

SUBMISSION TO THE DEPARTMENT OF JUSTICE AND EQUALITY

REVIEW OF DEFAMATION ACT 2009

1. Introduction

1.1 Further to the request from the Minister for Justice and Equality for contributions to inform her Review of the Defamation Act 2009 ("the Act"), these submissions outline our experience of the operation of the legislation and some key issues that we believe ought to be considered as part of the Review.

1.2 The Department has indicated that the purpose of its Review pursuant to section 5 of the Defamation Act, 2009 is:

- to promote an exchange of views and experiences regarding the operation in practice of the changes made by the 2009 Act
- to review recent reforms of defamation law in other relevant jurisdictions
- to examine whether Irish defamation law, and in particular the Defamation Act 2009, remains appropriate and effective for securing its objectives: including in the light of any relevant developments since 2009
- to explore and weigh the arguments (and evidence) for and against any proposed changes in Irish defamation law intended to better respond to its objectives, and
- to publish the outcomes of the review, with recommendations on appropriate follow-up measures.

For the purposes of this submission we take it that the "objectives" of the Act referenced above were as stated in the Explanatory Memorandum to the Defamation Bill, 2006, namely to revise in part the law of defamation and replace the Defamation Act 1961 with modern updated provisions, taking into account the jurisprudence of our courts and the European Court of Human Rights.

2. Context of this submission

2.1 McCann FitzGerald regularly provides legal advice to a wide range of clients relating to defamation and publication more generally. We have an experienced media defence team, led by partner Karyn Harty, which represents a range of media organisations, including newspapers, technology companies, broadcasters and book publishers. We also regularly provide defamation advice to corporate clients, charities and other organisations that are not engaged in the business of publishing, which also have to defend actual or threatened defamation claims.

2.2 The effective operation of legislation in this field is thus important to us as a firm and to our clients, given the significant costs involved in managing and defending defamation claims. Our media practice is almost entirely a defence practice.

2.3 We enclose with this submission a copy of our recent Guide 'Damages and Costs in Ireland – A Guide for Publishers' from February 2015, which provides a detailed overview of our experience of the operation of the Act and the taxation process in respect of defamation claims. This submission should be read in conjunction with the Guide, which provides an in

depth analysis in respect of damages and costs. Note that the Guide predates the Court of Appeal's decision in *McDonagh*¹.

- 2.4 We have focused in these submissions on measures that we believe require specific consideration in the context of the Review, rather than going through every aspect of the legislation.
3. **Imbalance between plaintiffs and defendants**
- 3.1 There remains a significant imbalance between plaintiffs and defendants in Irish defamation law notwithstanding the changes introduced with the Act. While the Act improved the ability of defendants to manage defamation claims to a degree, there is still a significant degree of unnecessary cost and uncertainty for defendants, as well as exposure to potential damages that is many multiples of the potential exposure in other jurisdictions. As outlined in more detail below, it is also virtually impossible in practice to dismiss a defamation claim for want of prosecution.

Undue weighting towards trial

- 3.2 Defendants regularly incur significant unnecessary costs because there are few interlocutory measures available to encourage settlement or to enable unmeritorious claims to be dismissed, and current procedures are weighted towards matters going to trial. There is a need for greater recognition of the benefits of dealing with claims on a summary basis or at an interlocutory stage. It is also unclear to us why the jury list has been excluded from the case management Rules introduced in 2016 in respect of chancery and non-jury cases (albeit that these Rules are not currently operational due to lack of court resources).
- 3.3 While the Act expressly provided for 'meaning' applications under section 34(2), there is no express provision for dismissal of claims on the grounds of no 'real and substantial tort', for example, an issue that arises frequently as regards on-line defamation, where only a tiny number of people in Ireland, if any, may have viewed the publication. The recent decision of the Court of Appeal in *Ryanair –v- Fleming*² shows the issues that can arise where there is no real connection with the State in the context of on-line publication.
- 3.4 It is submitted that it is in the interests of both plaintiffs and defendants to provide ways to resolve cases sooner. Consideration should accordingly be given to widening the express provision within the Act for grounds on which plaintiffs' claims may be dismissed in appropriate circumstances.

Inability to strike out claims for want of prosecution

- 3.5 It is virtually impossible to dismiss defamation claims for want of prosecution. This means that defendants often have to bear costs and uncertainty associated with stagnant defamation claims, and defend claims that do eventually revive many years after publication took place.
- 3.6 The introduction in the Act of a significantly shorter limitation period of 1 year, with scope to extend by 1 further year, reflected the legislature's intention that a person or entity whose reputation needs to be vindicated should move with expedition.
- 3.7 It is relatively easy for a plaintiff to obtain judgment in default of appearance or defence. Certainly where a defendant fails to plead to the claim a plaintiff has good scope to obtain judgment in default on a second motion for judgment. While successful applications of this

¹*McDonagh v Sunday Newspapers Limited trading as Sunday World* [2015] IECA 225

² [2016] IECA 265

nature are reasonably rare, it is submitted that this is because the mechanism prompts defendants into action. Order 122 Rule 11 gives the court jurisdiction to dismiss an action for want of prosecution on the application of a defendant where there has been no proceeding for two years. In practice, however, we have never seen a court dismiss a defamation action on that basis. A defendant seeking to dismiss a claim must show inordinate and inexcusable delay, and show that the balance of justice is in favour of a dismissal, for which the courts require actual prejudice to be demonstrated.

- 3.8 It is, therefore, exceptionally difficult for a defendant to strike out a defamation claim, even where there have been several years of inexcusable inaction on the part of the plaintiff. We have experienced a number of cases where plaintiffs have failed to move their cases on for several years but have successfully resisted applications to dismiss their claims for want of prosecution, even where the court found that the delay was inordinate and inexcusable. Actual prejudice has been interpreted narrowly and requires a defendant to show that a key witness is deceased or that important evidence is no longer available.
- 3.9 In practical terms, however, even without such acute prejudice, in defamation actions a lapse of time of several years can make it very difficult for the defendant to defend the claim. A defendant facing a claim issued years previously is at a special disadvantage as compared with civil claims generally, having regard to the manner in which the burden of proof shifts to the defendant in defamation actions (as compared with other civil claims where the burden of proof rests on the plaintiff throughout).
- 3.10 We submit that an express statutory requirement that defamation plaintiffs must proceed with due expedition would be of assistance in the context of stagnant claims. We also submit that the Act should include an express statutory jurisdiction to dismiss claims where there has been no proceeding had within 2 years of issuing proceedings unless special circumstances exist. Any such change would not disadvantage plaintiffs who proceed with claims within a reasonable timeframe, but would significantly assist defendants who have no option but to budget for and manage the risks of stagnant claims.

Offer to make amends is an unattractive option

- 3.11 The rationale behind the offer to make amends procedure was to provide a quick and relatively straightforward way for a defendant to apologise and make amends early on, in the interests of both parties. The provisions of Section 22 and 23 have not unfortunately had this effect in practice and following recent case law³ defendants are much less likely to see the offer to make amends procedure as strategically worth pursuing.
- 3.12 Section 23(c) has recently been interpreted as providing that where damages are not agreed they fall to be assessed by a jury and not by a trial judge sitting alone. This results from a lack of clarity in drafting. Section 23(c) does not contain express provision as to the meaning of "the court". Other sections provide that "the court" means a judge sitting alone, or a judge sitting with a jury, but no such wording is included in Section 23. It seems unlikely that the legislature intended that a jury trial would have to be convened to assess damages in those circumstances, and there are significant cost implications involved in a jury trial that should not have to be incurred when a defendant is availing of the offer to make amends procedure, which is meant to be an effective means of summary disposal. This is a significant disincentive for defendants to use the offer to make amends procedure.
- 3.13 We submit that Section 23 should be amended to provide expressly that "the court" for the purposes of the assessment of damages under Section 23(c) means a judge sitting in the High Court without a jury.

³ Higgins v Irish Aviation Authority, Court of Appeal, 4 November 2016 per Hogan J

- 3.14 It may also be noted that the discount procedure that is now operating is not provided for clearly in the Act. It may be preferable to provide for that expressly to achieve a level of consistency and clarity as regards the operation of the procedure.
4. **On-line publication**
- 4.1 A key aspect of the Act when introduced that was disappointing was the absence of express provision for on-line publication. This omission may have been due to the long gestation period of the legislation, and indeed smart phones were only just on the market when the Act came into force in January 2010. Apps, websites and blogs are now main stream and on-line publication constitutes a key method of ensuring freedom of expression in our society, both locally and globally. Artificial intelligence is transforming how information is communicated and will continue to introduce new ways of communicating, with algorithms influencing and, at times, distorting news and the circulation of information.
- 4.2 The EC (Directive 2000/31/EC) Regulations 2003 (the “E-Commerce Regulations”) exempt intermediary service providers (“ISPs”) from liability in respect of material which is hosted, cached or carried by them but which they did not create. An ISP is not specifically defined in the Regulations but the explanatory memorandum indicates that an ISP is a person whose business consists of connecting persons to the internet. There is therefore doubt as to whether the provider of a communications app falls within the E-Commerce Regulations.
- 4.3 The innocent publication defence under Section 27 of the Act is unsatisfactory. There is a contradiction between an app provider, for example, having to show that it was not the author, editor or publisher of the statement, that is that it “was responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment, system or service by means of which the statement would be capable of being retrieved, copied, distributed or made available” under Section 27(2)(c), and yet at the same time have to show that it took reasonable care in relation to its publication, and did not know, and had no reason to believe, that what it did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation. This latter wording reinforces an impression that an app provider bears responsibility for the content that appears on its app prior to publication, and does not reflect the position in fact that content is now posted on a constant live basis and is immediately accessible on-line in a way that simply could not have been anticipated at the time of drafting of the Defamation Bill, which ultimately became the Act.
- 4.4 The outcome in *Muwema v Facebook Ireland Ltd*⁴ is an example of the unsatisfactory state of interim remedies available in Irish defamation law and the uncertainty on-line publishers as regards their obligations. In *Muwema*, Facebook was promptly put on notice of allegedly defamatory material concerning Mr Muwema posted by one of its users in Uganda. It removed the content but it transpired it was still visible on its site and had also been re-published widely elsewhere.
- 4.5 In applying the principles established under section 33 and at common law, the High Court refused the prior restraint or “take-down” orders sought for the offending material as Facebook had a defence that was likely to succeed at the full trial. It was found to be an internet service provider within the meaning of the E-Commerce Regulations and as a result, could rely the innocent publication defence under Section 27 of the Act, which provides a defence for a defendant who is not the author, editor or publisher of the statement and only distributed or disseminated the information. The Court also considered that Facebook may be able to rely on Regulation 18 in so far as it alleged that it was not aware that the content was “unlawful” (it could be true and therefore not defamatory) and the Court agreed it

⁴ [2016] IEHC 519

“may” be able to rely on that defence. The Court also had regard to the fact that the take-down order against Facebook would serve no useful purpose as the offending content was widely available elsewhere online. However, the court expressed dissatisfaction with the law, commenting:

“The Act of 2009 now provides a shield against damages (as indeed do the Regulations) to defendants meeting its requirements, and the same shield also prevents the Court from granting injunctive relief to persons claiming to be defamed. Thus, it appears, a person who has been defamed by an internet posting may be left without any remedy at all, unless the author is identified and amenable to the jurisdiction of the Court.”

- 4.6 The above outcome begs the question why a procedure similar to the Notice of Complaint process deriving from section 5 of the UK Defamation Act 2013 could not be introduced in Ireland. Section 5 creates a similar defence to that in section 27 of the Irish Act, making it a defence to show that the website operator did not post the statement, however, this is not absolute and the defence is defeated if the claimant can show:
 - (a) it was not possible for he or she to identify the person who posted the statement;
 - (b) he or she gave the operator a notice of complaint in relation to the statement; and
 - (c) that the operator failed to respond to the notice within 2 days (subject to the courts’ discretion); or
 - (d) malice on the part of the operator.
- 4.7 The above provisions reflect Regulations 15 to 18 of the Irish E-Commerce regulations which provide a shield for those hosting information online, but which can be held liable in certain circumstances, such as if they are on notice of the “unlawful activity” (e.g. a defamatory post) and fail to “act expeditiously to remove or disable access to the information”. “Expedientiously” is not defined in the Regulations, nor is the format of notice required.
- 4.8 The test for a plaintiff to obtain a section 33 order is to show that: (i) the statement is defamatory; and (ii) the defendant has no defence likely to succeed. If there is a viable defence, then the balance of justice lies in not granting the injunction. This is a high threshold for a plaintiff to satisfy before he or she can obtain any injunctive relief and there are few cases in Ireland where it has been successfully invoked. Injunctive relief is easier to obtain if the plaintiff can also show breaches of ancillary rights such as privacy under Article 8 (ECHR) or data protection rights, for example, if the publication concerns sensitive personal information. The position in the UK is similar (relying on the rule in *Bonnard v Perryman*).
- 4.9 Given the breadth of the section 27 innocent publication defence, the current remedies in either the Act or the Regulations may be of little use to a plaintiff wishing to urgently have harmful content removed online and they continue to create uncertainty for defendants. While some on-line publishers operate strict ‘notice and take down’ policies which encourage the reporting of abuses and provide an easy mechanism for resolution, there is no uniformity across such policies and no mechanism for them to disclose the details of the third party publisher without breaching data protection obligations.
- 4.10 It should also be noted that the Press Council, which was a key development in the Act, has no relevance to app providers and on-line publication that is not generated by a newspaper. This renders its impact quite limited in the modern context as a significant volume of news coverage is now generated on-line rather than by modern print media, and a significant percentage of the publication issues we now deal with do not relate to the print media at all.

5. **Honest opinion**

- 5.1 This defence is oblique and over complicated in its present form in Sections 20 and 21. Juries tend to get confused by it. We submit that adopting a much simpler formula closer to the original wording of the fair comment defence in Section 23 of the 1961 Act would enable juries to understand the defence and give effect to the intent behind the section, to allow latitude for opinion honestly expressed, which would enhance freedom of expression not only in the media but also on-line and in scientific journals.

6. **Fair and reasonable publication on a matter of public interest**

- 6.1 It is difficult to assess the effectiveness of this provision as very few cases have gone to full trial in which this defence has been pleaded since the Act came into effect. There is one notable area which we believe is potentially impacting the effectiveness of this defence, which is the requirement in section 26 that the various criteria be assessed by a jury rather than by the trial judge. The criteria under section 26 are complex and would, we submit, fall better to a trial judge than to a jury, which may struggle with an over complicated issue paper.

- 6.2 It is notable that juries have now largely been removed from hearing defamation claims in England & Wales and this move was, we understand, prompted to a significant degree by the complexity of issues following the development of the *Reynolds* defence in that jurisdiction. With regard to Section 26, it is a cumbersome and difficult exercise for a jury to navigate and make an assessment as to whether the defence applies. We submit that it would be more satisfactory for the trial judge to consider whether the defence is made out and direct the jury accordingly. This would require a statutory amendment.

7. **Alternative dispute resolution**

- 7.1 This firm has endeavoured in vain to introduce the concept of mediation and alternative dispute resolution for defamation claims. Mediation is, in our view, particularly suited to defamation claims. It enables much less costly and more effective resolution of defamation complaints than court proceedings and enables parties to explore and agree to imaginative solutions which achieve vindication for the injured party without being trammelled by the inevitable constraints present in civil litigation. While mediation of defamation claims is now quite common in the UK, for example, counsel in Ireland strongly prefer traditional settlement talks, which may not take place until the claim is well advanced or close to trial, and will often discourage mediation. This is partly because of a, in our view largely outdated, perception that offering mediation gives an impression of weakness to the other side. Given the significant cost savings available when a claim successfully mediates, publishers ought to embrace ADR and would, we believe, do so if encouraged by mediation having formal recognition within the defamation law framework.

- 7.2 In line with the recent moves towards encouraging ADR in civil claims, we accordingly submit that specific consideration should be given to legislating for mediation of defamation claims as an option that may be considered by parties. Giving formal recognition to mediation in this area might encourage parties and their counsel to consider it as an alternative means of reducing costs and resolving complaints.

8. **Damages**

- 8.1 As is clear from the Guide appended to this submission, damages are extremely high in this jurisdiction as compared with other common law jurisdictions. This undoubtedly has a significant chilling effect on freedom of expression. It is too early to say whether the provisions in the Act enabling juries to receive guidance on damages will result in a reduction in damages in the long term, and the delays in obtaining appeal hearings undoubtedly

contributed to a lack of clarity in this regard. The Supreme Court's decision in *Leech -v- Independent Newspapers* not to place any upward limit on damages for defamation while awarding damages of €1,250,000 for defamation in that case has led to significant inflation in the expectations of plaintiffs in defamation actions. The more recent decision in *McDonagh* has not had a corresponding deflationary effect because the facts of that case are viewed as being *sui generis*.

- 8.2 It is notable that although the threshold for defamation claims in the Circuit Court is now €75,000, the vast majority of defamation claims still issue in the High Court where plaintiffs can avail of a jury trial.
- 8.3 The high degree of uncertainty surrounding libel damages has caused some international publishers, particularly those based in the US, to decide against publishing into Ireland. It is important that those engaged in the business of publishing should have clarity and certainty about their potential exposure when claims arise, and introducing greater certainty on damages would benefit plaintiffs and defendants. There is no reason why, with proper guidance, juries cannot assess damages at a more reasonable and consistent level. The focus should, we submit, therefore be on providing a clear and unambiguous structure for guidance for juries in respect of damages. The Act should set out clearly the nature of the guidance that can be provided, as confusion remains about what can and cannot be said to juries about damages.

9. Conclusion

- 9.1 We have sought to identify areas that require special focus to improve the balance between plaintiffs, who wish to vindicate their good names, and defendants facing claims for defamation. Legislation in this area should encourage early resolution of valid claims and reward defendants who seek to make amends where appropriate. It should also seek to bring about greater certainty for plaintiffs and defendants. The changes that we suggest in this submission would, in our submission, go a considerable distance towards this goal.

McCann FitzGerald

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Damages & Costs in Ireland

A Guide for Publishers

A LEGAL VIEW

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Welcome

As a market for publishers and broadcasters Ireland is full of contradictions. The potential for profit is good but risk management can be a major issue. Current affairs are a national obsession, with 4 out of 5 adults reading a newspaper regularly¹. Irish litigation can, however, be costly and uncertain, with high damages awards in defamation actions and significant procedural delays. Publishing in Ireland is not for the faint hearted.

THIS GUIDE
EXPLAINS THE
LEGAL CONTEXT
AND AIMS TO
ASSIST PUBLISHERS
IN NAVIGATING
THE DIFFICULT
TERRITORY OF
DAMAGES AND
LEGAL COSTS IN
DEFAMATION
ACTIONS IN
IRELAND

Following the enactment of the Defamation Act, 2013 in England & Wales (“**the English Act**”), which imposes a serious harm threshold for libel plaintiffs and has substantially reworked defences in favour of media defendants, we have already begun to see a level of forum shopping, with celebrities that might previously have litigated through the courts in London opting to sue for defamation in Ireland. For many years publishers have been awaiting direction from the Irish Supreme Court as to the appropriate measure of damages in defamation actions. The Supreme Court has now spoken in *Leech -v- Independent Newspapers*, opting not to place a ceiling on libel damages. Instead the Court has rejected comparisons with personal injury damages and emphasised the special role played by juries hearing defamation actions, while substituting an award well above €1 million. High damages awards are here to stay.

The stakes are high and publishers must respond by implementing effective risk management. Having the benefit of expert local advisers and understanding the cultural differences and specific procedures are key to this. This guide explains the legal context and aims to assist publishers in navigating the difficult territory of damages and legal costs in defamation actions in Ireland, considering the factors influencing high damages awards, the implications of the *Leech* judgment and how costs are measured in defamation actions.

I hope that this guide will serve as a useful reference for practitioners and editors alike.



Karyn Harty

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¹ JNRS 2013/2014 – Readership Figures, National Newspapers of Ireland

A New Venue for Forum Shopping

Individuals with international public profiles have choices as to where to sue to vindicate their reputations and will always seek out the most favourable forum.



IRELAND'S
GENEROUS
APPROACH TO
DAMAGES AND
PLAINTIFF FRIENDLY
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DEFAMATION
CLAIMS.

Ireland's generous approach to damages and plaintiff friendly procedures make it an attractive forum for defamation claims. Indeed Ireland has seen defamation actions in 2014 by high profile figures not resident here and this trend seems likely to continue². The fact that most international publishers publish into the Irish market increases the likelihood of claimants opting for Ireland as the place to sue, although the political landscape is very different to that in the UK and US, for example. It is of course by no means guaranteed that claims by well known individuals will succeed before an Irish jury. Celebrities relish being able to visit Ireland and travel the island while being politely ignored – perhaps this famous begrudger presents risks for the unwary claimant.

Of interest to international publishers, Northern Ireland (which is a separate legal jurisdiction) has not adopted the radical changes introduced by the English Act, which only applies to England & Wales and to Scotland to a very limited extent. The Northern Ireland Executive's decision not to adopt the English Act appears to have been aimed at maintaining a healthy volume of defamation claims in Belfast. Whether it will give rise to a larger number of claims being taken through the Belfast courts remains to be seen.

² <http://www.msn.com/en-gb/entertainment/other/timberlake-and-biel-sue-magazine/ar-BB8vJxx>

Ireland's Defamation Law

Ireland has a constitutional common law legal system, which is culturally, substantively and procedurally unique.

Ireland's defamation laws are closest to the law which pertained under the English Defamation Act, 1996, although reforms enacted in 2009 have introduced some important procedural and substantive points of difference. The divergence between Irish and English defamation law is now even more marked following the most recent English Act and the expressly pro media approach adopted by the English legislature is not going to be replicated here.

The Irish Constitution has a marked impact on the treatment of defamation in Ireland. Freedom of speech is protected, subject to some qualifications, as is the entitlement of citizens to access the courts and to vindicate their reputations.

Until recently defamation law in Ireland was largely common law based and governed by the Defamation Act, 1961. Following a lengthy period of consultation, complicated by attempts at cabinet to link defamation law reform with the introduction of a statutory privacy law, Ireland enacted the Defamation Act, 2009, which came into force on 1 January 2010 and applies to all publications after that date. Note that the 1961 Act continues to apply to publications before that date and it will still be possible to issue libel actions under the 1961 Act up to and including 31 December 2015³.

³ Slander actions, which had a 3 year limitation period under the 1961 Act, are now out of time.

The 2009 Act

The 2009 Act sought to modernise Irish defamation litigation. It affords both parties a greater range of procedures and remedies than was previously the case and has codified many of the common law defences.

The 2009 Act abolished the distinct torts of libel and slander and replaced them with a tort of defamation. Note that defamation, whether transient or permanent, is actionable per se for individuals and corporations, which only have to show that defamatory words have been published about them to a third party to have a cause of action. There is no requirement to prove special damage and no serious or actual harm threshold.

Once a plaintiff has established the basic elements of publication, the burden shifts to the publisher to either justify the defamation (“*truth*”), show that it was comment on facts truly stated on a matter of public interest (“*honest opinion*”), that it was a responsible publication to an appropriate party (“*qualified privilege*”) or that it benefitted from absolute privilege. Alternatively a publisher may seek to defend the action on the basis that it was a fair and reasonable publication on a matter of public interest, a defence derived from Reynolds privilege, and it is for the jury to assess that issue as a matter of fact. A publisher can seek to rely on meaning or identification in the usual way, and if the publication is very limited it may be able to invoke the ‘real and substantial tort’ jurisprudence, but there is nothing in the 2009 Act to provide for any limitation on claims on this basis.

The 2009 Act introduced a multiple publication rule, confining a plaintiff to a single cause of action in respect of multiple publications of the same statement by the same publisher. This removes the risk of publishers facing separate hard copy and on-line actions in respect of the same content. Note that unfortunately the legislature did not avail of the opportunity to enact specific provisions to protect online publications, and there is still a lack of clarity around the obligations on ISPs and those hosting data in this regard.

New remedies

One of the most radical developments in the 2009 Act was the introduction of new remedies for plaintiffs, including a statutory prohibition order, a correction order and a new declaratory order, whereby the Circuit Court can declare that a person or corporation has been defamed and make any necessary correction or prohibition orders, but cannot award damages. This bypasses the rule in *Bonnard -v- Perryman*, making it easier to obtain prior restraint but only where the plaintiff can show there is no defence that is reasonably likely to succeed.

The limitation period reduced from 6 years to 1 year⁴. A new offer to make amends procedure has not had much uptake, although defendants can pay money into court against a claim without admitting liability. Parties must verify their pleadings on affidavit within a specified time limit.

⁴ Although this period can be extended at the discretion of the court

Significantly in the context of our consideration of damages below, the 2009 Act emphasises the central role of the jury.

Overall the 2009 Act represented a marked improvement in the position of defendants from a strategic perspective but they were coming from a low base as compared with other jurisdictions.

The 2009 Act provides for pre-trial applications on meaning and summary disposal of actions, but it can be difficult to persuade judges to dismiss claims at an interlocutory stage and thus deprive a plaintiff of a jury trial. It is also common for pleadings to be terse and largely uninformative, so that the issues are often not framed until the opening of the trial. This extends to defendants merely traversing claims without giving adequate particulars of their defence and often jettisoning defences at the door of the court. The introduction of active case management and a greater judicial

acceptance of pre-trial applications would assist parties in defining the issues between them at the pre-trial stage and thus reduce the length of time at hearing and the attendant costs.

Court procedures

The time allowed for hearing jury actions within the court calendar is limited. A maximum of 48 hearing days are allocated for jury cases in the Court calendar, divided into 4 jury terms of either 8 or 12 days each. If a case is likely to take up greater court time than is available in a jury session, the parties must apply to have a date specially fixed. A person suing for damages for defamation can expect to wait 1 - 2 years for the trial of the action, with similar delays experienced in privacy actions which are dealt with by judge alone in the non jury list. In February 2015 the entire jury list was adjourned as the judge assigned to the list was still hearing a lengthy action carried over from the November list.

Overall the 2009 Act represented a marked improvement in the position of defendants from a strategic perspective but they were coming from a low base as compared with other jurisdictions.



The 2009 Act

(continued)

The courts have stressed that there is a special onus on a plaintiff who institutes defamation proceedings to advance them without delay in order to restore any alleged damage to reputation. This rarely, however, translates into claims actually being dismissed for want of prosecution, even where the court is satisfied that the delay has been inordinate and inexcusable.

In October 2014 a new Court of Appeal began sitting, which is interposed between the High Court and the Supreme Court and has already substantially reduced the backlog of appeals and sped up the time between notice of appeal and hearing. Under this new system only cases of real constitutional importance will go to the Supreme Court.

It is disappointing that huge advances in the management of commercial litigation in Ireland in recent years, with an extremely efficient Commercial Court, have not extended to the jury list, which still suffers from trial by ambush, an absence of case management and significant delays.

There is a tentative but increasing willingness to use mediation to resolve defamation actions, which seems logical given the emotive nature of the underlying causes of action where reputation is involved. Publishers ought to press mediation as an appropriate mechanism for resolving claims, given the cost savings associated with mediation as compared with costly and time consuming litigation.

Changes in the jurisdiction level of the Circuit Court, whereby it can now hear claims valued at up to €75,000, do not appear to have abated the preference for litigating defamation in the High Court. Circuit Court claims proceed before a judge sitting alone and a party has to seek certification from the trial judge for senior counsel from a costs assessment perspective. As outlined below a much more frugal approach to the assessment of costs in recent years might incline counsel to opt for the High Court provided that

there is a sound cause of action which will carry a jury trial. Certainly the prospect of having to meet High Court costs and the uncertainty of a jury trial are key factors for defendants when considering whether to compromise claims.

Juries

Juries are central to the Irish defamation system. This much is clear from provisions such as section 26 of the 2009 Act, which provides that it is the jury that will assess whether a defendant can successfully rely on the new defence of fair and reasonable publication on a matter of public interest, including an assessment of various factors including any attempts made to verify the information, the seriousness of the allegation and so on. This necessitates presenting the jury with a complex issue paper, addressing the steps taken, the context in which they were taken and the motivation behind the publication. There is therefore now a marked contrast with the position in England & Wales where the default position is now that defamation actions are heard without a jury unless the court orders otherwise.

It is interesting to note that in the *Leech* judgment the Court confirmed with reference to Irish and English authorities that⁵

“an appellate court should only set aside an award made by a jury in a defamation action if the award made is one which no reasonable jury would have made in the circumstances of the case and is so unreasonable as to be disproportionate to the injury sustained.”

The Court rejected an argument by the newspaper that the jury award should be subject to greater scrutiny, which would impinge upon the “*unusual and emphatic sanctity*”⁶ applied to jury awards.

The Court held that there is an overlap between compensatory and aggravated damages.

⁵ Including *John v. MGN* [1997] QB 586

⁶ Per Finlay CJ in *Barrett v. Independent Newspapers Limited* [1986] I.R. 13 (at page 19)

“The fact that a separate question did not go to the jury herein asking them to assess aggravated damages does not mean that when the jury were assessing damages having regard to the circumstances of the case, they could not consider the conduct of the defendant both in relation to the publication at issues, the lack of an apology and the manner in which the case was defended. In other words, their award could properly encompass an element of damages designed to compensate for those matters which, in an appropriate case, could be dealt with by way of a separate heading of aggravated damages.”

The jury system is in need of reform⁷. It is a relatively easy matter to get excused from jury duty and juries therefore tend to be made up of students, the unemployed and senior citizens, with a smattering of civic minded professionals or business people. Lawyers are excluded from serving on juries.

European Convention on Human Rights

If a right recognised by the ECHR is already protected under the Irish Constitution, the Irish courts rely on the constitutional protections in coming to their decision rather than having regard to the ECHR⁸. This means that it can be difficult to introduce arguments about Article 10 and Article 8, Irish judges tending to the view that as existing constitutional protections correspond to Convention rights, the Convention does not need to be considered. Some judges are more open to Convention arguments than others and it is certainly arguable that the protections afforded to freedom of speech under Article 40.6.1 of the Irish Constitution are not equivalent to Article 10. Those used to first amendment

arguments should note the balancing exercise between protection of reputation and freedom of speech under the Irish Constitution – freedom of speech does not take precedence.

Press Regulation

The Press Ombudsman and Press Council, which started handling complaints from January 2008, now have a statutory footing under section 44 of the 2009 Act. The Press Council, which has a majority lay membership, has developed a code of practice and has a complaints procedure⁹. It is not possible to obtain compensation or cost through this process, but a publication may be forced to publish details of a decision. A complaint will not be considered if legal proceedings are threatened or in being but the fact that a person complains successfully to the Press Ombudsman does not preclude a subsequent defamation action.

Irish media specialists have watched the recent furore over the prospect of statutory press regulation in the UK with interest, given that the mechanisms in the 2009 Act seem to be working well for both media and consumers. Ireland’s Press Ombudsman, Professor John Horgan, gave evidence at the Leveson Inquiry in July 2013 that public acceptance of the system, and its effectiveness, was contingent upon his office being independent of the government and the media industry. While the system works well, the ‘no foal, no fee’ system tends to militate against individuals with statable defamation claims opting for this regulatory system.

⁷ http://www.lawreform.ie/_fileupload/Reports/r107.pdf

⁸ European Convention on Human Rights Act, 2003

⁹ <http://www.pressombudsman.ie/code-of-practice.150.html>

Damages

The Supreme Court has only considered whether to set aside a libel award on 4 occasions since 1993.



WHAT IS CLEAR FROM THE LEECH JUDGMENTS IS THAT THE SUPREME COURT REGARDS DAMAGES IN RESPECT OF DEFAMATION AS DISTINCT FROM OTHER CAUSES OF ACTION AND REQUIRING SPECIAL TREATMENT.

In that twenty year period the ceiling for damages increased from IR£30,000 1993 to IR£300,000 between 1993 and 1999, while in the most recent decision in *Leech* the Supreme Court has declined to set a defined ceiling on damages and regarded a figure of €1.25 million as a fair award while stating expressly that the defamation was not at the top end of the scale. This inflation in libel damages is extraordinary when compared with damages awards in other cases and the *Leech* decision leaves open the prospect of an award greater than €1.25 million in an appropriately serious case. What is clear from the *Leech* judgments is that the Supreme Court regards damages

in respect of defamation as distinct from other causes of action and requiring special treatment.

Facts underlying the Leech judgments

It is fair to say that the facts of the *Leech* case were unusual, particularly as the claim was in respect of a series of articles published over a two week period.

Mrs Leech was a communications consultant, who had recently set up her own company in partnership with another communications executive. In November 2004 a new story emerged that Mrs Leech had been awarded

Supreme Court decisions on libel damages

1993	€114,276	<i>McDonagh -v- News Group Newspapers</i>	(upheld on appeal)
1999	€380,921	<i>de Rossa -v- Independent Newspapers</i>	(upheld on appeal)
2000	€317,434	<i>O'Brien -v- MGN Ltd</i>	(overturned on appeal)
2006	€750,000	<i>O'Brien -v- MGN Ltd</i>	(jury award on retrial)
2007	€300,000	<i>McManus -v- Murphy</i>	(jury award - slander action)
2008	€900,000	<i>McDonagh -v- Sunday Newspapers Ltd</i>	(jury award, under appeal)
2009	€1,372,000	<i>Leech -v- Independent Newspapers (Ireland) Ltd</i>	(overturned on appeal)
2010	€10,000,000	<i>Kinsella -v- Kenmare Resources plc</i>	(jury award, under appeal)
2012	€150,000	<i>O'Brien -v- Associated Newspapers</i>	(jury award, not appealed)
2014	€1,250,000	<i>Leech -v- Independent Newspapers (Ireland) Ltd</i>	(Supreme Court award)

lucrative communications contracts by a government minister and questions were raised about the sums paid to Mrs Leech and the circumstances surrounding the award of the contracts. Some media outlets began falsely to carry innuendo to the effect that Mrs Leech had obtained the contracts because she was engaged in an extra marital affair with the government minister. The Evening Herald's coverage was in this vein and it was accompanied by colourful photographs and editing which conveyed images of Mrs Leech enjoying a luxury lifestyle at the expense of the taxpayer.

At the trial of the action it emerged however that some of the images had been photoshopped, including one particularly prominent montage relating to attendance at a conference which showed Mrs Leech and the minister standing very close together, with Mrs Leech in evening wear with a large split in the skirt and the minister in a lounge suit, superimposed on the New York skyline. It transpired that the 'split' was in fact Mrs Leech's arm, which had been obscured by the image of the minister superimposed over it.

The newspaper pleaded a form of justification, arguing that the natural and ordinary meaning of the articles was true and seeking to rely on qualified privilege having regard to the public interest in the publications. It did not seek to justify the meaning that the minister and Mrs Leech were having an extra marital affair and at no stage in the proceedings was it contended that that allegation was true. At an interlocutory stage the Supreme Court ruled that the newspaper had to give particulars of justification and that a bald plea would not suffice. The newspaper then amended its defence to provide particulars of justification and qualified privilege, relying on the public interest aspects to the publications.

At the trial of the action the newspaper abandoned its justification defence but proceeded to cross examine the plaintiff at length on the basis of qualified privilege, seeking to demonstrate that the sums paid to her were higher than the industry standard, a case which was not made out on the evidence. However when the defence case opened it declined to call any evidence and thus lost the benefit of the privilege defence.¹⁰ The jury found that the articles bore the meanings contended for by the plaintiff and awarded Mrs Leech €1.872 million in damages. The fact that the foreman of the jury was an accountant lent an interesting angle to the calculation of the damages award.

Independent Newspapers appealed against the size of the award.

The trial judge directed the newspaper to pay out €750,000 to Mrs Leech pending its appeal, as well as €100,000 on account of costs. It took seven years for the appeal to be heard in the Supreme Court.

Basis for the substituted figure

At the hearing of the appeal counsel for Mrs Leech argued against the Court substituting its own figure in the event that it upheld the appeal.

The Supreme Court in *Leech* unanimously found that it was a very serious defamation, but that the jury award was excessive and must be set aside. There was, however, some disagreement as to the appropriate figure and the basis for it.

McKechnie J viewed the libel as being at the highest level of seriousness and he would have substituted €1 million in damages. By a majority of 2:1, however, the Supreme Court substituted a figure of €1.25 million, reducing the damages by around €600,000.

¹⁰ The case predated the 2009 Act

Damages

(continued)

Ms Justice Dunne, who handed down the majority judgment, observed that the publications had impacted on every aspect of the plaintiff's life and had a real and long lasting effect on her professional life. While special damages were not pleaded the jury was entitled to compensate for loss of business opportunity. It was a "sustained campaign". The defamation was towards the higher end of the scale but not one of the most serious libels to come before the courts.

The Supreme Court had regard to the extent of the publication, which spanned 11 articles over 9 different editions of the newspaper over a 2 week period; the fact that the campaign "amounted to a serious attack on her business and personal integrity"; the defendant's conduct in maintaining a justification defence and its failure to apologise; the cropping and manipulation of photographs; the fact that her newly launched business was destroyed before it could get off the ground; and the impact of the defamation on the plaintiff and her family, which the Court described as "profound".

Scrutiny of a jury award

With a nod to the newly established Court of Appeal, the Supreme Court confirmed with reference to Irish and English authorities that

"an appellate court should only set aside an award made by a jury in a defamation action if the award made is one which no reasonable jury would have made in the circumstances of the case and is so unreasonable as to be disproportionate to the injury sustained."

Dunne J rejected an argument by the newspaper that the jury award should be subject to greater scrutiny, which would impinge upon the "unusual and emphatic sanctity" applied to jury awards, holding that there is an overlap between compensatory and aggravated damages.

The newspaper urged the Supreme Court to have regard to the highest level of general damages that may be awarded in the most serious personal injuries cases. The Supreme Court found, however, that personal injuries damages are not an appropriate analogy for damage to reputation. Damages for defamation are to compensate the plaintiff for injury to feelings and to vindicate the plaintiff's name in respect of the public at large. This element of vindication is not present in personal injury actions.

The Irish Courts have therefore adopted a distinct approach to the assessment of damages in defamation actions.

Impact on settlement

Publishers often find it frustrating that plaintiffs' solicitors in Ireland generally will not discuss settlement of a defamation action without the involvement of counsel.

This is in many ways a protective measure to ensure that their client gets the best advice on the value of their claim, as most solicitors representing plaintiffs on these matters are general practitioners and not defamation specialists. There is a small number of experienced Irish media defence solicitors and they will generally conduct negotiations without engaging counsel, although be prepared for the plaintiff to insist on formal talks at the Four Courts.

Barristers in Ireland find it amusing that “claimants” in England are willing to resolve claims for payments of less than £10,000. A plaintiff suing in Ireland with a reasonably statable case will rarely be prepared to accept less than the Circuit Court jurisdiction (€75,000) in settlement, save where a case is resolved at a very early stage. The temptation to make an offer in the low thousands should generally be resisted, as it will not be taken seriously, will undermine subsequent settlement discussions and may strengthen rather than weaken the plaintiff’s resolve (and that of their legal advisors).

The level of damages in defamation actions is also reflective of higher damages in Ireland in respect of other civil claims. This differential is exemplified by a decision of the Supreme Court in a constitutional action in March 2007, increasing an award of damages to an individual who had been wrongly incarcerated from €1.9 million to €4.5 million, including €1 million in punitive damages in respect of the State’s failure to apologise.

In actions for breach of privacy damages tend to be considerably higher than in other European jurisdictions (see *Herrity v-Associated Newspapers*, in which the High Court awarded €90,000 in general and aggravated damages for breach of privacy, including €30,000 in punitive damages for the use of illegally obtained phone transcripts). Notably in “*Herrity*” the award for breach of privacy was against a private entity, a first in Ireland where such awards had previously only been made against State defendants. The high level of privacy awards is a particular risk issue for book publishers, who must be careful to obtain consents and avoid unnecessary intrusion in non-fiction publications. It also presents real challenges for internet publications.

Implications for Publishers and Editors

The *Leech* judgments set clear water between Ireland and other jurisdictions and send a strong message that the courts will penalise publishers of defamatory content particularly where colourful editing is employed. The decision presents news editors with a real dilemma, as there is a strong message that repeated coverage of a story is a factor to be taken into account when assessing how to compensate a plaintiff for injury to reputation.

The egregious nature of the editing of the articles and the prominence of manipulated images in “*Leech*” mean that this case may not present an ideal opportunity for persuading the ECHR to intervene, given the emphasis placed by that court on the special impact of photographs in publications. Publishers will be extremely concerned at the prospect of figures well in excess of €1 million being viewed as reasonable compensation for defamation. While the defamation in this case was undoubtedly very serious, the substituted award will now make it much more difficult to resolve claims at a commercial level.

There are already indications that plaintiffs’ expectations have increased following this decision and there is nothing in the decision to give publishers comfort, particularly as the 2009 Act contains express provision in respect of causes of action accruing after 1 January 2010 that juries may be given guidance on damages, and will presumably be able to be told about the Supreme Court’s guidance on damages in “*Leech*”.

Appeals in two other libel actions, in which the plaintiffs were awarded €900,000 and €10,000,000 (including €1 million aggravated damages) respectively are

awaiting hearings in the Supreme Court. There is therefore scope for the Supreme Court to provide greater clarity on the range of damages that is appropriate in defamation actions.

It remains open to defendants to defamation claims in Ireland to seek to strike out a claim on the basis that it does not meet the ‘real and substantial tort’ threshold and *forum non conveniens* arguments can be made in an appropriate case. Defendants without assets in Europe, particularly a US based organisation, may opt not to defend the claim and force the plaintiff to seek to enforce any judgment obtained. This flat earth approach entails having no role in the proceedings and could in itself cause reputational damage to an organisation and is not for the faint hearted.

Publishers should, though, assess their risk profile as far as Ireland is concerned and consider, in particular, whether on-line publication into Ireland is commercially necessary. They should also consider regular training to assist with risk management.

Costs

It was widely reported that reform of the legal profession was a priority for the ‘troika’, which was in place pending Ireland’s exit from the IMF bailout. At the date of writing, the Legal Services Regulation Bill 2011 is likely to be enacted soon. This legislation will provide for a new office of Legal Costs Adjudicator, which will take over the assessment of costs in respect of civil claims from the Taxing Masters, who have been operating on an interim basis since 2012.



WHILE THERE HAS BEEN A MARKED REDUCTION IN THE ASSESSMENT OF SOLICITORS’ INSTRUCTIONS FEES IN DEFAMATION ACTIONS, COSTS ARE STILL HIGH AND ARE A MAJOR DISINCENTIVE TO FIGHTING CASES TO TRIAL.

Since their appointment the two Taxing Masters, who replaced retiring predecessors, have taken a different approach to taxation of costs in defamation actions, with a greater focus on work done and less emphasis on the value of the damages. There has been a steady reduction in the level of instructions fees assessed in respect of plaintiffs’ costs and this is examined below.

How is defamation litigation funded?

The majority of plaintiffs suing for defamation in Ireland secure representation on a no fee, no fee basis. In other words, the solicitor and barristers assume the risk on behalf of a client on the basis that they will get paid if they win and will not get paid if the claim fails. In general, costs follow the event with the unsuccessful party ordered to pay the costs of the winning side, although this is not universally applied. Plaintiffs are of course still at risk as regards their opponent’s costs, to the extent that they have assets that are susceptible in the event of judgment being obtained against them. This assumption of risk by the lawyers representing plaintiffs means, however, that plaintiffs do not need to be

well funded in order to sue for damages for defamation. It also means that Ireland has not experienced the rather complex Conditional Fee Agreements (CFAs) which have been a feature of this type of litigation in England and Wales and insurance against the risk of losing defamation proceedings is very unusual in this jurisdiction although it may be permissible following a judgement recognising after the event insurance as a valid substitution for security for costs: *Greenclean Waste v Leahy* (No 2) [2014], IECH 314. Solicitors may agree with their client that they will charge a success fee, but may not charge a percentage of the damages recovered (contingency fees).¹¹

How are costs assessed?

While there has been a marked reduction in the assessment of solicitors’ instructions fees in defamation actions, costs are still high and are a major disincentive to fighting cases to trial. There are some rules of thumb applied in the measurement of defamation costs in Ireland that may seem outdated and illogical to many clients.

When a case settles or at the conclusion of a trial the parties will usually try to agree the successful side’s costs to avoid the

¹¹ Section 68(2) of the Solicitors (Amendment) Act, 1994

Costs

(continued)

need to go to taxation, which is the formal process for the assessment of legal costs. Costs may be assessed on a solicitor/client or indemnity basis, being the full costs due to be paid by the client to the lawyers in respect of the handling of a matter, or on a party/party basis, which costs tend to be assessed at around 80% of the indemnity costs. In other words, there are items that can be charged to a client for which one's opponent cannot be expected to pay and which will be excluded from party/party costs when assessed. This may include witness expenses or the cost of media monitoring, for example.

Party/party costs when assessed are broken down into the fees due to the solicitor for the handling of the matter, mainly encompassed in an instructions fee, and the fees due to counsel in respect of drafting and advocacy.

Where possible, we try to agree costs on behalf of clients at the time of settlement as it is not uncommon for this process of drawing up costs to take months, if not years. As most solicitors acting for plaintiffs are not experienced in defamation litigation it is often difficult to get them to agree costs without first referring their papers to legal costs accountants, which can delay matters considerably. We have encountered several cases where it took more than a year for solicitors to produce a bill of costs.

If the parties cannot agree costs they send papers to their legal costs accountants, who will in turn seek to negotiate figures between them. If the costs accountants cannot reach agreement, then the matter will be referred for taxation. The parties bear their own costs as regards this negotiation and assessment procedure and clients must factor in the fees payable to their costs accountants, which are usually charged as a percentage of the sum allowed or on the basis of hourly rates.

The taxation process

There are two Taxing Masters. They are officers of the court and their role is to

determine the amount of costs due on foot of a bill of costs furnished for that purpose in respect of High Court proceedings. In Circuit Court proceedings the County Registrar for the relevant county assesses costs and the approach taken can vary substantially from county to county.

The taxation of costs is done by way of oral hearing. In general only the costs accountants attend hearings before the Taxing Masters, although solicitors commonly attend hearings before the County Registrars in the Circuit Court.

Prior to the Courts and Court Officers Act, 1995 a Taxing Master was not entitled to consider any matters other than the reasonableness of the costs submitted, and could not take the quality, value or extent of work done into account. Section 27 of the 1995 Act provided that the Taxing Master could evaluate the costs and expenses submitted by reference to the nature of the work actually done or services provided, as well as having regard to the reasonableness or fairness of the amounts in the circumstances of the case. This assessment is however, with regard to global fees paid to the solicitors and counsel (the 'instructions fee' and 'brief fees' respectively). These global fees are to compensate the solicitors and counsel for taking in instructions and preparation for the trial, attending the trial and the overall care and attention given to the case.

What happens after taxation?

At the conclusion of the taxation and on payment of the court fees, the Taxing Masters' Office issues a certificate of taxation. Interest runs from the date of issue of the certificate, not from the date of the taxation. The party wishing to be paid is responsible for paying the court fees, which can be substantial (see below).

If a party is dissatisfied with the outcome of the taxation it can lodge objections to specific items before the certificate is signed or not later than 14 days after the taxation has concluded. In that event the Taxing Master is required to review and

Court fees and stamp duty

A party wishing to take up a certificate of taxation must first discharge court fees:

	High Court	Circuit Court
Summons to tax	€275.00	€70.00
Certificate of taxation	€68.00	€70.00
Stamp duty	8% ¹²	8%

reconsider the items queried and will hold a further oral hearing if he or she considers it appropriate. The party objecting can require the Taxing Master to state reasons for the decision in respect of those items including any special circumstances or relevant facts taken into account. Pending that review the Taxing Masters' Office can issue an interim certificate of taxation in respect of any items he or she considers appropriate.

A dissatisfied party may request a further review of the Taxing Master's review in the High Court within 21 days, in which case the Taxing Master will submit a report and the court will consider the documents that were before the Taxing Master, the notice of objection and any submissions. The High Court may amend the assessment of costs where it considers that the Taxing Master erred to the extent that the taxation was unjust, in which case the taxation is referred back to the Taxing Master. In the Circuit Court, decisions of the County Registrar are reviewed by the Circuit Court.

The 8% stamp duty is payable on the total amount allowed on the taxation. This includes the solicitor's instructions fee, counsel's fee, witness expenses, outlay and VAT. On a substantial bill of costs the liability for stamp duty can be considerable. The stamp duty is initially paid by the party presenting the bill of costs in order

to obtain the certificate of taxation but is then added to the amount contained in the certificate of taxation and must be paid by the paying party. The certificate of taxation has the effect of a court order and enables the party to enforce as necessary in the event of non payment.

It is always worth doing a cost benefit analysis before sending a matter to taxation to see if any potential deductions on a costs bill will be wiped out by the imposition of stamp duty and by the costs to be paid to the legal costs accountants for handling the taxation.

Interlocutory Applications

It had been common for judges to reserve the costs of interlocutory applications to the trial of the action but since 2008¹³ there is an onus on judges to adjudicate on the costs of interlocutory applications rather than reserve them, unless it is not possible to do so justly. Once an order for costs has been made, the costs can be taxed and it is not uncommon for parties to seek payment of costs on foot of interlocutory orders in defamation actions prior to the trial of the action. If costs cannot be agreed the party may proceed to tax the interlocutory costs and obtain a certificate of taxation in the usual way. The party of course takes the risk that on the next interlocutory outing the costs could go the other way, leaving

¹² With credit given for the €275.00 notice to tax stamp duty already paid

¹³ SI No 12 of 2008 amending Order 99 Rule 1 (3) and (4) Rules of the Superior Courts

Costs

(continued)

them open to a liability to pay costs to the other party. The 2008 amendment also permits the court to measure costs but this is not commonly done.

VAT

Value Added Tax ("VAT") is payable on solicitors' and counsel's fees at 23%. Clients based outside Ireland are liable to VAT at nil rate on solicitors' and counsel fees, provided that the services are being provided to an entity domiciled outside Ireland. VAT is recoverable on party and party costs only where the sum is otherwise not recoverable.

How solicitors' costs are assessed

In contentious matters solicitors are obliged to explain to their client in writing the basis on which they will charge for work done and the risk of being liable to pay the other side's costs in the event of losing the action.¹⁴

On taxation of party and party costs a solicitor can expect to recover around 80% of the fees that would be recoverable were the costs to be taxed on a solicitor and own client basis. Where a judge feels that a party should be penalised for egregious or wasteful conduct costs may be awarded on

an 'indemnity' or solicitor and own client basis to the other party, in which case that party is entitled to recover the full costs that it is liable to pay to its solicitor.

The bulk of the fees allowed to a solicitor on taxation are caught by the solicitor's instructions fee. Steps taken such as filing documents and swearing affidavits also attract set fees¹⁵. These items have to be gone through in minute detail on taxation but represent a small percentage of the overall fees allowable.

Until recently the general rule of thumb applied was that the solicitor's instructions fee on a party/party taxation of costs in a defamation claim would be around 40% of the damages received. The solicitor for a plaintiff who received damages of €100,000 could therefore expect to receive an instructions fee of around €40,000 plus outlays and incidental items and plus VAT, assuming that all work done was vouched and apparent from the file.

The new Taxing Masters have placed a greater focus on work done and give less emphasis to the value of the claim. In *Reynolds -v- RTE*, the plaintiff's solicitor had claimed an instructions fee of €275,000

"assessment of costs before the Taxing Master comes down to a full and complete examination of the work done by reference to the Solicitors file. However, this does not preclude a solicitor or barrister giving oral evidence to the Taxing Master... Damages awarded are not the determining factor, they are treated in the same manner as each of the other factors such as, for example, the complexity of the issues, the amount of time actually spent and the importance of the case."

Shane Galligan,
Behan & Associates
Legal Cost Accountants

¹⁴ Report of the Legal Costs Working Group, November 2005, para 5.28

¹⁵ Appendix W to Order 99 of the Rules of the Superior Courts, 1986

plus VAT and his senior counsel had each claimed a brief fee of €65,000 plus VAT in respect of a settlement, whereby the plaintiff received an undisclosed sum in damages and an apology read out in open court. It was accepted that the defamation was serious and the solicitor had been working on the matter for six months prior to the settlement, which settled on the morning of trial. The Taxing Master reduced the solicitors' fee to €80,000 and the senior counsel's fees to €26,000 each. The fact that notes of consultations were not on file and there were no interviews with witnesses prior to trial were key factors in the reduction of the fee, as was the fact that counsel had settled most correspondence and had dealt with negotiation of the apology, although it was noted that the instructions were carried out with great efficiency and dedication.

Shane Galligan, a partner at Behan & Associates Legal Cost Accountants in Dublin says from his experience now the *“assessment of costs before the Taxing Master comes down to a full and complete examination of the work done by reference to the Solicitors file. However, this does not preclude a solicitor or barrister giving oral evidence to the Taxing Master... Damages awarded are not the determining factor, they are treated in the same manner as each of the other factors such as, for example, the complexity of the issues, the amount of time actually spent and the importance of the case.”* He further added that *“there is a general expectation amongst plaintiff's solicitors in defamation actions that costs should be higher than they generally are and in these instances there may be no alternative, or it may be beneficial for Defendants, to allow costs to be taxed. However, one needs to be mindful of the costs associated with Taxation, ie Court fees at 8% of the total amount allowed, which are payable ultimately by the Defendant regardless of the outcome”*.

Where two or more related actions are to be taxed it is important to draw any duplication of work to the attention of the Taxing Master (or County Registrar) who should discount the fees accordingly.¹⁶

When submitting costs for taxation, files which a party seeks to rely on as evidence of work done are liable to be inspected by the opposing party. The party claiming the costs is not entitled to withhold documents on grounds of confidentiality, although the parties can agree special arrangements in that regard if there are particular concerns. Commonly where there are sensitivities about confidential documents the party will not seek to recover costs in respect of them, in which case they need not be submitted for inspection. This can be a good reason not to seek to have costs assessed at an interlocutory stage, as the Taxing Master and the other side will be entitled to see the entire file on which the party seeking payment relies.

Counsel's fees

Barristers' fees fall into the following categories:

- brief fees
- daily refresher fees
- negotiation fees
- drafting and appearance fees
- consultation fees
- fee for drafting submissions

Brief fees are global fees the level of which, like a solicitor's instructions fee, will largely depend on the level of damages involved. In a High Court defamation action, one would expect the plaintiff's senior counsel's brief fee to tax at a figure between €20,000 and €30,000 and junior counsel may be allowed two thirds of the senior counsel's brief fee. It is very unusual

¹⁶ Ormond (An Infant)-v-Ireland [1988] ILRM 490

Costs

(continued)



SHANE GALLIGAN REMARKED THAT “ALTHOUGH IT IS ACCEPTABLE IN PRINCIPLE THAT BRIEFS WERE REASONABLY OUT, THE EXTENT OF THE WORK ACTUALLY UNDERTAKEN BY COUNSEL IN PREPARATION OF THEIR BRIEFS WILL BE FULLY EXAMINED...

for barristers to mark hourly rates. Brief fees are only payable after briefs have issued, and it is generally regarded as appropriate to issue briefs once a trial date is allocated. It may be possible in certain cases to demonstrate that briefs necessarily issued before a trial date was allocated, an argument that can be persuasive in defamation actions where hearing dates are only given out a few weeks before trial. In that event the solicitor will have to vouch by producing correspondence and a copy of the brief that the brief had issued.

Shane Galligan remarked that *“although it is acceptable in principle that briefs were reasonably out, the extent of the work actually undertaken by counsel in preparation of their briefs will be fully examined. There may be instances where, for example, a Notice of Trial has issued but the case has not been formally called on for hearing. It is unlikely that two counsel (or perhaps 3 as is commonly the case in Defamation actions) will have prepared for the trial and even if they maintain that they have, it may be deemed unreasonable to have prepared in such circumstances. In such an instance, if a case were to settle, very minimal, if any, brief fees may be allowed. The general principles governing the recovery of brief fees have not been altered but the complete examination of the nature and extent of the work has altered, particularly insofar as it entails an assessment of the work/fees of each individual counsel independent of that of the other, i.e. no 2/3rds rule of thumb”*.

The brief fee covers preparation for the trial and the first day of the action and thereafter each barrister is entitled to a daily refresher fee for each day or part of day at trial. If the court sits after normal hours (4 p.m.) the barristers may seek an additional refresher for that day. Senior counsel will generally mark a daily refresher fee of €4,000 - €5,000 in a defamation action, with junior counsel marking two thirds of senior counsel's fee.

If a case settles before a trial date is given for the hearing of the action the Taxing Master will allow the plaintiff a negotiation fee for one barrister, plus any drafting or

appearance fees, having regard to the level of damages paid and the work actually done. The negotiation fee will be about two thirds of the brief fee that would have been allowed had briefs issued and there are ‘going rates’ for drafting of pleadings and court appearances, which tend to be in the low hundreds of euro. Counsel may also mark fees for attending consultations and it is important in negotiating counsel's fees to be clear on any such additional fees.

Where counsel has drafted written submissions, the Taxing Master will usually allow a fee equivalent to a refresher fee in respect of that work. In a case where junior counsel appears without senior counsel he or she could expect to receive a fee for drafting submissions closer to the senior counsel level. In the event of an appeal counsel is entitled to a brief fee on the appeal and refresher fees in the normal course.

Two seniors rule

The Taxing Master will generally allow the plaintiff in a defamation action brief fees for two senior counsel (assuming that the plaintiff has briefed two seniors) along with junior counsel. In contrast the defendant will generally only be allowed one senior and one junior counsel and generally they will brief accordingly.

The so-called ‘two seniors rule’ has been the subject of much criticism. The rationale is that there is considerably more work involved in a jury action as compared with a standard oral hearing and that it is appropriate that one senior counsel should not have to open the case, take witnesses through evidence, cross-examine, handle legal submissions and close the case to the jury without a second senior. It should also be said that it is not unusual in commercial cases for parties to brief two or even three senior counsel and the practice is not unique to jury actions.

The practice is unlikely to change, particularly given that the callover of the list to fix dates is scheduled just a few

weeks ahead of each jury term, meaning that counsel are only given a few weeks notice of trial and frequently have to step out of the defamation action at the last minute due to other commitments. Briefing a second senior therefore serves as a safety net against a plaintiff losing their lead senior just weeks before the trial, bearing in mind that most media defendants would expect a level of loyalty from barristers that they use frequently and are perhaps less likely to suffer the loss of counsel at the last minute.

It is often noted that when juries were abolished in personal injury cases in Ireland and the two seniors rule fell away in relation to those actions, brief fees increased accordingly. In reality the scope for a defendant to challenge the two seniors rule seems limited and any victory would be pyrrhic if it were to lead to a general increase in brief fees.

Two thirds rule

It has traditionally been the practice of the Taxing Masters to allow junior counsel a brief fee and refreshers equivalent to two thirds of senior counsel's fees. The primary objection to the use of this artificial calculation was that it had no regard to the work actually done. Frequently one would encounter a case where junior counsel had done the lion's share of the work but received less than the senior counsel who had apparently done very little. Conversely it was not unusual to see junior counsel brought in at the last minute in a case, having had no involvement up to that point but expecting to receive two thirds of the senior's fee on a settlement half an hour later.

There has been some move away from this practice in recent years with a shift towards having greater regard to the work actually done by counsel, but the Taxing Masters still use the two thirds rule as a yardstick and the High Court has given the practice its approval.¹⁷

Shane Galligan commented that "the taxing master will generally carry out an independent assessment of counsel's fees. This can sometimes result in junior counsel receiving two thirds of senior counsel's fee depending on the level of work carried out by junior counsel, however, there have been cases where junior counsel has received a larger fee than senior counsel as a result of the independent assessment".

If the case proceeds to trial and if there is evidence that junior counsel fully considered the brief and carried out substantial work then the likelihood is that the fee will be allowed at in or around two thirds of senior counsel's fee. Where the case settles prior to trial, the Taxing Master may allow briefs at less than the two thirds rate. Also, if two senior counsel have been briefed junior counsel's fee may be reduced to between half-two thirds of the senior counsel fee.

In *Boyne -v- Dublin Bus*¹⁸ the Taxing Master, in responding to the defendant's objections in relation to his decision to apply the two thirds rule, said:

"It is a long-established and well-settled custom and practice that junior counsel is entitled to a fee of two-thirds of his leader's fee. Notwithstanding the fact that senior counsel conducted the examination of the majority of the witnesses in court itself, junior counsel carries a responsibility in ensuring that senior has not overlooked any particular aspect or element of the evidence or law which is material to the Plaintiff's case. It is in the recognition of the lesser role performed by junior that he/she is allowed a two-thirds proportion of the fee allowed to senior in respect of both brief and refresher fees.

No compelling evidence or argument has been presented on these objections that I should depart from this well-established custom and practice in existence to date. Junior counsel has to carry out an examination and read into a brief similar and identical to that presented to his leader. Junior counsel is not given any

¹⁷ *Boyne -v- Dublin Bus* [2006] IEHC 209

¹⁸ [2006] IEHC 209.

Costs

(continued)

lesser of a brief. He must also take a careful note of all evidence given during the trial. Having considered all the evidence in this particular case and its complexities especially in respect of liability itself, this ground of objection now put forward is unmeritorious and is being dismissed.”

In that case the defendant had objected to the application of the two thirds rule in respect of the plaintiff’s costs, but had paid its own counsel fees calculated on that basis, a factor which was not unreasonably highlighted by the Taxing Master in rejecting the argument that he should only have regard to the work actually done. When the matter came before the High Court on a review of the taxation, Gilligan J described the rule as “only a yardstick, but nevertheless a well established yardstick which is now governed by the relevant provisions of s. 27 of the Courts and Court Officers Act 1995.” He found that it was reasonable for the Taxing Master to continue to apply the yardstick, provided that he also had regard to the work done and all the circumstances of the case. It is clear though that in a case where there is no evidence of a barrister having done any substantive work the Taxing Master must have regard to that fact and any other relevant factors in assessing the appropriate fees.

In its 2005 report, the Legal Costs Working Group was heavily critical of the two thirds rule, noting that *“the fee a Junior may receive in a case is independent of skill, or work done, but determined by the good fortune of the Senior’s earnings capacity and fee setting agility.”*¹⁹

The Group considered that it would be appropriate that where junior counsel carries out most of the work where a senior counsel is also engaged, the junior should receive a higher fee than the senior, or

that an experienced junior running a High Court action without senior counsel should receive the level of fee that the senior would traditionally have expected, *“the essential point being that fees would be directly linked to the work actually and appropriately done, time expended, and complexity involved, and not to the professional grading structures.”*²⁰

In response to these recommendations and similar criticisms from the Competition Authority, the Bar Council was broadly supportive of the concept of payment for work actually done but cautioned against setting some objective standard for measuring fees without reference to the circumstances of the case²¹. The Bar Council also pointed out that greater emphasis on time spent and the introduction of hourly rates would result in higher fees for clients given that many of the mentions and attendances by barristers are not currently charged for, although they are effectively ultimately encompassed in the brief fee if a brief fee becomes payable.

In response, the Bar Council adopted an amended rule in its code of conduct, which provides:

“Barristers’ fees are based upon work done. Barristers are entitled to charge for any work undertaken or to be undertaken by them (whether or not it involves an appearance in court) on any basis or by any method they think fit, provided that such basis or method is permitted by law and a barrister is entitled to take into account when marking or nominating such fee, all features of the instructions which bear upon the commitment which is thereby undertaken or has been undertaken by them including:

- the complexity of the issue or subject matter;
- the length and venue of any trial or hearing;

¹⁹ Report of the Legal Costs Working Group, November 2005, para 5.28

²⁰ Ibid. para 5.30

²¹ Submissions to the Implementation Advisory Group on the “Report of the Legal Costs Working Group”, Bar Council 10 May 2006

- the amount or value of any claim or subject matter in issue provided, however, that the level of fee should not be calculated solely on the basis of the value of the case or on a basis directly proportionate to the value of the case;
- the time within which the work is or was required to be undertaken;
- any other special feature of the case.”²²

Barristers are also now expected to provide estimates of the anticipated fees in writing if requested.

Prospects for reform

There has recently been a comprehensive review of the taxation system and a full overhaul of how costs are measured in Ireland is expected.

The Legal Services Regulation Bill 2011 provides for the regulation of the provision of legal services and includes provision for reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services. It provides for the establishment of the Office of the Legal Costs Adjudicator in place of the Taxing Master. This office will be empowered to publish legal costs guidelines and will maintain a register of determinations in relation to legal costs. It will set out the duties of legal practitioners in relation to legal costs and provide for the adjudication of legal costs. It contains a schedule of ‘Principles Relating to Legal Costs’, which provides inter alia that costs should follow the event unless the court orders otherwise.

The reforms are not radical in nature but are designed to ensure that clients will be better informed about the costs of their legal transactions and will be kept up to date on any developments in their case which may have additional cost implications for them.

The new Office of the Legal Costs Adjudicator will replace the Office of the Taxing Master only and County Registrars will continue to tax party/party costs in Circuit Court cases. They will however be required to keep a public register of their decisions and will, in their own adjudications, be guided by the Principles Relating to Legal Costs.

The Bill also envisages new alternative business structures along with new partnership options for solicitors and barristers. These structures will include multi-disciplinary practices or “one-stop-shops” where lawyers can provide services with other providers such as accountants.

²² See Code of the Conduct for the Bar of Ireland, adopted Thursday 26 July 2012, Rule 12.1 (a)

Conclusion

The above is no more than a summary of the practical aspects of litigating in defamation in Ireland. We are happy to advise or provide training in respect of any aspect of the above.

It is hoped that procedural reforms, such as the new Court of Appeal, will lead to a marked improvement in the management of and speed of resolution of defamation claims and the assessment of damages. Publishers will no doubt take an active interest in improvements in the process for the assessment of costs.

This document is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed.

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About McCann FitzGerald

With approximately 500 people, including over 350 lawyers and professional staff, McCann FitzGerald is one of Ireland's largest law firms. We are consistently recognised as being the market leader in many practice areas and our preeminence is endorsed by clients and market commentators alike. Our reputation is founded principally on two factors – the quality of the service we provide and our ability to attract, develop and retain the best legal talent.

We are uniquely placed to meet the needs of the media sector and the challenges it faces and we offer a multi-disciplinary service to meet those needs. Led by Karyn Harty, we have acted in many key libel actions in Ireland in recent years, including *O'Brien -v- MGN*; *Waters -v- Times*; *Leech -v- RTE*; *Kushnir -v- Guardian Newspapers* and *McAuley -v- Times Newspapers*. We advise a number of US based internet service providers on risk management, the defence of litigation and liaison with the Irish authorities regarding mutual assistance requests and production orders.

Karyn specialises in complex commercial litigation in the financial services sector and is a frequent trouble shooter for clients in that context on media handling, crisis

management, risk avoidance and the safe publication of contentious reports. She is an experienced litigator and negotiator, and is also a CEDR accredited mediator.

A media specialist since qualifying Karyn and her team have provided pre-publication advice to various international publishers and media organisations, including the Sunday Times, The Irish Daily Mirror, AOL and Random House. She leads a media defence team, which provides advice on defamation, breach of confidence, contempt of court, privacy, injunctions and Norwich Pharmacal applications.



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