsBrands believes, that if they are to be retained, a change to the operation in practice of section 31 of the Act would be of some, albeit limited, assistance. This section, which provides that a judge must give directions to juries on the matters which ought to be considered in deciding on damages, is positive in principle. In practice though, it suffers from the law of unintended consequences.

When charging a jury in a defamation action, the judge necessarily deals at the outset with issues of liability, outlining the law, the plaintiff's claim and the defendant's case. The judge will then turn to the question of quantum and outline, at a bare minimum, the eleven criteria to be considered under section 31(4). That takes time. By way of example, approximately one quarter to one third of the judge's charge in the *O'Brien* case related to damages. As a result of the time spent on damages and the fact that this invariably happens at the end of the judge's charge, the jury's views on liability have to be skewed. It is very difficult for a defendant to persuade the jury of the merits of its defence if the great majority of the final words it hears from the judge just before it returns to the jury room relate to damages.

A simple way around this problem would be to split counsel's speeches and the judge's charge between liability and quantum. The jury would hear argument about, and the judge's charge on, liability before deciding if the material complained of was defamatory. Only then, if necessary, would it be addressed on quantum.

3. Damages

The level of damages in defamation cases remains a serious concern. Damages here are much higher – often double and treble – the equivalent awards in all other European

countries. Ireland is significantly out of kilter with its neighbouring jurisdiction, the U.K., where London was once the world's libel capital.

Any benefits of the reforms introduced by the Act have been eclipsed, if not set at naught, by the Supreme Court decision in *Leech – v – Independent Newspapers*. While the court reduced a jury award of €1.87 million to €1.25 million, it did so without any explanation of how it reached that figure for a defamation it deemed to be very serious but not at the highest level of the scale.

Delivering the judgment of the court, Ms. Justice Dunne stated:

'I accept that the defamation in this case could not be described in the same terms as that in the de Rossa case which was described as coming within the category of "the gravest and most serious libels which have come before the courts" but it is nonetheless a very serious libel ... one that comes towards the higher end of the scale'.

Even allowing for the time lapse since the de Rossa case, a jump from approximately €350,000 at the top of the scale of seriousness to €1.25 million at a level of seriousness but not at the top level, is staggering. While under appeal to the European Court of Human Rights, this decision has set a worryingly high benchmark for general damages and has already led in practice to demands in settlement negotiations for damages much higher than had ever previously been sought.

Remedies must be proportionate, as the Supreme Court judgment recognised, but an award of €1.25 million only exacerbates the existing situation where there is a dual problem of high damages and a low threshold as to what is defamatory. *Independent Newspapers* has lodged an application at the European Court of Human Rights, claiming that the €1.25 million award to Ms Leech has a "serious chilling effect" on freedom of expression and that defamation law and practice in Ireland is incompatible with Article 10 of the European Convention on Human Rights in that it fails to provide "adequate and effective safeguards against disproportionate awards in defamation actions".

The fact that a plaintiff in a 'serious' but not the 'gravest' of defamation cases can obtain general damages nearly three times greater than the highest that would be allowed in cases of the worst personal injuries does little credit to the legal system.

The inflationary effect of the Supreme Court's decision is already being seen. Thus, in *Christie –v- TV3 Television* [Unreported, O'Malley J, 12 November 2015] the plaintiff solicitor was awarded €140,000 having been mistakenly identified as his client, who was facing fraud charges. He was on screen in a news item for seven seconds and an apology, albeit not in agreed terms, was broadcast within a day of his complaint being received and four days after the original report. Were it not for the offer of amends made by TV3, Judge O'Malley, relying on *Leech*, would have awarded €200,000.

Dublin is now be perceived by many as a capital for libel tourism (see, for example, the *Justin Timberlake* case) especially as the U.K. has sought to address this phenomenon with the Defamation Act 2013.

A feature of this change is, as one NewsBrands' lawyer pointed out, that some plaintiffs are suing for damages in what is essentially an exercise of image control and has little to do with defamation. Given that the Supreme Court's award in *Leech* is approximately eight to ten times greater than the plaintiff would have obtained in the UK, the media's concerns about libel tourism in the Republic of Ireland are not fanciful.

At present, and as confirmed in several decisions and in the recently published Book of Quantum, the highest award of general damages in a personal injury action is €450,000. To obtain such a figure a plaintiff would have to be very seriously injured and, probably, paraplegic. While not seeking to minimise the distress and embarrassment suffered by Mrs. Leech, it is indefensible that she should receive damages from a jury and then an appellate court three times greater than those available to someone who has suffered catastrophic personal injuries. The award to Mrs. Leech is approximately ten times what she would expect to receive in the U.K. Damages at this level are simply unsustainable for the media in Ireland and will, without doubt, lead to the closure of newspapers, with a consequent impact on a cornerstone of our democratic system.

NewsBrands therefore recommends that the Act be amended so that no award of general damages in a defamation action can exceed the highest permissible award in a personal injuries action. This will not, however, impact on the ability of the court to award special, exemplary or aggravated damages in a suitable defamation action.

4. No liability for user generated comment

The absence of clarity in the Act surrounding liability for user generated comment is a major concern for newspaper websites.

Third party comments, sometimes also referred to as 'user generated content' have become a desirable - indeed a necessary - part of modern media. Newspapers are no exception. Video and interactive content help drive traffic online thereby providing the advertising revenue NewsBrands' members need to survive and to produce content to inform the public. Interaction with readers is part of the life-blood of online communication.

While the media is recognised in the Constitution as an 'organ of public opinion', and therefore has certain rights and privileges, it also has concomitant responsibilities. However, nowadays everyone has the power to publish and to become an organ of public opinion, so the press should not be held to higher standards than others; either those standards should be relaxed or preferably the standards of others should be raised. The press want to be responsible about how they handle third party comments but they need protection and a system that will target the author, not the newspaper.

There is uncertainty around the availability of the hosting defence in the e-Commerce Directive to comments placed on newspaper websites. The question of whether to monitor in light of this uncertainty, is problematic. Pre-moderation is almost impossible, given the volume, the 24-hour nature of posting comments, and the difficulty of checking the factual basis of statements or the honesty of the opinion expressed.

There is contradictory case law from both the EU court (CJEU) and the European Court of Human Rights (ECHR). The former considered the provisions limiting liability for mere ‘hosts’ and ‘intermediary service providers’ under the eCommerce Directive (Directive 2000/31/EC) but ruled that to be eligible for that protection, a 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. The provisions did not apply, the Court said, to a newspaper publishing company which posted an online version of a newspaper on its website as it had, in principle, knowledge about the information which it posted and exercised control over that information. The company was remunerated by income generated by commercial advertisements posted on the website but it was immaterial whether or not access to that website was free of charge (Judgment of 11 September 2014 (Case C-291/13 *Papasavvas*))

In a case that dealt specifically with third party comments, *Delfi AS v. Estonia* (no.64569/09, judgment of 10 October 2013), a section of the European Court of Human Rights unanimously held that a 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. While much criticised, the decision was upheld by the Grand Chamber in 2015 (ECtHR 64659/09, judgment of 16 June 2015). The court placed emphasis on the fact that the applicant was a commercial news portal and that a small number of the comments complained of amounted in the domestic courts’ view to hate speech or incitement to hatred. The judgment of the Grand Chamber has been widely and trenchantly criticised, not least in the dissenting opinion of two of the judges of the Court themselves.

This legal uncertainty now places news websites at a legal and commercial disadvantage to their larger and much wealthier competitors such as Facebook and Google. They argue that they are “traditional” ISPs and have thus escaped legal liability for user generated content. (see, for example, the decision of Mr Justice Binchy in *Maurema – v- Facebook Ireland Limited*, 23 August 2016,[2016] IEHC 519).

The Pew Research Center, a U.S. based non-partisan fact tank, has found that 62% of all Americans get all or some of their news from social media, of which Facebook accounts for the lion’s share. While there are no up to date figures for the Republic of Ireland, there can be little doubt that social media is a significant, and increasing, source of news here. The impact of Google on news transmission is obvious. Yet both Facebook and Google operate in a much more lenient legal environment when it comes to user generated commentary than traditional media. They also have considerably greater financial resources. This places

NewsBrands' members at an enormous commercial and legal disadvantage. All NewsBrands seeks is a level legal playing field in which to operate.

As a result, specific protection should be afforded to news websites for third party comments, whether or not they are pre-monitored. This is the position in the U.K., under the Defamation Act 2013 and related Regulations.

The relevant provisions of s.5 of the 2013 Act are as follows (emphasis added):

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.

...

(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.

NewsBrands would encourage Government to adopt similar legislation.

5. Pre action protocols

Part 15 of the Legal Services Regulation Act 2015 provides for the introduction of pre-action protocols in clinical negligence actions. NewsBrands submits that pre-action protocols should also be introduced for defamation actions.

It is generally accepted, that pre-action protocols can allow for the efficient disposal of litigation in a way which reduces the legal costs for the parties. Both parties to a defamation action would benefit from the introduction and implementation of pre action protocols. From the perspective of plaintiffs, it would facilitate an early resolution, and allow for early publication of an apology (where agreed by the defendant). From the defendant's perspective, it will assist with the very significant cost burdens which currently must be factored into the defence of any litigation by the Defendant in a defamation action.

6. Fair and reasonable publication (section 26)

Considerable concern was expressed before the passing of the 2009 Act that placing the defence of fair and reasonable publication on a statutory basis would hinder both its effectiveness and its future development. Those worries, exacerbated by concerns about the ability of juries fully to grasp the complexities of the defence, have been fully borne out in practice.

The defence provided for in section 26 has its genesis in Ireland's obligations under Article 10 of the European Convention on Human Rights, as initially applied through the prism of the common law and Irish constitutional provisions. Article 10 requires the availability of a defence which allows for the publication by the media of material in the public interest, even where it contains an error damaging to a reputation, provided that was done fairly and reasonably.

It is important to remember that Article 10 applies not just to the defences available to a publisher embroiled 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. If a publisher cannot do so, it is likely to forgo publication. Where the matters at issue are clearly in the public interest, such self-censorship deprives the public of information to which it is entitled, with consequent damage to the democratic system.

There is a considerable and widespread lack of confidence on the part of the media about the practical effectiveness of section 26. This rarely stems from a belief that the proposed publication is not in the public interest. Rather it is caused by the additional

requirements of the 2009 Act and, in particular, the provisions of sub-sections 26 (2) and (3). Those sub-sections also have the effect of "fossilising" the defence so that it does not have the freedom to grow with technological and legal advances or to be flexible enough to meet Ireland's obligations under the ECHR. They become, in effect, hurdles to be leapt over in a race more akin to a marathon than a sprint.

The defence would, in NewsBrands' submission, be much more effective, and ECHR complaint, if it was both simplified and allowed, as in the U.K., to develop organically with changing conditions. Its development would, of course, be considerably assisted by the abolition of juries in defamation actions and their replacement by reasoned judicial decisions, which would provide clarity and guidance to publishers as to what was, and was not, fair and reasonable.

NewsBrands is conscious that section 15 of the 2009 Act abolished any defences, both under statute and common law, which were available before the commencement of the Act. Consequently, NewsBrands would advocate the replacing of section 26 with a provision stating:

26 – It shall be a defence (to be known, and in this section referred to, as “the defence of fair and reasonable publication”) to a defamation action for the defendant to prove that –

- (a) The statement in respect of which the action was brought was published-
 - (i) in good faith, and
 - (ii) in the course of the discussion of a subject of public interest, and
- (b) In all the circumstances of the case, it was fair and reasonable to publish the statement.

7. Offer to make amends (section 22)

Judge to decide

The introduction of the offer to make amends was an important attempt to vindicate the reputation of someone who had been defamed by allowing for the speedy resolution of claims. However, since the Act was introduced, there has been controversy over whether, when the parties are unable to agree an appropriate figure for damages, the plaintiff is entitled to have these measured by a judge or by a jury.

Several cases under section 22 have been determined by a judge sitting alone: most recently Mr. Justice Paul MacDermott in *Ward and Quinn – v – The Donegal Times* (High Court, unreported, 8 November 2016).

However, in the case of *Higgins – v – The Irish Aviation Authority*, both the High Court and Court of Appeal decided that section 23(i)(c) of the 2009 Act requires that the determination be made by a jury.

It is NewsBrands’ submission – supported by *dicta* in the Court of Appeal - that this was not the intention of the legislature when drafting the Act. It has the effect of both elongating the litigation to the benefit of neither party while, for the reasons outlined above, increasing the uncertainty of the outcome and the likelihood of appeals. This serves to neutralize the effect of an otherwise reforming provision.

NewsBrands submits that, as in the U.K., decisions on quantum in offer of amends cases should be made by a judge sitting alone.

This could easily be confirmed by a change to section 23(i) (c) of the Act by amending the phrase “the High Court” to “a judge sitting alone in the High Court”.

Such a change would, of course, be rendered moot if, as submitted above, juries were abolished in defamation actions.

Comparison with UK legislative provisions

The offer to make amends procedure in the Defamation Act 2009 differs in a significant respect from the equivalent provision in the UK.

Section 23 (2) of the 2009 Act provides

Subject to subsection (3), it shall be a defence to a defamation action for a person to prove that he or she has made an offer to make amend under section 22 and that it was not accepted, unless the plaintiff proves that the defendant knew or ought reasonably to have known at the time of publication of the statement to which the offer relates that

*(a) it referred to the plaintiff or was likely to be understood as referring to the plaintiff;
and*

(b) that it was false and defamatory of the plaintiff.

The UK equivalent, section 4 of the Defamation Act 1996, provides:

(2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer.

A qualified offer is only a defence in respect of the meaning to which the offer related.

(3) There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of—

*(a) referred to the aggrieved party or was likely to be understood as referring to him,
and*

(b) was both false and defamatory of that party;

but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case.

Thus, where a publisher in Ireland publishes a defamatory statement and seeks to rely on the procedure, if the plaintiff can show that the defendant ought to have known it was defamatory of the plaintiff, the defendant cannot rely on the offer as a defence. This is, in effect, a negligence ouster.

The UK provision does not include this and the defence will not apply only if the defendant knew or had reason to believe the statement referred to the plaintiff and was defamatory of him. This has been held to involve a finding of actual malice - and not simply negligence.

The proposed benefits of the new defence, for defendants and plaintiffs alike, was the facilitation of the expeditious resolution of actions, hopefully without involving the courts at all. By imposing a negligence ouster, the benefits of section 23 can easily be lost.

NewsBrands submits, therefore, that section 23 (2) should be amended more closely to reflect the provisions in the UK legislation. That would better reflect the appropriate balance to be struck between the parties and render the offer of amends procedure more effective than at present.

8. Presumption of falsity

The Defamation Act 2009 maintained the pre –existing position that the Plaintiff in a defamation claim enjoys the benefit of the presumption of falsity. In other words, that the onus is on the publisher to prove the truth of a statement once it is alleged by a Plaintiff to be defamatory.

The law can neither be correct nor fair to allow a Plaintiff to maintain an action for defamation merely by showing that the words are capable of defamatory meaning, when the Plaintiff is not in a position to prove their untruthfulness. Under the Defamation Act 2009, a Plaintiff can win a defamation case notwithstanding that the words about which they complain are true (if the Defendant has difficulties in proving their truth in a court hearing context).

The Law Reform Commission recommended in its 1991 Report on the Civil Law of Defamation that the presumption of falsity be abolished and NewsBrands continues to endorse that position.

To the extent that the 2009 Act introduced a requirement for verifying Affidavits to be sworn by the parties in proceedings, NewsBrands believes that this is an inappropriate and inadequate approach and that the original recommendation made by The Law Reform Commission in 1991 is the appropriate one – that the presumption of falsity should be abolished and that to be defamatory, a matter should be required to be untrue.

9. Court Reporters

Last December, the Attorney General called for a review of defamation law so as to ensure protection for court reporters. The Attorney stated that court reporters are responsible for an “important public service” and deal with one of the “most challenging assignments in journalism”.

The Attorney stated that court reporters should not have to fear “a simple oversight, omission or error” when reporting on court proceedings. The Attorney General stated that there should be a consideration of the introduction into Irish law of a provision that no report of court proceedings should be actionable in defamation unless there is proof of malice.

NewsBrands endorses the comments of the Attorney General and submits that a provision should be introduced into defamation law to the effect raised by the Attorney General – that no report of court proceedings should be actionable in defamation unless there is proof of malice.

10. Lodgments – Application to all aspects of a claim.

A somewhat rigid adherence by the courts to a “winner takes all” approach to lodgments renders many of the reforms in the 2009 Act ineffective.

An example can be found in the offer of amends procedure outlined above. This was introduced to encourage the early resolution of complaints to the benefit of the parties and the court.

In most, if not all cases, an offer under section 22 will, if not accepted, be bolstered by a payment into court. However, it is extremely rare that the offer of amends and allied lodgement will cover every aspect of the plaintiff's complaint, which is usually pleaded at the higher end of the scale, particularly with regard to meanings. As the great majority of legal costs are incurred in the period after the lodgement is made and as in many cases the plaintiff will not be a mark for those costs, this places defendants on the horns of dilemma. Do they adopt all of the plaintiff's case, thereby increasing the possibility at trial of a very high award of damages, or take the risk that their lodgement will not cover a subsidiary aspect of the complaint and therefore lose the protection the payment into court was meant to provide on costs? This cannot have been the intention behind the reforms in the 2009 Act.

In this context, it also appears inequitable that a defendant who has lodged, say, €80,000 should suffer the same consequences on costs if a plaintiff is awarded €80,001 or €1 million. The prospect for such inequity is heightened by the uncertainty caused by the continued presence of juries in defamation cases.

In NewsBrands' submission, a new legislative provision should be introduced obliging judges, in cases where lodgements have been made, to make costs orders which reflect, in percentage terms (and, potentially, up to 100% of the plaintiff's costs) the level of success of the claimant in either beating the payment into court or in persuading the court that aspects of the claim were not covered by the defence.

11. Abolition of causes of action for bodies corporate.

Irish law is increasingly out of kilter with its sister common law jurisdictions in granting a company the right to sue for defamation “*whether or not it has incurred or is likely to incur financial loss as a result of the publication*” (section 12 of the 2009 Act).

Since the introduction of the “serious harm” test in the U.K. by the Defamation Act 2013, companies can only sue where the publication complained of has caused or is likely to cause serious financial loss. Many Australian States have limited actions in defamation to companies with fewer than 10 employees.

In NewsBrands' submission, companies should not be entitled to take actions in defamation.

In *Derbyshire County Council – v- Times Newspapers* [1993] AC 534, the House of Lords held that a public corporation could not maintain an action for libel. This was not because a public corporation did not have a reputation. Instead, the public interest in unfettered public criticism was deemed more important. Why should there be an exception for private, rather than public, corporations?

Given their ubiquity, we tend to forget that companies are abstractions, mere legal fictions that exist only to the extent that the law allows. They have “*no soul to be damned and no body to be kicked*”. They have no feelings to be offended. They cannot suffer embarrassment or distress. They are a legal device to protect commercial interests by limiting the financial and legal exposure of these involved.

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, of course, directors and employees can sue for defamation in their own names.

In practice, companies have used their financial might and defamation law to effectively bully and chill their critics. Many large legal and public relations firms make a living from promoting “reputation management” to corporate clients. While companies can strictly only sue in respect of their trading reputations, in practice companies instruct their lawyers to issue threats for all sorts of criticism.

It is difficult to see what legitimate purpose the right of a company to sue and, crucially, threaten to sue can have in a democratic society. A glimpse at a number of recent cases in U.K., that lead to the Defamation Act 2013, suggests that the law was used in an unattractive way and against the public interest. See *McDonalds Corporation –v– Steel and Morris* (“*McLibel*”) 1997; *British Chiropractic Association –v- Dr Simon Singh* [2009] QB and *General Electric Healthcare –v- Professor Henrik Thomson*.

Given their legal basis and the range of other legal options open to corporations, their ability to sue for defamation should be removed. At the very least, as this is probably the only way to keep Irish law ECHR compliant, they should only be able to do so if they can prove that a publication caused or was likely to cause serious, direct financial loss.

12. Honest Opinion (section 20)

The defence of honest opinion and that of fair comment, which it replaced, both work better in theory than in practice.

In broad terms, to mount a successful defence under section 20, a defendant must prove:

- (i) The opinion was honestly held;
- (ii) The defendant believed in the truth of the opinion at the time of publication or, where the defendant was not the author, believed that the author believed it to be true at the time;
- (iii) The opinion was based on facts specified in the statement containing the opinion or referred to in the statement that were known or might reasonably be expected to be known by readers; and
- (iv) The opinion related to a matter of public interest.

Several of these requirements contain pitfalls which have rendered the defence difficult to bring home. This should not be the case in a properly functioning democracy. Arguably, it makes Irish law non-ECHR compliant.

The requirement that a publisher must prove that he believed in the honesty of the author was a new one introduced in 2010. It is wholly unnecessary and unduly onerous. It causes pre-

publication legal difficulties with the simplest of news coverage. For example, how are editors able fully to satisfy themselves that a view expressed by an opposition politician on government policy is honestly held or that a letter to the editor was not written with an ulterior motive? In addition, this new requirement causes serious difficulties for broadcasters, particularly with respect to live programming. It also represents a significant shift in the burden of proof.

In NewsBrands' submission, no defendant should, logically or otherwise, be required to prove anything other than that the author of the opinion complained of honestly believed what he or she said or wrote. Section 20 should be amended to reflect this.

The requirements in section 20 (2) (b) also go beyond those of the common law defence of fair comment. Under the latter defence, the opinion merely had to be based on accessible, relevant facts to be proven at trial. Further, the requirement that facts, not referred to in the statement complained of, be known, or might reasonably be expected to be known, by the persons to whom the statement was published, should have no place in laws affecting modern media. How can this properly be applied to material placed on a news website? Must the defence fail because some of the potentially millions of readers, including those outside Ireland, might not reasonably be expected to know the factual basis for otherwise honestly held views? There was no requirement at common law that everybody to whom the allegedly defamatory opinion was published should be aware of the facts underlying the views expressed. Section 20 (2) (b) should be amended to revert to the common law position.

Finally NewsBrands believes that, as in the U.K. following the Defamation Act 2013, there should be no requirement that an honestly opinion be on a matter of public interest. Such a requirement is moot given the protection afforded by the Irish

Constitution and Article 8 of the ECHR to a person's privacy. As exemplified by the decision of the jury in *O'Brien –v- Irish Daily Mail* (above), it causes unnecessary confusion. Further, as the U.K's joint committee on defamation reform (2012) stated: "*It may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not*".

13. Survival of causes of action for benefit of deceased's estate.

Section 39 of the 2009 Act amended the law so that a cause of action existing at the time of the death of a plaintiff would survive for the benefit of his or her estate. However, as any award shall not include general, punitive or aggravated damages, only special damages and legal costs can be awarded against an unsuccessful defendant.

It was, and remains, NewsBrands' view that this provision is unnecessary and that there was no evidence to support its introduction. It fails properly to strike the balance between the right to freedom of expression and that to a good name.

As long ago as 1948, the Porter Committee refused to recommend any alteration to the then existing position that no actions may be maintained in defamation in respect of injury to the reputation of a person who was dead at the time of publication or who died after an action

had been commenced. That remains the law in the U.K. There is no equivalent provision to section 39.

The courts have consistently stressed the personal nature of the cause of action in defamation. This often works to the benefit of plaintiffs. By way of example, bankrupts are permitted both to initiate defamation claims without having to obtain the leave of the court and cannot be obliged to provide security for costs. This personal cause of action necessarily, and logically, ends with death. There is, therefore, no logical legal basis for granting a cause of action in respect of statements about a dead person or allowing a case to continue after the plaintiff has passed away.

Section 39 only allows for the recovery of special damages for the benefit of the deceased's estate. However, in practice this causes significant evidential difficulties for both sides and for the court. How can an estate prove special damage in the absence of the deceased? A defendant is, in NewsBrands' submission improperly, constrained in challenging the veracity of any claim for special damage by an inability to cross-examine the person effectively making the claim. These problems are exacerbated by the fact that it is left, under the current law, for a jury to weigh this evidence and reach a decision.

The compromise that section 39 clearly is satisfies neither side of the argument; neither those who advocate restricting what can be written after death nor those who oppose it. However, once it is accepted, as the 2009 Act does, that the dead cannot be defamed by a publication after they have passed away, there is no compelling argument that actions already commenced should continue in similar circumstances.

Section 39 should be repealed.

14. Amendment of section 18 Post-Brexit

Section 18 of the Act gives legal protection, through statutory qualified privilege, to reports of press conferences and of public meetings. This is because of the importance of the public being informed of the matters raised. They must, however, be held "*in the State or in a Member State of the European Union*".

Once the U.K. gives notice under Article 50, its membership of the EU will end within two years. If the Defamation Act is not amended in the interim (by either a general or a targeted statute) there will likely not be protection for reports of press conferences and meetings in, particularly, Northern Ireland and the rest of the U.K. (Section 15 of the Act provides "*that any defence that, immediately before the commencement of this Part (of the Act), could have been pleaded as a defence in an action for libel or slander is abolished*", so common law qualified privilege may not apply to reports not covered by section 18). This could have a very significant impact not only on press freedom but on the access by the public to very important information.

This can be fixed by a relatively easy amendment to the First Schedule of the Defamation Act 2009 (Part I sub-section 11 and Part II sub-sections 1, 2, 3, and 5) so that the phrase

employed in the legislation would read *“whether in the State, the United Kingdom or a Member State of the European Union.”*

That said, the rationale behind the geographical limitations in section 18 appears arbitrary at best. It is odd, for example, that qualified privilege applies to reports of press conferences and public meetings held in Romania, Hungary and Estonia but not in Canada, New Zealand, Australia or the United States. The media often need to report on matters highly relevant to Irish public discourse raised at press conferences and public meetings outside of the EU and the UK. A recent example is the Olympic tickets controversy and the reporting of police press conferences in Rio de Janeiro. In the future, it is likely that there will be highly charged press conferences and public meetings in the United States to discuss immigration and undocumented workers, including the many Irish there.

Given that the privilege attaching to such reports is qualified, rather than absolute, NewsBrands would advocate the removal of any geographical restriction in the provision.

15. The Press Council and Online media

This point concerns the remit and membership of the Press Council. It centres on the definitions of ‘publication’ and ‘periodical’ in the definitions section and the Second Schedule of the Act. The respective definitions are:

Part 1 Section 2 – Definitions:

“— In this Act— “ 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; ...”

Part 2 Section 6 (2):

“The tort of defamation consists of the publication, by any means, of a defamatory statement”

Schedule 2 - Minimum Requirements in Relation to Press Council

Section 44 Subsection 4:

“The owner of any periodical in circulation in the State or part of the State shall be entitled to be a member of the Press Council.”

In providing for recognition of the Press Council, the Act refers to the Council’s role exclusively in respect of *“periodicals”*, the definition of which is limited to print publications and *“any version thereof published on the internet or by electronic means....”*

There is a lack of clarity in this wording. Given the definition of *‘periodical’*, it is arguable that it does not include stand-alone websites like *The Journal* or the majority of newspaper websites, which publish unique content in addition to versions of their printed newspaper. That would mean that these sites would not be entitled to become members of

the Press Council and obtain some of the protections and concomitant responsibilities provided for in the Act.

The issue is whether an online-only publication is a periodical for the purposes of Part 1 of Section 2. The wording is ambiguous and somewhat outdated. There are a couple of meanings which can be taken from it. Firstly, one can read the section as providing that, in order for a publication to be a “*periodical*”, it must just be a ‘publication’ which is published, issued or circulates in the State at regular or substantially regularly intervals. This would include an online only publication. However, that interpretation jars somewhat with the last part of the wording which states that the definition of periodical “*includes any **version** thereof published on the internet or by other electronic means*” (our emphasis). That would suggest that a publication on the internet (or by other electronic means) is not in itself a periodical but comes within the definition only provided that the internet or electronic publication is a “version” of an existing periodical.

It is highly desirable that the standards espoused in the Press Council code and applied by the Ombudsman and the Council should be adhered to by online only publications as well as by offline publications which also have online ‘versions’ and/or online publications other than ‘versions’ of their offline publications (e.g. Evoke.ie published by Associated Newspapers).

The Press Council is given recognition in the Act and membership of the Council and adherence to its standards are given credit in the substantive provisions of the Act. The Press Council is widely viewed as being successful in its role, including by NewsBrands’ members and lawyers, and therefore its inclusion in its membership of online-only publications should be supported and fostered. Consequently, NewsBrands would urge that the wording be clarified to make clear that online publications are periodicals in their own right.

16. Evidence of criminal convictions in defamation actions

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. In particular, 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. In short, 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 thereby incurred.

Legislation in the U.K. has sought to ameliorate this through the passing of section 13 of the Civil Evidence Act 1968 (as amended). This states, among other things:

s13. Conclusiveness of convictions for purposes of defamation actions.

(1) 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.

(2) 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.

NewsBrands is of the view that this provision is improperly limited by the requirement that the proof is only available “at the time when that issue falls to be determined”. In fact, the only appropriate limitation relates to the timing of the publication complained of as that is matter at issue and it is then that any damage to the plaintiff’s reputation has been caused. The phrase should, therefore, be replaced with “at the time of the publication complained of”.

Conclusion

As demonstrated in the detail of this submission, NewsBrands contends that the defamation regime serves neither plaintiff nor defendant effectively. Not only is it onerously expensive and cumbersome to seek redress, it is prone to imposing huge damages that are largely out of kilter with awards made in defamation cases in other jurisdictions.

Many of the recommendations we make are intended to facilitate speedier, more efficient and more focused litigation and to achieve a greater level of predictability and certainty in outcomes and indeed to provide a more balanced and fairer process for the resolution of defamation claims.

Ends / January 2017

Contact:

Ann Marie Lenihan

CEO

NewsBrands Ireland

E: amlenihan@newsbrands.ie

M: 086 816 2764

www.newsbrands.ie

