

Review of the Defamation Act 2009

Public Consultation Process

Submission: Defamation and the defence for Comedy and Satire.

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DEFAMATION

“If a man in jest conveys a serious imputation, he jests at his peril” Irish Slander Case from 1831 (Donoghue v Hayes)

The purpose of this submission is to highlight where improvements can be made in the current legislation regarding defamation in Ireland particularly in relation to the Defamation Act 2009 and offer assistance towards the State to include but not exclusively the judiciary regarding the position of comedians and in particular satirists and the publication and communication of satiric or comedic utterances.

I propose to set out the Submission as follows:

1. Introduction
2. The Current Law
3. An International Perspective
4. Proposals
5. In closure

Introduction

A free society is served best by free citizens with the right to Freedom of Speech. A true and functioning democracy ensures citizens not just Freedom of Speech but Freedom of Expression to allow the exchange of ideas and information and the challenge of policy and prejudice.

The Hierarchy of Human Rights contained in the Universal Declaration of Human Rights considers not just the liberty of opinions and expression as a right that can only be derogated from in the event of public emergency but also considers on a slightly lower level the freedom to engage in and benefit from cultural, scientific and artistic expression a fundamental human right.

The American humourist and writer Peter Finley Dunne is often quoted as saying *“that stories are meant to comfort the afflicted, and afflict the comfortable”* and this definition should be more applicable to Satire and humour.

This Submission posits that satire and comedy in a functioning democracy allows its citizens Freedom of Speech and Expression which results in the engagement and participation of citizens. In many respects this gives voice to and involves the less powerful in a discourse about power and the powerful in their Society and such engagement can and often should be light-hearted especially in the satire of the powerful and the elite and the highlighting of inequality in society. Satire allows these difficult and challenging issues to be discussed and considered for reflection in a light hearted which means the exchange of ideas in a relatively peaceful manner. People have a right of engagement, association – Comedy and Satire should show people have a right not to feel excluded.

Humour has often been seen to regulate social norms allowing for outpourings of emotion and the acceptance of various difficult circumstances often through laughter enabling powerful expressions of social disapproval through variations of wit and comedy. The Roman poet and philosopher Horace defined Satire as allowing a comedian to “tell the truth with a laugh”.

*All rights are subject to and tempered with others
(The Hierarchy of Rights)*

The right to Freedom of Expression presents great challenges in this regard and cannot be always absolute. The right to Freedom of Expression must also acknowledge that people have a right to their good name and this is why Defamation law has developed. It is this Submission that the work of comedians and satirists should be given special exemption from defamation not a blanket protection but rather an allowance in order to allow citizens think, and laugh and collaborate.

This Submission argues that the central risk to satire is that unlike most fiction-based comedy, it deals with real and living persons, companies and institutions. That broadcasters and publishers, constrained by current defamation laws, edit and censor satire in the same way they would a piece of hard news journalism. The current law requires a comedian to have journalistically established a fact before they can write jokes about that fact. Satire arrives at the truth but only on a road paved with fiction.

In formulating this Submission there was a concern about comedy regarding racial, ethnic or gender especially as they might to weaker members of society, but the point of Satire is not to punch down but rather punch up and pierce the shades of the elite. Further this submission believes such comedy is subject to various prosecutions under the *Prohibition of Incitement to Hatred Act 1989 et seq.* For further example the Broadcasting Authority of Ireland often manage complaints from the public regarding broadcasts by Satirists.

It is hoped this Submission will reflect the position of Satire in comedy which by its nature is prone to the criticism of those in power.

The American Supreme Court Judge Potter Stewart indicated when asked to rule if a film was pornographic, that he could not define it but “he knew it when he saw it” and society has evolved to know the difference to know bigotry when they see as opposed to genuine satire or comedy.

One final clarification that this Submission is not an argument for complete protection for freedom of speech such as that set out for example in the American Constitution, rather it is endeavouring to argue that the Defamation Law in this Country should reflect that we are a nation that respects its authors so that they can try and make a nation laugh and perhaps reflect on larger social issues at the occasional expense of those in power or the elite. Comedy and Satire especially requires interpretation, thought as to its fundamental truth as to what the Comedian intended rather than a strict objective definition of Truth and as such should be accorded protection in Irish Law

Also this submission has been drafted in light of a career spent working for and enjoying experiences with various comedians and satirists but also always admiring the work of such writers and performers. Further the writer has presented this submission to various writers and performers and satirists who have indicated their support of this submission. We have specific instructions from several names to particularise their support of this submission.

These names are:

Brendan O'Carroll Writer, Comedian, Performer

Oliver Callan Writer, Satirist, Performer

Roddy Doyle Writer

Tommy Tiernan Comedian, Performer.

The Current Law

Defamation Law in Ireland is administered in accordance with the Defamation Act of 2009 ("the Act") which endeavoured to codify the Common Law and amend previous legislation.

Defences to a threat of or a defamation action are set out in the Act. Traditionally and obviously the fundamental defence to a defamation action is Truth (section 16 of the Act) Section 20 of the Act allows that in the case of the communication or publication of an opinion a Defence can be that the opinion was honestly held and Section 21 allows a defendant to argue that an allegation of a statement of fact being defamatory can be defended by a defence that it would be reasonably understood as a statement of opinion rather than a statement of fact.

There is no defence in the act for artistic expression, certainly no defence for comedic output or satiric commentary. Section 26 refers to a defence of fair and reasonable publication on a matter of public interest, "the discussion of which was for the public benefit"

The Act could provide a defence for a comedian or a satirist, however there has been no Judicial Pronouncement and the position of this Submission is that the Act is not fit for purpose and that the law should be changed so as to protect comedians especially satirists.

There is case law on the issue especially English Decisions perhaps the most famous being **Burchill v Berkoff 1997** ([1996] 4 All ER 1008, [1997] EMLR 139 Court Of Appeal (Civil Division)) the Journalist Julie Burchill described the film actor and director Berkoff as follows: "film directors from Hitchcock to Berkoff are notoriously hideous looking people" and in a review of Kenneth Branagh's Frankenstein movie she said that "the monster looked like Steven Berkoff only marginally better looking" One Judge on appeal stated "there is many a true word spoken in Jest. Many a false one too. But chaff and banter are not defamatory, and even serious imputations are not actionable *if no one would take them to be meant seriously* (my emphasis). It is one thing to ridicule a man; it is another to expose him

to ridicule. Miss Burchill made a cheap joke at Mr Berkoff's expense; she may thereby have demeaned herself, but I do not believe she defamed Mr Berkoff"

It is possible that comedians and satirists would find the Irish Courts amenable to defence such as that set out in the Burchill case but the lack of such a defence being codified in Statute means it is unpredictable and further the Threat of Litigation looms.

However, this Submission argues that the central risk to satire is that unlike most fiction-based comedy, it deals with real and living persons, companies and institutions. That broadcasters and publishers, constrained by current defamation laws, edit and censor satire in the same way they would a piece of hard news journalism. The current law requires a comedian to have journalistically established a fact before they can write jokes about that fact. Satire arrives at the truth but only on a road paved with fiction.

The Threat of Litigation.

The fear and apprehension of commentators and performers and the extreme caution exercised by publishers and broadcasters will limit the right to Freedom of Expression. Regardless of the merits of a defence the expense of mounting a defence no matter how bona fides will often mean that publishers will not take the risk and even artists themselves are conscious of their financial exposure.

This is especially true now when there are less restrictions to broadcast especially via YouTube, social media, self-publication and podcasts. However ironically despite this democratisation of broadcast many outlets of expression are restricted to those who actually hold the apprehension of the threat of litigation as real threat and are simply unable to afford the legal defence. Effectively people are afraid to express views because they are worried they will not be able to defend those views.

Satire by its very nature as already set out should act as a marker against the rich and powerful, it should even more so than comedy be an equaliser in society the challenge for the law in this area is that those who should be the subject of Satire are those who can afford and fund comprehensive legal battles, some of whom have ownership or control over broadcasters or publishers and may pursue their own agenda in pursuing Defamation cases that might be eventual failures but will cause such intimidation of artists (and their publishers) that Freedom of Expression will be constrained again. All Defendants in an Irish Defamation action must effectively prove their Defence, in other words if a Plaintiff claims a matter is Defamatory then the burden shifts to the Defendant to prove otherwise.

Below, this Submission will make a suggestion that in the event of a defamation action against a comedic sketch or a satiric statement the Courts or an alternative quasi-judicial body should be empowered to make an order (effectively an order of the absurd) that same should be dismissed without the expense of a harrowing trial.

International experience

Clearly the USA experience where satire no matter how offensive or damaging is protected by the Constitutional guarantee of Free Speech. The cases are interesting and many well-known, however the Law is different and it is more helpful to consider Defamation in the Irish Jurisdiction in comparable (Common Law) jurisdictions which more closely resemble Ireland.

England and Wales

English Defamation Law was reformed (although not consolidated) by the Defamation Act of 2013 (the “2013 Act”).

The 2013 Act made many changes that are relevant to a discussion of proposed changes to Irish Defamation Law especially in light of this Submission. Among these new concepts introduced by the 2013 Act:

- that a Plaintiff must prove serious harm by the allegedly defamatory statement (which is not an unreasonable position in light of how Plaintiffs must behave in other litigations),
- that the Court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate and most interestingly removed
- that the primacy of the jury has been abolished with Defamation now being considered a matter appropriate for case management and Mediation.

The 2013 Act has eroded the apparent problem of *Libel Tourism* (the New York Times in 2009 referred to “London as the town called sue”) but by removing the concept of the Jury Trial being the preferred forum for Defamation Actions and amending various procedural rules so that Defamation Actions could be taken into case management and Alternative Dispute Resolution (ADR) suggests there might be hope for the argument that the threat of a Defamation Trial is enough to intimidate a Publisher or Artist into removing or deciding against publication of a piece particularly one that might be satiric or comedic in nature.

If the matter could be dispensed with before a forum such as the Personal Injuries Assessment Board (PIAB) or the Private Residential Tenancies Board (PRTB) the fear of the expense of Defending a Defamation action might become less vital and further might even allow Artist and Comedians to act for themselves and engage in further discussion with the allegedly injured party around the issues raised.

In other words, it would lead to discussion, engagement and more Freedom of Expression.

Australia and New Zealand

Both countries have a common law jurisdiction like our own but neither country has a constitutional defence of Freedom of Expression nor a tradition of free speech exemptions such as those in the USA.

Further both countries have strict Libel Laws, Australia is seen internationally since the 2013 Act as a more favourable jurisdiction to pursue international Libel cases than the UK.

Both countries as a nation however are known for their robust sense of humour and their egalitarian views on those who might consider themselves the elite.

Australian Courts concentrate not on defences of truth or academic definitions of the differences between fact and opinion but if a defence of jest (or joke) is put forward whether a jest sufficiently disparages the plaintiff as to call for civil liability.

Commentators on the Australian system see defamation actions in that jurisdiction more as actions of Tort than issues of Freedom of Expression and what is the actual Damage caused to the complainant by the Defamatory action.

Curiously this view of the Australian courts of Defamatory Humour is comparable to the US Supreme Court finding in the seminal *People v Larry Flynt* case whereby they believe Satire is to be protected as free speech and its humorous nature means that it is free speech the Australian Court hold that something cannot be considered defamatory if it is outrageous or humorous.

Satire by its nature is calculated to injure the reputation of another (albeit someone in power) and may often be false so the defences of truth or fair comment do not always apply the Australian Courts have dealt with this by indicating that if something is patently satiric regardless of intention or truth or otherwise it may not be defamatory.

In a case involving a cartoon **Seidler v Fairfax** (1986) (NSW SC, No S15860/82, Hunt J, 8 April 1983, unreported) the appellate court in Australia indicated that a cartoon on a matter of public interest is “bound by its nature to traffic in exaggeration, caricature, allegory and fiction” and that “the ordinary reader would understand that cartoons are often not to be taken literally”

Satire is not to be taken literally, it involves the interpretation it rewards interpretation.

The Australian court when faced with *Defamatory Humour* that words are often used “not in their natural sense ...but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves” **Australia Newspapers v Bennett** ([1894] A.C. 284, 287 (Eng.))

In **Coleman v John Fairfax Publications Pty LTD** ([2003] NSWSC 564 (25 June 2003) a satiric article about a high profile/celebrity rugby coach the court reasoned reasonable reader would find nothing in the article to be taken seriously and the “article was self-evidently absurd” and “*simply a joke.*”

Proposals

There should be a defence to a defamation action of it is *simply a joke.*

The Common Law Defences of Fair Comment and Truth (as far as they apply) do not protect comedians.

The Statutory Defences set out in the Act and as outlined do not help. The Threat of Litigation is often enough to intimidate artists, broadcasters and publishers.

The Declaratory Order and Correction Order as set out in Section 28 and Section 30 of the Act are voluntary and consequently are not effective.

In England the 2013 act has removed the primacy of Juries in defamation actions and suggested that Defamation can be dealt with by ADR.

This Submission makes three proposals:

1. Defamation Recognition Commission

- It should now be a requirement that the State form a Defamation Recognition Commission. (DRC)
- This Commission should be peopled by a legally qualified person, an artist or comedian or journalist and a member of the public
- As in Personal Injury Cases the law should be changed so that it is mandatory that all defamation actions be presented to the DRC before initiation in the courts
- If the Commission find an utterance or publication was Defamatory there should at least be an option for Mediation or Arbitration.
- The Commission should have no power to award Legal costs
- Parties to an action should be encouraged to represent themselves and engage collaboratively in the process.

2. Certificate of Loss

- Every claimant in defamation action should be required to set out the nature of the loss complained of in the event of the DRC issuing a finding of defamation.
- In the event that claimant cannot allot a value to the loss details of communication of the defamatory statement should be furnished.
- In the event that the DRC make a finding of defamation same should be qualified as to whether the communication complained of was in jest.

3. Defence of Satiric or Comedic utterance.

- There should be such a defence enshrined in Statute

- The proposed DRC should be in a position to issue a finding of Satire or Comedy
- Adopting wording from judicial dictate in Australia a suggested defence could be:

It shall be a defence to such proceedings to claim that despite the falsity of statements complained of and any intention to cause damage with such statements that the utterances contained in the statements where satiric in nature and as such by its very nature conducted in exaggeration, caricature, allegory and fiction for the purposes of humour and comedy and are not utterances that cause any damage.

Conclusions

Freedom of Expression is being eroded.

In America where there is a constitutional right to free expression and settled law on the matter President-elect Trump has suggested he will introduce (presumably draconian) Libel Laws.

In America the recent Hulk Hogan v Gawker Media case (albeit not a defamation case but an invasion of privacy case) saw an entire media empire shut down after losing a case which was actually funded by Silicon Valley Billionaire who wanted to get revenge on Gawker for previous true stories they published about him. In a common law jurisdiction champerty rules would forbid such third party litigation finance but again the Gawker case highlights that litigation (in a jurisdiction where there is virtually no libel) is being used by the wealthy to silence and even punish those who publish or broadcast something critical of the wealthy.

Litigation is increasingly becoming the preserve of the Rich and the Elite and the Powerful who can use the Threat of Litigation to effectively silence Artists, Broadcasters and Publishers.

Both nationally and internationally there is Media convergence and a concentration of Ownership of various Media Outlets all mean that it is increasingly difficult but possibly more essential than ever that the voice of satirists be heard.

The Introduction of the DRC will create access to the protection of the Defamation laws for individuals who are currently excluded because of price and cost concerns. The point is to involve the public in the process, this Submission is endeavouring to contend out that limiting Freedom of Expression excludes citizens from society, but the introduction of something akin to a DRC would in fact not only create more Freedom of Expression but would also ensure greater involvement by the public in the Defamation process.

Confirming protection for our comedians and our satirists and our writers will actually add to engagement in society and encourage the exchange of ideas.

We are happy to meet a discuss this Submission or any matters therein or furnish clarification or further information or notes and express the genuine hope that the Minister, the Department and the Government will consider this Submissions seriously even though it involves matters of comedy.
