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*Submission by Council of The Bar of Ireland to
the Department of Justice and Equality for
the Review of the Defamation Act, 2009*

21st December 2016



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OF IRELAND

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Defamation Act Review,
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21st December 2016

To whom it may concern,

Please find enclosed a submission by the Council of The Bar of Ireland in response to the public consultation for the Review of the Defamation Act 2009.

Please contact me should you require any clarification or additional information in relation to the submission.

With best regards,

Yours sincerely,

Ciara Murphy
DIRECTOR

INDEPENDENCE
EXPERTISE
INTEGRITY

Submission to the Department of Justice and Equality for the

Review of the Defamation Act, 2009

1. The Defamation Act, 2009 was introduced in to law in January 2009. Pursuant to section 5 of the Act, the minister is compelled to review the provisions of the Act within a five year period of the act coming in to being.
2. It is pursuant to this obligation to review the Act that that the Department of Justice has invited submissions from interested parties as part of the public consultation, inherent to the review process.
3. The purpose of the Defamation Act 2009 is stated in the explanatory memorandum as follows:

"The purpose of the act is to revise in part the law on defamation and to replace the Defamation Act 1961 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of Human Rights."

4. In general, the legislation has achieved its aim of codifying the law of defamation subject to some modernisation. The within submission, however, highlights some specific areas that may require amendment. In some cases, it is felt that the highlighted sections, as interpreted by the courts, do not effectively achieve the results in practice for which they were introduced or meet the needs of the parties to defamation actions.
5. The suggestion, set out at paragraphs 42 onwards below, that the Oireachtas might want to reconsider the structure of the defence of fair and reasonable publication under section 26 of the 2009 Act, falls less clearly into this category and is more a matter of policy, save perhaps for the suggestion that the statutory defence should encompass reportage.

THE OFFER OF AMENDS PROCEDURE – SECTIONS 22 AND 23

6. Sections 22 and 23 of the Defamation Act 2009 provide a statutory scheme whereby a Defendant in a defamation case may, by fulfilling certain statutory obligations, compromise

the claims of the Plaintiff. Previously, under section 21 of the Defamation Act, 1961 an offer of amends was only available to those who innocently published material about a Plaintiff and about whom the publisher had not intended to refer. Section 21 of that Act was not a useful tool for a Defendant and the provisions of the section were rarely utilised in practice. The introduction of section 22 of the Defamation Act, 2009 abolished section 21 of the old Act and replaced it with a new and different defence called the “offer of amends”. This defence was enacted with a view to facilitating the quick and inexpensive compromise of defamation actions.

7. Pursuant to Section 22 of the 2009 Act any publisher may make an offer of amends any time before the delivery of a Defence in the case. The offer must be in writing and state that the publisher is making the offer pursuant to the Act and whether or not the offer is in respect of the whole of the statement complained of or is a “qualified” offer relating to only some of the statement.
8. The content of the offer must include the following elements:
 - i. To make a suitable correct and sufficient apology,
 - ii. To publish that correction and apology in such a manner as is reasonable and practicable in the circumstances, and
 - iii. To pay such sum in compensation or damages and such costs as may be agreed by the parties or determined to be payable.
9. The decision to make an offer and whether or not to accept it is one which requires tactical consideration by either party.
10. In practice the offer can be made in one of two ways:
 - i. The Defendant simply recites the wording of the act and undertakes to perform the three matters outlined therein.
 - ii. Alternatively, the terms of the offer, with regard to the correction, the damages / compensation can be outlined within the letter.
11. It is possible to make a qualified Offer of Amends, which offers to make amends for only some of the pleaded meanings, leaving the residue to be litigated in the normal way.
12. It then falls to the Plaintiff to either accept or reject the offer in whatever form it is made.

EFFECT OF THE OFFER – SECTION 23

12. The effect of an acceptance of the offer of amends is to compromise the proceedings.
13. Acceptance of the Offer of Amends then allows for the parties to enter into negotiations regarding the terms of that offer. If the parties can achieve consensus the Court has no further role except to make the required Orders pursuant to the agreed terms between the parties.
14. In the event that consensus is not achieved, the Court has a role in the assessment of damages in the case, as well as in the approval of the wording of any apologies or corrective statements which the Defendant may be offering. It is at this point that it is felt that the 2009 Act is unclear.
15. A feature of the introduction of the Offer of Amends procedure under the 2009 Act was that it was modelled on the equivalent regime in the United Kingdom. Legislation in the United Kingdom expressly states that hearings with regard to the Offer of Amends procedure will be heard without a jury. In Ireland, it was commonly presumed that the effect of an offer was that it would, if accepted, remove the matter out of the hands of a jury and that damages would be assessed by a judge sitting alone.
16. However, this issue came before the High Court in March 2016 in the case of ***Higgins v The IAA [2016] IEHC 245***. Mr Justice Moriarty held that the interpretation of section 23 of the Act does not displace the long standing right to a trial by jury in the case of an alleged defamation. He held that the Plaintiff therefore had the right to require that a jury should assess the damages due to the Plaintiff, following the acceptance of an offer of amends. That decision was appealed to the Court of Appeal and on 4th November 2016 Mr Justice Hogan delivered a unanimous decision which upheld the Plaintiff's right to have his damages assessed by a judge and jury. See ***Higgins v Irish Aviation Authority [2016] IECA 322***.
17. This decision has now been appealed to the Supreme Court together with a companion case of *White v Sunday Newspapers Limited*.

18. Although the role of the jury in the assessment of damages in defamation actions is an important one, it is of greatest importance in the assessment of whether words are defamatory. That issue does not arise in assessments following the acceptance of an offer of amends.
19. It is submitted that the inclusion of a jury in the assessment of damages in an offer of amends application runs contrary to the basis upon which the regime was brought into being under the 2009 Act.
- a. This follows from the Dail debates surrounding the consideration of the 2006 Bill. The “General Note” found under section 22 in the Irish Current Law Statutes Annotated indicates that the section of the Act, *“taken in conjunction with section 23 of the 2009 Act, replaces the defence that existed under section 21 of the Defamation Act, 1961 and modernizes it in a fashion similar to s.4 of the Defamation Act 1996 (UK) making it procedurally straightforward in the hope of encouraging greater use by the Defendants”*. Since the UK Act provides for trial of these issues by judge alone, it seems likely that the Oireachtas in 2009 intended to provide likewise. Thus, the absence of a clear provision to that effect is most likely a simple drafting error.
 - b. Litigants in defamation claims face the risk of long delays in the prosecution of cases, and, potentially, large legal fees. The rationale for the introduction of the offer of amends regime in sections 22 and 23 was to attempt to limit litigants’ exposure to either or both of those eventualities. The trial by judge alone of any issue is both quicker and cheaper than trial by judge and jury. Thus, the entitlement of a party to elect to have a jury in an application pursuant to section 23, goes contrary to the intention behind the new procedure.
 - c. Part of the rationale of the offer of amends procedure was almost certainly to encourage early settlement. Jury awards remain highly unpredictable. That feature necessarily makes those actions more difficult to settle. Furthermore, if these disputes are determined by Judges sitting alone it is likely that clear jurisprudence will emerge that will indicate the amount of a discount likely in any given and the circumstances in which such a discount will be applied (as per the decision of

O'Malley J. in *Christie v TV3 Television Network Ltd* [2015] IEHC 694). More certainty and clarity around the basis of these determinations is likely to lead to more of these disputes being resolved earlier and by agreement. Thus, it seems likely that the Oireachtas intended in 2009 that one attraction of the offer of amends procedure would be that those using it could avoid the unpredictability associated with jury trial.

20. It is therefore submitted that any review of the Defamation Act, 2009 must look at the provisions of the Offer of Amends procedure found in sections 22 and 23 and should consider the role of the jury in the statutory scheme and in particular assess whether the inclusion of a jury goes against the stated aims of the scheme itself. The position could be made clear by the inclusion of words in section 23 akin to those already found in section 34, namely:-

“An application under this section shall not be heard or determined in the presence of a jury.”

THE OFFER OF AMENDS AS A DEFENCE

21. The Act of 2009 also provides for a single defence which can be put forward by a Defendant in circumstances where an offer has been made but rejected by the Plaintiff. In this instance a Defendant has a choice. S/he can either plead any of the conventional defences provided for in the legislation (such as truth or qualified privilege) or s/he can, by virtue of Section 23 ss 2, plead that an offer was made and not accepted by the Plaintiff.

22. Section 23 (2) states as follows:

(2) Subject to subsection (3), it shall be a defence to a defamation action for a person to prove that he or she made an offer to make amends 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 the 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) it was false and defamatory of the Plaintiff.

23. In such circumstances it then (rather unconventionally in Defamation proceedings) falls to the Plaintiff to prove that at the time of the publication the Defendant “Knew or ought reasonably have known” that the words complained of referred to the Plaintiff or were likely to be understood as referring to the Plaintiff and that they were false and defamatory of the Plaintiff”.
24. Although it is not clear, one could interpret the wording of section 23 as requiring only proof of negligence.
25. When compared to the legislation in the United Kingdom, on which the Irish legislation was largely modelled, it is notable that under Section 4 (3) of the Defamation Act, 1996 the burden on the Plaintiff is greater. Under section 4(3) of the UK Defamation Act, 1996 the Claimant must show that the Defendant knew or had reason to believe that the statement referred to the Claimant or was likely to be understood as referring to him, and was false and defamatory of him. It has been determined the UK Court of Appeal (*Milne v Express Newspapers* [2004] EWCA iv 664) that this could not be satisfied by constructive or imputed knowledge based on negligence, or by anything less than recklessness.
26. It seems contrary to the spirit of the measure that there should be test of negligence only. If the defendant has accepted responsibility at an early stage, and has offered a correction and apology, then it might be thought to follow that [s]he should be entitled to the benefit of a reduction, unless the original publication was made recklessly. A test of negligence would represent a low hurdle for a Plaintiff to get over to defeat the Defendant’s defence under section 23. If that is the test, then it makes the procedure less attractive, and is in any event contrary to what is likely to have been the thinking behind the provision.
27. These two features militate against the use of the offer of amends procedure, and indeed it is likely that it will be infrequently used in future. Therefore, amendments to those provisions should be strongly considered to enable better everyday functionality.

DECLARATORY ORDER – SECTION 28 OF THE DEFAMATION ACT 2009

28. Part 4 of the Defamation Act, 2009 provides a number of remedies available to parties to defamation litigation in Ireland.
29. Pursuant to Section 28 of the 2009 Act, provision is made for an application to be made to the Circuit Court for a "declaratory order", that is an order that a statement made by the respondent was false and defamatory of him or her. Under section 28(2), the court shall make a declaratory order if it is satisfied, inter alia, that:-
- “the statement is defamatory of the applicant and the respondent has no defence to the application”.*
30. Under section 28(8), no damages can be awarded. A central feature of the section is that, under section 28(4), the effect of bringing an application for summary relief is that the applicant shall not be entitled to bring any other proceedings in respect of any cause of action arising out of the statement to which the application relates. Thus, the Plaintiff who fails in an application for declaratory relief cannot subsequently initiate a standard defamation action.
31. The declaratory relief procedure is suitable when a person simply wants to vindicate his or her reputation. In exchange for foregoing the right to claim damages, the person would secure a speedy and cheap procedure, leading to a declaration that he or she had been defamed.
32. As previously outlined above, the purpose of the Defamation Act 2009 is stated in the explanatory memorandum as follows:

“The purpose of the Act is to revise in part the law on defamation and to replace the Defamation act 1961 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of human rights.”

33. The explanatory memorandum of to the 2006 Defamation Bill explained the purpose and functions of section 28 of the Bill in the following manner;

“Section 28 provides a new remedy for defamation to be known as a declaratory order. The intention is to provide an expeditious avenue of redress for a plaintiff where damages are not being sought of the defendant (and cannot be awarded against him).”

34. In the case of **Lowry v Smith [2012] IR 400** Kearns P determined that, under the provisions for summary judgement in section 34 of the Act, the plaintiff could achieve summary judgement only if he satisfied the judge that *“the defendant has no defence with a reasonable chance of success.”* Thus, if the Defendant had merely an arguable case to suggest that his defence might be reasonably likely to succeed, then such an application would fail. He added, albeit obiter, that there was a yet higher burden imposed on a Plaintiff applying for relief under section 28. This was because section 28 provides for relief where there is “no defence” and section 34 provides for relief where the defendant has “no defence which is likely to succeed”. He said that:-

“I think in practical terms the test under both sections is a high one, though that under s. 28 must necessarily be at the very highest, being that of no defence at all.”

35. If this is correct, then the burden of proof on a Plaintiff in such a case is an onerous one. Unless he can show that the Defendant has no possibility at all of succeeding at full trial, then the application for declaratory relief must fail. It is unsurprising that there have been few such applications since this decision. On this analysis, they are almost impossible for an applicant to win, and if [s]he brings the application but fails, then [s]he has no other remedy thereafter.

36. It can hardly have been the intention of the Oireachtas to provide a remedy of so little utility. The reference in section 28(1)(a) to the necessity for the court to be satisfied that “...the respondent has no defence to the application” should not, in context, be read as requiring that the respondent can escape merely by showing that [s]he might succeed at full trial. Rather, it should simply be read as meaning that the court should be satisfied that the defendant has no defence on the merits. It may be that the court could be so satisfied on summary application, but it may be that an exploration of evidence would be required

before the court could reach a determination on the point. The proposition that the section contemplated the possibility of oral evidence is supported by the fact that section 28(7) provides as follows:-

“(7) The court may, for the purposes of making a determination in relation to an application under this section in an expeditious manner, give directions in relation to the delivery of pleadings and the time and manner of trial of any issues raised in the course of such an application.”

37. Thus, it is suggested that the Oireachtas should take the opportunity of clarifying section 28, by providing more clearly that the requirement is that the judge should be satisfied, after such exploration of the evidence (including oral evidence if required), that the respondent has no defence on the merits.

SUMMARY RELIEF FOR A PLAINTIFF – SECTION 34 OF THE ACT

38. Section 34 of the Act provides for summary disposal of proceedings. Under section 34(1) the following applies:-

(1) The court in a defamation action may, upon the application of the plaintiff, grant summary relief to the plaintiff 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 to the action that is reasonably likely to succeed.

39. Under section 2, "summary relief" means (a) a correction order, or (b) an order prohibiting further publication of the statement to which the action relates.

40. Thus, if a plaintiff brings a defamation action to which a defendant has no defence, the plaintiff can secure the summary disposal of that action at an early stage only by application for summary relief, but that brings with it the consequence that on such an application the plaintiff is not entitled to an award of damages. One might think that this is unreasonable: in a case in which the defendant has no defence, why should the plaintiff who wants damages have to go to full trial, with all the delay and expense that that involves? It is perhaps not surprising that there have been very few applications for summary disposal by plaintiffs.

41. The issue might be met by allowing for some modest award of damages on an application for summary relief. Under section 9(1) of the Defamation Act, 1996 in the UK various reliefs may be obtained by the Plaintiff on an application for summary relief, including, in particular, an award of damages not in excess of £10,000. This additional element, which is not available to a Plaintiff in Ireland, make the procedure a much more inviting and attractive opportunity to try and achieve speedy and straightforward resolution of an action, leaving the Plaintiff with an opportunity to vindicate his or her good name and to obtain modest damages.

**FAIR AND REASONABLE PUBLICATION ON A MATTER OF PUBLIC
INTEREST – SECTION 26 OF THE ACT**

42. Section 26 of the 2009 Act introduced a new defence of fair and reasonable publication. It was modelled on the previous common law defence of “Reynolds privilege”, albeit that this remained largely unexplored in Irish law.
43. The basic component parts of section 26 require the defendant to prove that -
- a. the statement in respect of which the action was brought was published in good faith, and
 - b. in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,
 - c. in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and
 - d. in all of the circumstances of the case, it was fair and reasonable to publish the statement
44. Section 28(2) sets out a list of issues to be considered by the court when determining whether it was fair and reasonable to publish the statement concerned.
45. It appears that, in the seven years of the operation of the Act, there has not been a single case in which the applicability of section 26 has been determined by a court.
46. It may perhaps be deduced that the section is over-complicated. In particular, the application of an entirely separate test of fairness and reasonableness complicates a process

that ought to be simple. That is particularly so where the assessment appears to be intended to be by the jury. It is also not clear that this part of the test really adds anything. If the point is to protect speech that is in the public interest, then that test in itself might be sufficient, although of course in many cases the application of such a test might encompass consideration of the fairness and reasonableness of the statement.

47. Section 4 of the Defamation Act 2013 in the UK also abolished Reynolds privilege, and introduced a new defence of “publication on matter of public interest”. But it did so in a much simpler manner, by providing:-

*“(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.”

48. A further feature of this provision is that it allows, in section 3(3), for the defence of “reportage”. This is a defence that is related to, but slightly different from, Reynolds privilege. In a reportage case, the journalist merely reports both sides of a public debate, without carrying out independent research to see which side is correct. In traditional Reynolds privilege, an important feature of the defence was whether and the extent to which the journalist ascertained the truth of the allegation reported. The case for according privilege to reportage is clear: it is in the public interest that the press should be able impartially to report both sides of a story that is in the public domain, and it is positively undesirable that it should take one side or the other. It is very doubtful whether section 26, as it stands, provides a defence for reportage.
49. The Oireachtas might therefore like to consider the amendment of section 26 so as to simplify it and so as to introduce a defence for reportage.