

DEPARTMENT OF JUSTICE AND EQUALITY
DEFAMATION ACT REVIEW
SUBMISSION BY MICHAEL WILLIAMS

This submission will focus on print publications, typically newspapers, and for convenience will refer to all of them as “newspapers”. Its arguments and proposals are in principle also applicable to other media, as I shall try to show.

THE INTERESTS TO BE PROTECTED.

The interest of citizens in not being unjustly denigrated is clear, and similar to our interest in not being subjected to unlawful violence or the unlawful destruction or theft of our possessions. It is an interest shared by all, but its infringement concerns each of us as an individual, and in that it differs from the interest in “free speech”.

The interest of a citizen in being able to express his (or her, but from now on, for brevity and convenience I will use “he”, “him” and cognate words as not implying one gender) opinions is also an individual one, but its corollary is communal, and in that respect it differs – as mentioned above – from the interest in protecting “good name”. Expressing our opinions and convictions means communicating them to others. What one citizen expresses, others receive, and may consider. Some may agree with the views expressed, and others disagree. Some may passively accept what they read in a newspaper, while others may be moved to express their agreement or disagreement. One expression of opinion may start a discussion or dialogue on a topic of importance or interest to those who read it. The interest of one citizen in expressing his opinions is also the interest of others in considering them, and in participating, actively or passively, in a debate. This is a process from which public opinion evolves. (A view influential in the early years of this State, that “the People” should be protected from exposure to unorthodox or unapproved opinions, is now almost universally rejected.)

Interest in freedom of expression is thus a communal interest, while an interest in protecting reputation is shared by all but is personal, not communal. Newspapers are essential in the communication of opinions and convictions. They are the traditional, and in spite of the rise in social media still probably the main way in which the communal interest in engaging in serious public discussion is recognised and satisfied. A state that values that discussion should foster newspapers and if necessary protect them from laws that threaten their ability to be the conduit through which the discussion takes place. Public discussion is essential to genuine democracy.

The Constitution recognises each of these interests as citizens' rights in Article 40.3. 2° and 40.6 1°, respectively:

“40.3. 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

“40.6. 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i The right of the citizens to express freely their convictions and opinions.”

(Extract only.)

PROTECTION OF “GOOD NAME” CURRENTLY

The traditional means by which a citizen seeks to vindicate his “good name” against unjust attack, both before we adopted our Constitution in 1937 and since, has been by an action for damages for libel, usually in the High Court. In 2016, this remedy has become so expensive as to be beyond the reach of most citizens. An indigent citizen who complains of being defamed might persuade lawyers to represent him on a “no foal, no fee basis”. But that is generally not open to a citizen with an income or assets. A citizen who wants to vindicate his good name against injustice but has assets he cannot afford to lose faces the danger of losing and having a crippling award of costs against him. In practice, that seems to deter most citizens from protecting their “good name” in the only way currently available.

So, it seems the State currently offers only one means of vindicating “good name” against injustice done, and it is one that is beyond the reach of probably most citizens. Does this meet the Constitutional obligation “to protect as best it may and in case of injustice done, by its laws...[to] vindicate the good name of every citizen”? The words “as best it may” seem to release the State from strict obligation. But it seems doubtful that by providing to citizens a means of vindicating their good names against injustice (not doing so itself, as the Constitution seems on a strict reading to require) which is so expensive that it is out of reach of a majority, the State is fulfilling its Constitutional obligation, even with the saving phrase “as best it may”. If the State could provide a better means of discharging its constitutional obligation, but does not do so, it must be questionable whether it vindicates citizens' good name in case of injustice done “as best it may”. The approach I propose in this Submission is intended to resolve that problem by supplying a means of vindicating “good name” that all can avail of.

ADEQUACY OF EXISTING REMEDY?

Is a right to sue for libel an adequate means of vindicating “good name”? Assume an article damaging to my reputation appears in the Irish Times, I consult my lawyers, who write to the paper seeking a retraction, and the newspaper refuses. I sue and my action is heard, if I am lucky, 18 months or two years later. Assume I am successful, and an award of damages is made in my favour. People who have read the original article may not see the Court report, and may continue to think badly of me because of what they read months or years ago. Even if some of them become aware of my successful libel action and are led to revise their bad opinion of me, I have laboured under the unjustified slur for however long it has taken for my claim to be processed through the Courts. I may receive a hatful of money (and be left with a capful after I have paid my lawyers the difference between what they charge me and the newspaper’s contribution), but in terms of vindicating my good name, the system has clearly failed me.

Monetary compensation does not change that fact. Indeed, it recognises it. The message of a system where an award of damages is the only remedy is, “Your good name has been unjustly injured, and a Court decision saying so does not restore it. The injury is permanent, so here is money to compensate you for what you have lost.”

SPEEDY REBUTTAL

I submit that what a citizen whose “good name” is injured by a newspaper article or report needs is not a long-deferred Court hearing that may produce monetary compensation, but will do so only because his “good name” has suffered irreparable damage. He needs an opportunity for speedy rebuttal of untrue injurious statements about him. A citizen whose good name is unjustly injured and who cannot rebut the falsehood promptly must suffer greater injury than one who has that opportunity and avails of it.

SUMMARY OF CURRENT SITUATION

Under our current system the only redress a citizen has if his reputation has been injured by a newspaper publication, and the editor declines his request for a correction, is recourse to the Courts. As noted above, the costs of a High Court action are prohibitive for most of us. This remedy is effectively available only to two classes of citizen: the extremely rich, and those with no assets to

lose, for whom lawyers might be willing to take a High Court libel action on a “no foal, no fee” basis, and who have no great reason to fear an order for costs against them. (Such an action has an additional drawback, which legislation should perhaps address: the financial hardship to a defendant who successfully defends a “no foal, no fee” claim taken by an indigent plaintiff, and has no prospect of recovering any of the huge expenses incurred, but that is outside the scope of this submission.) A Circuit Court action will cost considerably less, but the fear of an order for costs against us if we lose must deter most of us. Moreover, the size of the award will be limited to an amount that may not offer adequate compensation for the injury, and, since Circuit Court actions are seldom widely reported, a favourable verdict will do even less than one in the High Court to mitigate the injury inflicted by the false report.

At present, therefore, there is a strong argument that our law does not meet the Constitutional obligations of the State as set out in the Articles quoted above.

PROPOSAL

So, what I propose is as follows. Someone complains to a newspaper that he has been defamed by an article or report it has published. The newspaper’s editor may offer the complainant reasonable space in the newspaper to respond to that article or report and rebut what it says about him. Such an offer is not necessarily an admission that the complaint is justified. If the complainant accepts that offer and the newspaper publishes his rebuttal, the complaint has been satisfied so far as is reasonably practical, and he has no cause of action against the newspaper.

If the complainant rejects the offer, he may sue the newspaper, but it will be a good defence to his action for the newspaper to show that:

- the matter complained of was published without malice or recklessness on the part of the newspaper and its editor, and
- the newspaper offered the plaintiff an opportunity for him to rebut the article he complains of, and
- the offer was reasonable. For example, that the rebuttal would be published speedily, would appear no less prominently than the original article, in type at least as big, and on a day when expected readership would not be less than on the date of the original publication.

This defence should be supplementary to existing defences, not in substitution for them. It should still be open to a newspaper to refuse to publish a rebutting article and defend any claim for damages

for libel on any of the grounds currently available under the 2009 Act, e.g., the defence of justification.

I do not contend that a rebuttal will wholly undo the damage. For example, some people who have read the original article may not see the rebuttal. Unfortunately, complete vindication of an unjustly injured “good name” is not possible. I claim for my proposal only that it represents an improvement on the current system.

SOME CONSEQUENTIAL PROVISIONS

Some complainants may not have the ability to produce for publication a rebutting story that readers of the newspaper will read, not ignore. In order for the offer of “right of reply” to give them a constructive remedy, some – not all – complainants may need help. Although this may seem paradoxical, it will be in the newspaper’s interest to ensure such help is available. The newspaper’s interest is in being able to defend any legal action by showing it afforded the plaintiff a reasonable right of reply. If a newspaper were to offer space for a rebuttal that the complainant is clearly unable to compose, and lacks the resources to seek help, it is unlikely that either a judge or a jury would regard that offer as reasonable. So, a newspaper that hopes to rely on the defence of “reasonable right of reply” will have an incentive to ensure that a complainant who needs help in preparing a rebutting article, gets it. (Accordingly, it may not be necessary to legislate for such a provision.) Individual newspaper editors may decide how to provide help, if needed. Three possible ways occur to me:

1. The newspaper’s offer of “right of reply” might include an offer to make available a suitably qualified member of its staff, to help the complainant to write a readable reply.
2. Newspapers might reciprocally offer members of their own staff to assist complainants against their colleagues, so that if I complained, say, about an article about me in the Irish Times, a journalist in the Irish Examiner or the Irish Independent might help me compose my reply.
3. The Office of the Press Council might provide the service. This would probably necessitate an increase in its staff, costing more money, which the members would have to provide. In the context of a changed regime in which newspapers would be less vulnerable to libel actions than they are now, they might accept this, or even welcome it.

Such a service should be available to all, though a well-off complainant might prefer to rely on his own advisers. Clearly, an indigent complainant should not have to pay for services he could not

afford. The service would be of help in framing the complainant's rebuttal as a readable text, not giving legal advice, that is, a journalistic service, not a legal one. Each party would be free to take legal advice, but not at the other's expense.

POSITION OF AUTHORS?

The foregoing would give newspapers a measure of protection against libel actions. Should similar protection be extended to the authors of articles? Or should a complainant whose complaint against the newspaper has been met with a reasonable offer of "right of reply" be entitled to sue the author of the article? It is unlikely in the real world that an author could have written a defamatory article through malice or recklessness and an editor would publish it without either. However, it seems right that as part of a policy intended to encourage freedom of expression by the "media" the author of an article should not be liable to be sued for defamation if the newspaper in which the material appeared has offered the complainant a reasonable opportunity to reply. The author's action may have been wrongful, but if we accept the concept that offering a right of reply is an adequate response to a complaint of defamation, the offer must extinguish any claim. However, I propose that malicious or reckless defamation should attract criminal sanctions. (See below.)

ONUS OF PROOF WHERE MALICE OR RECKLESSNESS ARE IN ISSUE?

A statement by an editor or author that he believed the material complained of was true and that he made reasonable efforts to establish its truth, or trusted another (identified) responsible person to do so, should be *prima facie* evidence that the publication took place without malice or recklessness, putting the onus of proof of the existence of malice or recklessness on the plaintiff. In practice it would probably be rare for a prospective plaintiff to be able to produce persuasive rebutting evidence. It would be the role of a trial judge to rule on whether the plaintiff could be said to have met that onus, and that of the jury to decide whether he had. If the trial judge ruled that the plaintiff had not produced any credible evidence to challenge the newspaper's denial of malice or recklessness, the claim should fail, but if the judge did not so rule it would be the role of the jury to decide whether malice or recklessness had been proved, with the onus on the plaintiff.

OFFENCE OF CRIMINAL LIBEL?

In principle, the abolition of the offence of criminal libel seems strange. Someone who maliciously or recklessly kills or injures me, or damages or takes my property, may to be prosecuted and

punished. An exception in favour of someone who does none of those things but maliciously or recklessly injures my “good name” seems irrational. In each case there is moral responsibility and the infliction of injury. Moreover, if newspapers and their editors are to be relieved from the current threat of libel writs, it may be necessary, and would certainly seem prudent, to offer the public some protection against irresponsible authors and/or newspaper editors tempted to take the position attributed to the late Patrick Kavanagh: “Is that true, Paddy?” “I don’t know, but I’m spreadin’ it.”

On balance, therefore, I propose restoring the offence of criminal libel to the Statute Book. Of course, it would be prosecutable only by the DPP: private prosecutions would not be permitted. Nor would the DPP be obliged to consider a complaint about a newspaper publication by someone who had not complained to the newspaper or who had complained and had been offered a “right of reply”.

It might seem rational that if a complaint was dealt with by way of “right of reply”, on the footing that the article had been published with malice or recklessness, and the author or editor was subsequently prosecuted and convicted of malice or recklessness, the complainant should be entitled to re-open his civil complaint. However, the practical difficulties probably exclude such a provision.

ROLES OF JUDGE AND JURY (a) GENERALLY

Under the new rules I propose, if a newspaper offers “right of reply”, the complainant does not accept it and sues for damages for libel, three questions may arise. The first will be: was the “right of reply” offer reasonable? If the answer to that question is “yes” that will end the litigation in favour of the defendants, but if it is “no”, the second will be “is the material complained of defamatory?” Again, if the answer to that question is “no”, that will end the litigation in favour of the defendants, but if it is yes, the final question will be “what recompense should the plaintiff receive?” The arguments that have led to the conclusion that the second and third question should be answered by a jury of citizens, not by a judge, seem to apply with equal force to the first. Accordingly, I propose that the question of the reasonableness of the offer of “right of reply” should be answered by a jury in a libel action. It should be asked and answered at the beginning of the hearing, as its answer may determine the outcome without need for further evidence. (Since the question is one of reasonableness, neither party should be allowed to introduce expert evidence on that issue.)

ROLES OF JUDGE AND JURY (b) IN RELATION TO DAMAGES

A number of people, not only people involved with the Press, have expressed concern about the level of damages awarded by juries, and in some cases appeals have been lodged in which judges have been invited to set aside jury awards. That seems wrong in principle: the arguments that say juries should decide whether a plaintiff has been libelled and if so how he should be compensated must also direct that a judge or judges should not accept jurisdiction to act as a sort of “super-jury”. (I do not set out these arguments in detail, partly because I am not altogether convinced by them.)

However, those arguments do not inhibit legislation to control the level of awards in libel actions. Article 15 of the Constitution empowers the Oireachtas to legislate in this area, as in all others. And the argument that citizens, not judges, should decide on the compensation to be paid to a fellow-citizen who has been defamed is not set aside by legislation passed by the Oireachtas, since it is representative of all citizens.

Such legislation would need to be carefully framed, as I think I can best explain by analogy. Concern has been expressed in recent times about what have been described as excessive levels of compensation in Ireland in personal injuries claims. To a motorist who says that his motor insurance has become too expensive because compensation levels are too high, I would reply that the role of the Courts is to administer justice (Article 34.) If justice dictates that someone who has suffered personal injury should be compensated at a given level, then “*fiat iustitia ruat coelum*” – justice must be done. The motorists’ complaint may be legitimate, but an injured pedestrian’s right to be justly compensated over-rides it. Accordingly, while the Oireachtas may legislate to control a perceived tendency of jurors in libel actions to award excessive damages, such legislation would need to be carefully drafted to avoid challenge on the ground that it interfered with the judicial function of administering justice. I do not offer guidance on how this could be achieved, as I do not claim the expertise to solve a problem I have identified.

AN OBJECTION AND A REPLY

Might the process of publishing rebutting articles become an unending cycle? One person, A, writes an article that, say, the Irish Examiner publishes. Another, B, complains and the editor offers him a “right of reply”. A third, C, complains that B’s rebuttal of A’s article defames him, and claims a right of reply, but when his reply is published, a fourth, D, complains about it, and so on.

Some newspapers might consider this a boon – a stream of controversial articles that might attract readers keen to see how K had replied to J’s denunciation, but many would not. They can rely

on the concept that they are relieved from liability in a defamation suit if they have afforded the complainant a reasonable right of reply. If a complainant takes an action complaining, first, that he was defamed, and, secondly, that he was not afforded a reasonable opportunity to reply, the newspaper can defend by challenging either or both claims. Whether it can justify the original publication will depend on the facts in each case. But on the second issue –the “right of reply” - a newspaper should be in a position to say, “we offered the plaintiff space to reply, he insisted on publishing a reply that in our opinion would have libelled a third party. So, we proposed what we considered were reasonable changes in his text to protect ourselves from a claim by that third party, he refused, and we declined to publish his defamatory text. We claim we acted reasonably.”

In many cases, such a defence should be entitled to succeed, depending on the facts. Indeed, any negotiation between complainant and newspaper under this system would take place in the shadow of the law: if the newspaper’s offer is held not to have been reasonable, it may have to pay heavily in damages and costs, but if a complainant rejects it and sues unsuccessfully, he will face heavy bills.

CONSEQUENCES OF PROPOSED CHANGE IN LAW

I think the change in the law that I suggest should have the following desirable consequences:

- It would substitute for the present system of litigation and possible awards of damages, with its inevitable delay and inadequate attempt to restore reputation, one by which citizens would have an immediate opportunity to defend their reputations against unjust attack, correct mis-statements, and genuinely vindicate their good names.
- Unlike the litigation remedy, which is effectively closed to many citizens, perhaps even most, it would be available to all.
- It would respect and protect the constitutional freedom of citizens to express freely their opinions and convictions.
- It would go some way towards protecting print media from the threat of financially crippling litigation, thus supporting the media in informing the People, facilitating public debate and promoting a healthy democracy.
- It would not deprive a citizen of access to the Courts if no other means of vindicating his good name against unjust attack existed.

APPLICATION OF THIS PROPOSAL TO OTHER MEDIA

I do not have the expertise to describe how the reform suggested above would apply where a citizen complains of unjust damage to his good name in a radio or television programme. Most complaining citizens would probably need more detailed help and perhaps even coaching in preparing for a radio or television appearance than in writing a rebuttal. It might be best, if citizen complains that a radio or television programme has unjustly injured his “good name”, that a professional, not the complaining citizen, should present his rebuttal. But the change I propose would carry benefits for broadcasters, as it would for print media. Self-interest combined with professional expertise should help them to propose how the concept of “right of reply” should best be applied to broadcasting media. Their expert views on machinery are likely to be much more valuable than my amateur speculation.

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