

**Submission by RTÉ on the Review of the Defamation Act 2009 by the Tánaiste and the
Minister for Justice and Equality.**

RTÉ welcomes the opportunity to make a submission for the purposes of the Department of Justice and Equality's November 2016 statutory review of the Defamation Act 2009.

WHAT SORT OF CHANGE HAS THE DEFAMATION ACT 2009 BROUGHT ABOUT?

Probably the most important part of the Defamation Act 2009 is contained in the one sentence that is section 3(2) and which is as follows:

"This Act shall not affect the operation of the general law in relation to defamation except to the extent it provides otherwise (either expressly or by necessary implication)."

Therefore, any part of the law of defamation that is not expressly or necessarily amended by this Act of the Oireachtas remains. Defamation law is largely Irish common law (non-statute law) which in turn is based on English common law. The Defamation Act 2009 introduced, in the main, discreet reforms to this body of law. This submission focuses on those reforms in light of RTÉ's experiences since the coming into force of the Defamation Act 2009 and with due regard to the right to a good name on the one hand and freedom of expression rights on the other.

OFFER TO MAKE AMENDS – SECTIONS 22 AND 23

The introduction of the Offer to Make Amends procedure at Section 22 of the 2009 Act was believed to represent one of the most important reforms of defamation law when it was enacted. Section 22 of the 2009 Act (which replaced the ineffectual defence of unintentional defamation in section 21 of the Defamation Act 1961) provides that any person who has published an allegedly defamatory statement may make an offer to make amends before the delivery of the defence. The content of an offer to make amends under the section involves three elements, namely (i) the defendant must offer to make a suitable correction

and a sufficient apology; (ii) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances and (iii) to pay such sum in compensation or damages and such costs as may be agreed by the parties or determined to be payable (Section 22(5)). Section 23(1)(c) of the 2009 Act provides that if the parties do not reach an agreement as to the level of damages or costs that should be paid by the defendant “*those matters shall be determined by the High Court...*”. We attach Section 22 and 23 as Appendix A to this paper.

Section 23(1)(c) has been considered in the recent Court of Appeal judgment of *Padraig Higgins v The Irish Aviation Authority*¹ and it was held that a plaintiff’s right to a jury for the purposes of assessing damages in cases coming within section 23(1)(c) remains unaffected by the changes effected by the 2009 Act.

The 2009 Act was closely modelled on the United Kingdom Defamation Act 1996, Sections 2 and 3 of which provide for an offer to make amends procedure. Section 3(10) of that legislation, which is attached as Appendix B to this paper, expressly provides that “*proceedings under [the] section shall be heard and determined without a jury*”. It is RTE’s submission that section 23(1)(c) should be amended so that it explicitly provides for the assessment of damages by a judge sitting alone.

It has been said by the English Court of Appeal that the main purpose of the offer of amends procedure is “*to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial.*”² It is well established in England that trial by Judge alone has resulted in much greater certainty in relation to the quantification of damages. It enables the parties to predict the likely damages with greater confidence and means that many cases are settled once the offer of amends is accepted, without the need to proceed to a hearing before a Judge.

¹ *Padraig Higgins v The Irish Aviation Authority* [2016] IECA 322

² *Milne v Express Newspapers* (2005) 1 WLR 772 [14]

Overall, prior to the Court of Appeal judgment in *Higgins*, RTÉ had largely a positive experience with the Offer to Make Amends procedure in achieving swift settlements in cases without the necessity of and inevitable higher cost associated with a full scale trial. However, the clarification that a plaintiff retains the right to opt for a jury assessment following an offer to make amends has the consequence of rendering the Offer of Amends procedure extremely unattractive as to avail of it leaves a defendant open to all of the costs of a full trial. If Section 23(1)(c) is not amended, RTÉ submits that the Offer to Make Amends procedure, as drafted, largely neutralizes what was heralded as a reforming provision of the Defamation Act 2009.

Offer of Amends and Lodgements

A very practical issue for a defendant seeking to utilise the Offer of Amends procedure has become more evident following the *Higgins* decision. This issue arises in circumstances where an offer of amends has been made and accepted, but the parties do not reach agreement as to the level of damages that should be paid. As outlined above, it has been clarified by the Court of Appeal that the plaintiff in this scenario retains the right to a jury trial for the purposes of assessing damages. This essentially nullifies the very rationale behind the defendant making the Offer of Amends in the first instance, that is, the achievement of a relatively speedy and relatively inexpensive disposal of a defamation action, where the defendant was prepared to acknowledge that it had published defamatory allegations which were essentially inaccurate. Moreover, it appears from the 2009 Act that a defendant who has availed of the Offer of Amends procedure which has been accepted by the plaintiff loses the ability to make a lodgement under Section 29 of the 2009 Act, which is attached as Appendix C to this paper, as the legislation explicitly provides that a lodgement is made at the time of the filing of a defence, and no defence can be filed if an Offer of Amends is accepted by a plaintiff.³ It is RTÉ's submission that section 29 should be amended so that it explicitly provides that a lodgement can be made by a defendant if an Offer of Amends is accepted and the parties do not reach agreement as to the level of damages that should be paid by the defendant.

³ Section 22(3) of the Defamation Act 2009

HONEST OPINION – SECTION 20

The expression of opinion containing defamatory statements or innuendos has been protected by the common law defence known as “*fair comment*”. This was a misleading name for this defence in that in strictly legal terms it protected defamatory opinion that was not necessarily “*fair*”. Section 20 of the 2009 Act, which is attached as Appendix D to this paper, has at least removed the misleading name of this defence. However Section 20 does not protect all honestly held opinions but only those opinions satisfying the criteria set out in the legislation. The statutory re-casting of this defence provides for the following conditions:

- 1) The opinion must have been honestly held.
- 2) An opinion is honestly held for the purposes of the defence if at the time of the publication of the statement containing the opinion the defendant believed in the truth of the opinion or where the defendant is not the author of the opinion, the defendant believed that the author believed it to be true.
- 3) The opinion must be based on allegations of fact specified in the statement containing the opinion or referred to in that statement that were known or might reasonably be expected to have been known by the persons to whom the statement was published (or the opinion was based on allegations of fact to which the defences of privilege apply).
- 4) The opinion must relate to a matter of public interest.

The above provides an outline of this defence. In many ways it mirrors what it replaces, fair comment. In those terms it is a defence which promises more than it delivers if you are a publisher, journalist or programme-maker seeking to rely on it. Its predecessor did not have a good track record as a useful defence for publishers in the Irish Courts.

The statutory formulation of this defence defines it in terms that make its successful deployment challenging. First, in comparison to fair comment, the burden has shifted and the person relying on it must prove that the opinion was honestly held. In the context of broadcasting, this requires the broadcaster/programme-maker to demonstrate their belief in a programme contributor's own opinion, including where such an opinion is broadcast during a live radio or television programme. This is a new requirement. Formerly it was for the person bringing a claim to prove that the published opinion was not honestly held. Whilst this presents its own issues where the defendant is the publisher (e.g. RTE and the opinion complained of is one of an employee or presenter), *"it must begin to look like an impossible struggle to prove one's belief in the belief of someone else"*, as the author of a text on Irish defamation law has noted.⁴ The shift in the burden of proof coupled with the requirement to prove belief in another's state of mind has severe repercussions for the state of the defence generally. In the context of a live radio or television programme, the imposition of this requirement renders the defence of honest opinion particularly problematic.

Another factor which makes Section 20 less favourable to publishers than its common law predecessor is the requirement that an opinion must be based on allegations of fact (1) *specified* in the statement containing the opinion or (2) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published.⁵ The statutory requirement that the facts be *specified* requires more of publishers compared to the common law defence of fair comment, which had to be based on accessible relevant facts which had to be proved at trial. McMahon and Binchy state in no uncertain terms that *"if the allegations of fact are not specified in the statement...[and] no such reference is made, then, even if the persons to whom the statement is made are fully aware of the facts or alleged facts.... the opinion is not protected by s.20"*.⁶

⁴ Maher, J, 'The Law of Defamation', (2011, Thomson Reuters) at 6-65

⁵ Section 20(2) of the Defamation Act 2009

⁶ McMahon and Binchy, "Law of Torts", 4th Ed. (Bloomsbury, 2013) at 34.287

Moreover, the statutory formulation of the defence for an opinion not specifying the facts on which it is based only applies where facts referred to are known or are reasonably expected to be known by the people to whom the opinion was published. For opinions expressed on national radio or television this is a considerable limitation on the range of opinion that could benefit from the defence of Honest Opinion. This is a significant departure from the previous common law defence which only required that the facts were in some sense publicly available. There was no requirement at common law that all of those to whom the alleged defamatory opinion was published would be aware of the issues. Much commentary and opinion in public discourse depends on those with more familiarity with issues providing information and commentary for those who are not but are interested in receiving such information. The encapsulation of the protection of opinion set out in section 20(2)(6)(i) of the Defamation Act 2009 runs counter to that notion.

Finally, the final requirement in Section 20 provides that the opinion must relate to a matter of public interest. It is noteworthy that Section 3 of the UK Defamation Act 2013, which replaced the common law defence of 'fair comment' with a new defence of 'honest opinion', no longer includes a requirement for the opinion to be on a matter of public interest. The Joint Committee on the then draft Defamation Bill in the British Parliament supported the removal of the requirement stating that *"The law's protection of the right to personal privacy (which is another aspect of Article 8 of the ECHR) and confidentiality are now well established and can be used to prevent people from expressing opinions on matters that ought not to enter the public domain. In this respect, the public interest test no longer serves a useful purpose"* and went on to say that *"[W]e note that it may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not."*⁷.

The justification for allowing honest opinion only on matters of "public interest" is unclear and it is arguable that its inclusion in Section 20 fails to strike the balance between private reputations and the major countervailing factor – freedom of expression.

⁷ The Joint Committee on the Draft Defamation Bill. Available at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf> at 69.

We attach for your consideration at Appendix E a detailed note from March 2014 prepared by the RTÉ's Solicitor's Office entitled *Opinion and Defamation Law* which provides a more detailed analysis of the difficulties that arise with Section 20 and which was provided by RTÉ to the Joint Committee on Transport and Communication on the 26th March 2014.

FAIR AND REASONABLE PUBLICATION ON A MATTER OF PUBLIC INTEREST

Section 26 of the Defamation Act 2009 established a new statutory defence of fair and reasonable publication on a matter of public interest. The Explanatory Memorandum to the Defamation Act 2009, published by the Department of Justice and attached to this paper as Appendix F, held Section 26 out as introducing a "*significant new defamation defence into Irish law*" and said it was "*essentially designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place.*" RTÉ submits that this aspiration has not been realised and that Section 26 is so hedged and rigid that it is a statutory dead letter. Simply put, RTÉ submits that the defence does not protect a defendant from liability for the publication of a potentially defamatory statement where the defendant's conduct in publishing the impugned piece was fair and reasonable and related to a matter of public interest.

Section 26 of the Defamation Act 2009, which is attached to this paper as Appendix G, provides that it shall be a defence to a defamation action for a defendant to prove that the statement was published (a) in good faith; and (b) in the course of, or for the purpose of discussion of a subject of public interest, the discussion of which was for the public benefit; and (c) that in all of the circumstances of the case, the manner and extent of the publication of the statement did not exceed that which was reasonably sufficient; and (d) it was fair and reasonable to publish the statement. In addition to fulfilling the above criteria, in determining whether it was fair and reasonable to publish the statement, the court (or in the High Court, the jury) must have regard to any or all of a non-exhaustive range of matters which it considers relevant, including those listed at 26(2)(a)-(h).

The defence housed in Section 26 is broadly analogous to the development in English law of the so-called *Reynolds*⁸ privilege, in which the English Courts extended the traditional protection of qualified privilege to publications which were in the public interest, and which had been published in accordance with the requirements of “*responsible journalism*”. This decision recognised that, in a democratic society, it is vital to accept that notwithstanding best endeavours, false statements of fact (or at least statements that cannot be proven to be true) may sometimes be published during the course of public debate. The defence provides that where the subject matter of the publication is a matter of public interest, and the publisher has acted responsibly in preparing the publication, no liability in defamation will ensue.

The balance struck by the English courts through their development of the *Reynolds* privilege has been approved by the European Courts as an appropriate means of reconciling the demands of freedom of expression and the protection of individual reputation rights.⁹ These decisions illustrate the latitude which must be afforded to media organisations under Article 10 in relation to their coverage of issues of public importance and the fact that the publication of false or defamatory statements may be permissible provided that good journalistic practices have been adhered to and provided the subject matter is of sufficient public importance.

However, Section 26 does not accord with these principles. The onerous check list contained in Section 26(2) in practical terms represents an obstacle course for defendants in defamation actions and RTÉ submits that Section 26 as currently drafted does not protect freedom of expression interests. It is noteworthy that a defendant to a defamation action in Ireland has yet to successfully avail of the defence of fair and reasonable publication on a matter of public interest as provided for by section 26.

⁸ *Reynolds v Times Newspapers Ltd* [1999] 4 All E.R. 609

⁹ *Times Newspapers (No. 1) v U.K.* (Application no. 23676/03 and 3002/03), *Osterreichischer Rundfunk v Austria*, (Application no. 35841/02, December 7, 2006), *Tonsbergs Blad v Norway* (Application no. 510/04, March 1, 2007), *Verlagsgruppe News GmbH v Austria* (Application no. 76918/01, 23 November 2006), *Pedersen v Denmark* (Application no. 49017/99, December 17 2004).

It is RTÉ's submission that the section does not provide an adequate level of protection for freedom of expression on matters of public interest. The importance of a meaningful and working defence facilitating free speech on such matters of public interest was emphasised by Judge Clarke in *Cogley & Aherne v RTÉ*, holding that *"it is important to note that both the constitution itself and the law generally recognises the need for a vigorous and informed public debate on issues of importance...Any measures which would impose an excessive or unreasonable interference with the conditions necessary for such debate would require very substantial justification."*¹⁰ For a public service media organisation such as RTÉ, the absence of a working defence of this type in defamation cases means that important and serious journalism on matters of public interest remains exposed to legal claims.

It is notable that Section 4 of the Defamation Act 2013, a copy of which is attached to this paper at [Appendix H](#), explicitly abolishes the *Reynolds* defence¹¹ as it applies in England and Wales and replaces it with a new defence of *"publication on matter of public interest"*. The defence is available where the defendant is able to prove that the *'statement complained of was, or formed part of, a statement on a matter of public interest'* and that *'the defendant reasonably believed that publishing the statement was in the public interest'*.¹² It is available *'irrespective of whether the statement complained of is a statement of fact or a statement of opinion'*.¹³

Unlike *Reynolds*, the English Defamation Act 2013 provides no list of standards to help decide whether the publisher has acted with sufficient responsibility to warrant protection. Instead, the defendant now has to show that *"the statement complained of was, or formed part of, a statement on a matter of public interest"* and that the defendant *"reasonably believed that publishing the statement complained of was in the public interest"*.

¹⁰ *Cogley & Aherne v Radio Teilifís Éireann* [2005] IEHC 180

¹¹ Section 4(6) of the Defamation Act 2013

¹² ss 4(1)(a) & (b), *ibid.*

¹³ ss 4(5), *ibid.*

It is noteworthy that an earlier draft of the UK Defamation Bill presented a proposed codification of the *Reynolds* defence for responsible publication on a matter of public interest, however the House of Lords and Commons Joint Committee on Human Rights reported and recommended that the Government “*abandon the statutory checklist of factors in favour of clear, unambiguous defence of public interest*”. The Committee noted that there had been a history of the *Reynolds* factors having been misconstrued (albeit in a common law rather than statutory context), and that the law on responsible journalism should be recast in such a way as to leave no room for doubt.¹⁴

It is significant also that the House of Lords and House of Commons Joint Committee on Human Rights took the view that Section 4 was ECHR-compliant on the basis that courts would still look at the *Reynolds* criteria and case law when assessing whether a journalist held a reasonable belief but without following the criteria rigidly.

Section 4 is a far more flexible provision than the defence available under Section 26 of the 2009 Act in that it allows the courts to interpret the defence by reference to existing case-law without putting on a statutory footing the narrow checklist of relevant factors expounded in the *Reynolds* case. Considering Section 26, Cox & McCullough have commented that “[T]o a large extent, the considerations listed in s 26(2) replicate the *Reynolds* 10 principles” with “subtle differences” and “it may be suggested that these differences will tend to mean that it will be more difficult for a defendant to avail of the s 26 defence than the *Reynolds* defence.”¹⁵

The case law which has developed in England and from the European Court of Human Rights in Strasbourg has properly focussed on “*responsible journalism*”. This reflects a sensible and appropriate policy, that those reporting about matters of public interest should not be exposed to legal action if they act responsibly, verifying potentially defamatory material. However the course of public debate on matters of public interest or media exploration of genuine matters of public interest not infrequently gives rise to the issue of the publication

¹⁴ House of Lords and Commons Joint Committee on Human Rights, Legislative Scrutiny of the Defamation Bill. Available at <http://www.publications.parliament.uk/pa/it201213/itselect/jtrights/84/84.pdf> at 14-15

¹⁵ Cox and McCullough, “Defamation Law and Practice”, (Clarus Press, 2014) at 9.104

of material that affects the good name of identifiable individuals. Verification of potentially defamatory allegations is not always possible even with the best will in the world. The protection of free speech rights exceptionally requires a properly functioning defence on matters of public interest where a publisher or journalist cannot avail of the normal defences available in defamation proceedings.

RTÉ submits that in circumstances where the *Reynolds* defence has been abolished in the very jurisdiction in which it originated, consideration should be given to redrafting a new and workable defence of publication on a matter of public interest. Section 26 imposes obligations on defendants which are, in practice, impossible to meet and it follows that important and serious journalism on matters of public interest cannot be afforded protection notwithstanding that being its stated objective.

It should be noted that the law on both breach of privacy and breach of confidence accommodates a non-rigid defence based on publication in the public interest. Defamation law on the other hand has a statutory prescriptive test which in practical terms does not facilitate responsible journalism in the public interest.

PRIVILEGE

ABSOLUTE PRIVILEGE

Absolute privilege allows statements to be made without fear of legal action being taken, even if those statements should be defamatory. The rationale behind this protection is that publication occurs in a context which is regarded as so significant, from a public policy perspective, that there should be no fetter or chill on the speech. The concession this defence makes is to the *occasion of publication* rather than to the *publisher*.

Section 17 of the Defamation Act 2009, which is attached as Appendix I to this paper, provides that in addition to the old common law categories of publication attracting

privilege being retained¹⁶, there is a further list of 23 specific forms of publication which will benefit from the defence¹⁷. These sections relate to publications which are broadly connected to the administration of government at either a national or a European level.

It is notable that in England, Section 7 of the Defamation Act 2013 has extended the protection of absolute privilege contained in Section 14 of the Defamation Act 1996 to fair and accurate reports of court proceedings in respect of “*any court established under the law of a country or territory outside the United Kingdom*”¹⁸ and “*any international court or tribunal established by the Security Council of the United Nations or by an international agreement*”.

RTÉ submits that consideration be given to similarly extending of the scope of the defence of absolute privilege under Section 17(2) of the Defamation Act 2009. As drafted, it does not afford absolute privilege to courts established under the law of a country or territory outside the Republic of Ireland or Northern Ireland and it is suggested that absolute privilege should be extended to reports of such legal proceedings.

QUALIFIED PRIVILEGE

Section 18 of the Defamation Act 2009, a copy of which is attached as Appendix J, replaces and updates section 24 of the Defamation Act 1961 and its associated Schedule and provides a statutory definition of qualified privilege. The effect of Section 18 is twofold. Firstly, it encapsulates the existing common law defence of qualified privilege in statutory form. It retains the traditional requirements that the publisher have a duty or interest (legal, moral or social) to impart the information reasonably to recipients who had (or now whom the publisher reasonably believed had) a reciprocal duty or interest in receiving it and with its qualification that such privilege could be lost if the publisher was actuated by malice. Secondly, the 2009 Act does what had been done in the 1961 Act and in its second schedule. This is the creation of two categories of material, the first of which is privileged without

¹⁶ 17(1) of the Defamation Act 2009

¹⁷ 17(2), *ibid.*

¹⁸ Section 14(3)(b) of the Defamation Act 2013

explanation or contradiction and the second which is privileged subject to explanation or contradiction.

RTÉ believes that consideration should be given to reviewing the categories of documents contained in the first schedule of the 2009 Act with a view to expanding the circumstances in which the defence of qualified privilege is available. In this regard, RTÉ suggests that consideration be given to similarly extending the scope of qualified privilege, to the circumstances to which it is afforded under the UK Defamation Act 2013 in so far as such circumstances are not protected under the Defamation Act 2009 in Ireland. For ease we attach to this paper a table highlighting the amendments made by the 2013 Act to the UK 1996 Act on Absolute and Qualified Privilege as Appendix K. We would draw attention to the extension of qualified privilege in England to fair and accurate reporting of “*proceedings at a press conference held anywhere in the world of a matter of public interest*”, “*proceedings at a public meeting held anywhere in the world*”, and a finding or decision of associations “*formed anywhere in the world*”. Under Schedule 1 of the Irish Defamation Act 2009, similar reports benefit from the defence of qualified privilege but only where made in Ireland or a member state of the European Union. It is submitted that this form of qualified privilege should be extended beyond the European Union and apply worldwide.

DIRECTIONS TO JURIES IN RELATION TO THE MATTER OF DAMAGES

In defamation actions tried before a jury, the jury determines whether the defendant has published defamatory matter about the claimant and, if so, whether any defence raised by the defendant has been established. The jury also determines the amount of compensatory damages and aggravated damages (if any) to be awarded to the claimant.

RTÉ considers that the desirability of trial by jury is largely a question of public policy but submits that Section 31 of the Defamation Act 2009 should be considered from a practical perspective in terms of the manner in which it operates. Section 31(2) provides that in a defamation action brought in the High Court, “*the judge shall give directions to the jury in relation to the matter of damages*”. Section 31(4) goes on to provide a list of eleven criteria

which the judge must consider, as well as having regard to “*all the circumstances of the case*”¹⁹. We attach a copy of Section 31 as an Appendix L.

Judges, when charging juries in a defamation case, deal initially with issues of liability, the legal landscape in which the case has been brought and the case promulgated by the respective plaintiff and defendant. The judge then moves on to consider the issue of the amount of compensation and in doing so considers the list of eleven criteria at 31(4). Chronologically the issue of money is the last thing the jury hears before it retires and RTÉ submits that it is an uphill battle for a defendant to persuade the jury that it should not be liable in the first instance in circumstances where the judge’s final words are on the subject of money.

RTÉ thus favours a change to the operation, in practice, of Section 31 of the 2009 Act in defamation actions tried before a jury to effectively split counsel’s closing submissions and the judge’s charge to the jury into two stages. RTÉ suggests that counsel for the respective plaintiff and defendant could make their closing arguments on liability only and the judge could charge on liability only. If the jury was of the view that the material complained of was defamatory, it could then separately be addressed on the amount of compensation by the judge and counsel for the plaintiff and defendant.

GENERAL

RTÉ hopes that this submission is of benefit to the Department of Justice and Equality in its review of the Defamation Act 2009. However given the relatively tight timeframe laid down for making submissions, RTÉ would ask the Department to consider further consultation on specific issues once consideration has been given to the various submissions received at the end of this consultation. RTÉ notes in particular the referral by the Attorney General Máire Whelan to the Law Reform Commission pursuant to section 4(2)(c) of the Law Reform Commission Act 1975 to examine and research matters relating to defamation law and court

¹⁹ Section 31(3) of the Defamation Act 2009

reporting earlier this year and believes it would be useful if the Department of Justice and Equality conducted a further consultation when the Law Reform Commission issues their report.

December 2016

Defamation Act 2009

Offer to
make
amends.

22.— (1) A person who has published a statement that is alleged to be defamatory of another person may make an offer to make amends.

(2) An offer to make amends shall—

(a) be in writing,

(b) state that it is an offer to make amends for the purposes of this section, and

(c) state whether the offer is in respect of the entire of the statement or an offer (in this Act referred to as a “qualified offer”) in respect of—

(i) part only of the statement, or

(ii) a particular defamatory meaning only.

(3) An offer to make amends shall not be made after the delivery of the defence in the defamation action concerned.

(4) An offer to make amends may be withdrawn before it is accepted and where such an offer is withdrawn a new offer to make amends may be made.

(5) In this section “an offer to make amends” means an offer—

(a) to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer,

(b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances, and

(c) to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by them or as may be determined to be payable,

whether or not it is accompanied by any other offer to perform an act other than an act referred to in *paragraph (a), (b) or (c)*.

Defamation Act 2009

Effect of
offer to
make
amends.

23.— (1) If an offer to make amends under section 22 is accepted the following provisions shall apply:

- (a) if the parties agree as to the measures that should be taken by the person who made the offer to ensure compliance by him or her with the terms of the offer, the High Court or, where a defamation action has already been brought, the court in which it was brought may, upon the application of the person to whom the offer was made, direct the party who made the offer to take those measures;
- (b) if the parties do not so agree, the person who made the offer may, with the leave of the High Court or, where a defamation action has already been brought, the court in which it was brought, make a correction and apology by means of a statement before the court in such terms as may be approved by the court and give an undertaking as to the manner of their publication;
- (c) if the parties do not agree as to the damages or costs that should be paid by the person who made the offer, those matters shall be determined by the High Court or, where a defamation action has already been brought, the court in which it was brought, and the court shall for those purposes have all such powers as it would have if it were determining damages or costs in a defamation action, and in making a determination under this paragraph it shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer;
- (d) no defamation action shall be brought or, if already brought, proceeded with against another person in respect of the statement to which the offer to make amends applies unless the court considers that in all the circumstances of the case it is just and proper to so do.

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

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

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

(3) Where the defendant in a defamation action made a qualified offer only, *subsection (2)* shall apply in relation to that part only of the action that relates to the part of the statement or the meaning, as the case may be, to which the qualified offer relates.

(4) A person who makes an offer to make amends is not required to plead it as a defence in a defamation action.

(5) If a defendant in a defamation action pleads the defence under this section, he or she shall not be entitled to plead any other defence in the action, and if the defence is pleaded in respect of a qualified offer only he or she shall not be entitled to plead any other defence in respect of that part of the action that relates to the part of the statement or the meaning, as the case may be, to which the qualified offer relates.



Defamation Act 1996

1996 CHAPTER 31

Offer to make amends

3 Accepting an offer to make amends

- (1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.
- (2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.
- (3) If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.
- (4) If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular—
 - (a) make the correction and apology by a statement in open court in terms approved by the court, and
 - (b) give an undertaking to the court as to the manner of their publication.
- (5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.

The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.
- (6) If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings.
- (7) The acceptance of an offer by one person to make amends does not affect any cause of action against another person in respect of the same publication, subject as follows.

Status: This is the original version (as it was originally enacted).

(8) In England and Wales or Northern Ireland, for the purposes of the Civil Liability (Contribution) Act 1978—

- (a) the amount of compensation paid under the offer shall be treated as paid in bona fide settlement or compromise of the claim; and
- (b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 1 of that Act a greater amount than the amount of the compensation payable in pursuance of the offer.

(9) In Scotland—

- (a) subsection (2) of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies; and
- (b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 3(2) of that Act a greater amount than the amount of compensation payable in pursuance of the offer.

(10) Proceedings under this section shall be heard and determined without a jury.

Defamation Act 2009

Lodgment of
money in
settlement of
action.

29.— (1) In an action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of money into court in satisfaction of the action when filing his or her defence to the action.

(2) A payment to which this section applies shall be deemed to be a payment under such rule of court for the time being in force as provides for the payment into court of a sum of money in satisfaction of an action for damages for defamation.

(3) Where a payment to which this section applies is made, the plaintiff in the action concerned may accept the payment—

(a) in accordance with the rule referred to in *subsection (2)*, or

(b) inform the court in which the action was brought, on notice to the defendant, of his or her acceptance of the payment in full settlement of the action.

(4) The defendant shall not be required to admit liability in an action for damages for defamation when making a payment to which this section applies.

Defamation Act 2009

Honest
opinion.

20.— (1) It shall be a defence (to be known, and in this section referred to, as the “defence of honest opinion”) to a defamation action for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held.

(2) Subject to *subsection (3)*, an opinion is honestly held, for the purposes of this section, if—

(a) at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,

(b) (i) the opinion was based on allegations of fact—

(I) specified in the statement containing the opinion, or

(II) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,

or

(ii) the opinion was based on allegations of fact to which—

(I) the defence of absolute privilege, or

(II) the defence of qualified privilege,

would apply if a defamation action were brought in respect of such allegations,

and

(c) the opinion related to a matter of public interest.

(3) (a) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which *subsection (2) (b) (i)* applies, unless—

(i) the defendant proves the truth of those allegations, or

(ii) where the defendant does not prove the truth of all of those allegations, the opinion is honestly held having regard to the allegations of fact the truth of which are proved.

(b) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which *subsection (2) (b) (ii)* applies, unless—

(i) the defendant proves the truth of those allegations, or

(ii) where the defendant does not prove the truth of those allegations—

(I) the opinion could not reasonably be understood as implying that those allegations were true, and

(II) at the time of the publication of the opinion, the defendant did not know or could not reasonably have been expected to know that those allegations were untrue.

(4) Where a defamatory statement consisting of an opinion is published jointly by a person ("first-mentioned person ") and another person (" joint publisher "), the first-mentioned person shall not fail in pleading the defence of honest opinion in a subsequent defamation action brought in respect of that statement by reason only of that opinion not being honestly held by the joint publisher, unless the first-mentioned person was at the time of publication vicariously liable for the acts or omissions, from which the cause of action in respect of that statement accrued, of the joint publisher.

Opinion and Defamation Law

Bunreacht na hÉireann & The European Convention on Human Rights

The Irish Constitution in Article 40.6.1 guarantees the right of citizens to express freely their convictions and opinions. One of the unspecified personal rights of Article 40.3 is the right to communicate which includes the right to communicate convictions, opinions and feelings. Article 10 of the European Convention on Human Rights in providing for freedom of expression also provides for the right to hold opinions. Both of these documents limit the right of expression. In the case of Bunreacht na hÉireann, the State is obliged to 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 (Art. 40.3.2). The European Convention comes at this in a slightly different fashion; it limits the right to freedom of expression on the basis that the right also carries duties and responsibilities, one such responsibility being the protection of the reputation or rights of others (Art. 10.2)¹.

While we all may feel that we can freely express our opinions, the truth is that once those opinions contain defamatory allegations, that right is significantly circumscribed. The European Court of Human Rights has stated in relation to an opinion that there must exist a sufficient factual basis to support it in order for it to be protected expression.²

Leaving aside these high level statements about expression and reputation, we now must look at how opinion is protected in the detail and the reality of defamation law and practice.

Fair Comment becomes Honest Opinion

The protection of reputation is provided for in the civil wrong of defamation and the remedies afforded, principally the remedies of compensation and apology.

Freedom of expression is accommodated in the defences provided in law. These defences unfortunately do not have the merit either of simplicity or certainty of outcome. As described by one legal historian, there is “no conceptual scheme and certainly no unifying principle”.³

What was once called the defence of fair comment has now become one of Honest Opinion by the Defamation Act 2009. The conditions under which a defence for opinion is available have also been changed but the result is restrictive compared to the common law it has replaced. It is also worth recalling that the fair comment defence had little success in the courts in Ireland.

Below are the central elements of the statutory defence protecting the expression of opinion:

- (1) **The opinion must be honestly held.**
- (2) **The publisher/broadcaster of the opinion must believe in its truth and where it is not the author it must believe that the author believed it to be true.**
- (3) **The opinion must be based on allegations of fact**
 - (a) **specified in the statement containing the opinion, or**
 - (b) **referred to in that statement that was known or might reasonably be expected to be known by the persons to whom the statements were published.**
- (4) **The opinion must relate to a matter of public interest.**

The publisher/defendant in a defamation case must prove all the elements of this defence. Failure to do so means the defence fails completely and the statement can only be defended as a statement of fact, unless some other defence would apply. The term ‘honest opinion’ is a misnomer. It does not protect opinions honestly held per se, but only those which satisfy the criteria in the Irish Act.

Proving belief in opinion

Looking at element number 2 above, it is worth noting that the common law defence of fair comment would not succeed if the person bringing the case could show that the defendant’s opinion was not honestly held. Under the Defamation Act, a publisher in Ireland is now required to positively prove the honesty of their motives. In other words, the burden of proof has shifted. Whilst this presents its own issues where the defendant is the publisher (e.g. RTÉ and the opinion complained of is one by an employee or presenter), “it must begin to look like an impossible struggle to prove one’s belief in the belief of someone else” as the author of a recent text on defamation law has noted.⁴ The shift in the burden of proof coupled with the requirement to prove belief in another’s state of mind has severe repercussions for the state of the defence generally. In the context of a live radio or television programme the imposition of this requirement renders the defence of honest opinion inoperative. To be confident that you can prove belief in the opinion in the course of a live broadcast, your belief must manifest itself in a moment. How can you possibly prove that you believed someone else’s opinion when you only heard it as it was being broadcast? Thus, in respect of live broadcasting, which is an important service to the citizenry, the defence of honest opinion is an illusion, a chimera.

By way of comparison, the common law jurisdictions of England, Australia and New Zealand have all amended their defamation law in recent years by way of legislation.

In England the common law position is preserved and it is for the plaintiff to prove that the defendant knew or ought to have known that the author did not hold the opinion (section 3(6) Defamation Act 2013-UK). In Australia, legislation passed in 2005 enacted largely uniform legislation in each State and Territory. However the common law defence has been supplemented by the “defence of honest opinion” in section 31 of the Defamation Acts 2005.⁵ Section 31(3) of the Australian uniform Defamation Acts 2005 protects the expression of the opinion of any third person. In a

similar fashion to England, section 31(4) of the Australian Acts provide that the burden falls on the plaintiff to prove that the opinion was not honestly held, with the requirements depending on whose opinion was being expressed. In the case of the opinion of a third party, the defence is defeated only if the plaintiff proves that the defendant had reasonable grounds to believe the opinion was not honestly held. In New Zealand the burden is on the defendant but where the author is not an employee or agent of the defendant all it has to prove is that there was no reasonable cause to believe that the opinion was not the genuine opinion of the author (section 10(2) Defamation Act 1992).

The factual basis for an opinion

Turning the third element above, it has always been the case that the common law defence of fair comment had to be based on accessible relevant facts, which, of course had to be proved at a trial. The purpose of the defence of fair comment was to protect honest expressions of opinion upon, or inferences honestly drawn from, specific facts.⁶ As Neville Cox, the well known author mentions, the rationale in Ireland for the common law defence of fair comment was “*a concession to free speech...inter alia on the basis of the philosophical assumption that the reasonable reader, when presented with opinions and facts in a statement, will be able to distinguish the two, to see the opinion for what it is... a conclusion or inference drawn from such facts and no more than this...*”⁷ More recently in a significant judgment of the UK Supreme Court the defence was authoritatively reviewed and it was concluded that the comment (opinion) must explicitly or implicitly indicate, at least in general terms, the facts on which it is based. What was not required, is that every reader or hearer should be in a position to judge for themselves how far the comment was well founded.

By contrast, section 20(2) of the Irish Defamation Act requires an opinion to be based on allegations of fact (1) specified in the statement containing the opinion or (2) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published.

In the first instance, it is far from clear that the common law’s acceptance that the necessary reference to facts may be implicit has been carried forward by the Defamation Act, 2009. This is an important point. There is a legal precedent called *Kemsley v Foot*⁸. This arose when the future leader of the Labour Party in England, as a journalist, wrote an article critical of newspapers owned by Lord Beaverbrook. In criticising the Beaverbrook papers he used the comparison of the Kemsley press to indicate the level of press standards and described them as “lower than Kemsley”. The owner, Lord Kemsley, sued Michael Foot for defamation. It was contested whether Michael Foot would be allowed to use the fair comment defence. Ultimately, England’s highest court allowed the fair comment defence to be included and there was no need for the comment/opinion to identify specific extracts from these newspapers as facts to base an opinion.

It is far from clear a similar result would occur in Ireland today on the basis of the current requirement to refer to facts when making a comment. McMahon and Binchy⁹ state in no uncertain terms that “*if the allegations of fact are not specified in the statement...[and] no such reference is made, then, even if the persons to whom the*

statement is made are fully aware of the facts or alleged facts... the opinion is not protected by s 20."¹⁰ By way of contrast, the UK Defamation Act of 2013 in section 3(3) merely requires the opinion complained of to indicate in general or specific terms the basis of the opinion, or indeed just some of it. The rationale behind the requirement for facts to be communicated with opinion is that the reader can understand that it is comment and what the comment was about. The UK Supreme Court in *Spiller v Joseph*¹¹ states that only a referral to the facts in general terms is required to further this aim. The requirement in the Irish Act is therefore harsh, and indeed dangerous for freedom of expression.

In Australia, the common law position effectively requires that the recipient of the publication be able to make up their own mind as to whether they agree with the defamatory opinion. They can do this where the facts are expressly set out, or indicated at least in general terms, in the material,¹² where the facts are of general knowledge or notorious¹³ or where the comment relates to something that invites comment, such as a literary, musical or artistic work.¹⁴

Under the Australian statutory "honest opinion" defence, there is no requirement that the facts relied on are stated or indicated in the publication, at least in States other than Victoria. The opinion must be based on "proper material", which is defined as being material that is true or privileged. The legislation contains no requirement that the material be included in the publication.¹⁵

In New Zealand, where the facts are not referred to or specified, but rather 'generally known facts' are relied upon, there is no requirement to state them.¹⁶

Under the Irish Defamation Act if a publication does not set out specifically the facts being relied upon to base an opinion (a significant matter in itself), it may refer to facts that were known or might reasonably be expected to be known by the persons to whom the statement (being sued upon) was published. Therefore, only facts that are known to the audience to whom the opinion is published may be used to ground an opinion that has caused the author or publisher to be sued. This is a stark departure from the defence of fair comment. All that was required was that the facts were in some sense publicly available. There was no requirement that all those to whom the alleged defamatory opinion was published would be aware of the issues. Under the law provided for in the Defamation Act 2009, for broad or mass media publications, only facts that their entire audience know or might reasonably be expected to know are now available to defend an opinion. On many occasions, opinion will be based on a range of material that will only be familiar to certain sections of the public, perhaps a very limited number of people. Much commentary and opinion in public discourse depends on those with more familiarity with issues providing information or commentary for those who do not but are interested in receiving such information. The encapsulation of the protection of opinion set out in section 20(2)(6)(i) of the Defamation Act 2009 runs counter to that notion.

The defence of fair comment began in the 19th century and was fundamental in protecting reviews of literary and artistic works where many of the audience for the reviews would have had little or no knowledge of the work being reviewed and criticised. Under the current statutory model much of the benefit to society of a protection for published opinion seems to have been taken away.

Again, by way of contrast, section 3(4)(a) of the UK Defamation Act 2013 merely requires an opinion to be based on “any fact” which existed at the time of publication of the statement complained of. In Australia, as mentioned above, under the statutory “honest opinion” defence, there is no requirement that the facts relied on are stated or indicated in the publication, but rather can be based upon “proper material”. New Zealand seems to provide for facts generally known as a basis for an opinion but there it is as an addition to being able to prove facts alleged or referred to in the statement being sued upon (section 11 Defamation Act 1992).

Opinions and the Public Interest

Finally, reference is made to the final requirement; an opinion must relate to a matter of public interest. This requirement was also part of the conditions under which fair comment was available as a defence to a defamation claim in common law, and in legal precedents it was given a wide interpretation.

Prior to the enactment in Britain of the Defamation Act 2013, views were sought on whether this requirement should be kept. A public interest requirement, it was said, would unnecessarily and undesirably restrict the application of the defence particularly in the context of blogs, online discussion boards and forums where discussion may not consistently relate to a matter of public interest.¹⁷ The requirement was abolished. Australia, in section 31 of the uniform Defamation Acts 2005, has retained the requirement.

However, the 1992 Act in New Zealand effectively abolished the requirement. The chairman of the Committee on Defamation which produced the report leading to the 1992 Act wrote in *The Laws of New Zealand Defamation* at [133]:

“Under the statutory defence of honest opinion, however, there is now no requirement that the opinion be a matter of public interest.”¹⁸

This is in accordance with the Court of Appeal’s statement in *Simunovich Fisheries Ltd v Television New Zealand Limited*¹⁹ that the 1992 Act had modified the common law defence of honest opinion in important respects.²⁰

Fair comment has been described as a supplement to truth.²¹ In those terms, and given that the defence of truth is not limited to matters of public interest, there are grounds for examining the importance and relevance of a public interest requirement for the honest opinion defence now contained in statute. What good reason is there to allow honest opinion only when it is on a matter of public interest? What about the right to communicate? Why should expression of honest opinion be limited where the matter is not of political or of public interest?

**Eamonn Kennedy, Solicitor
March 2014**

End Notes

¹ For a discussion on the nature of Parliamentary Privilege and reputation and privacy, see the European Court of Human Rights decision in the case of *A. v The United Kingdom*, no. 35373/97, ECHR 2002

² *Case of Lindon, Otchakovsky-Laurens and July v France*, nos. 21279/02 36448/02, §55, ECHR 2007

³ Mitchell, P., 'The Making of the Modern Law of Defamation', (2005, Hart Publishing) at 145

⁴ Maher, J., 'The Law of Defamation', (2011, Thomson Reuters) at para. 6-65

⁵ Prior to the enactment of the legislation the common law defence, known as the "fair comment" defence, had three elements, a comment rather than a statement of fact; a subject matter of public interest; and the comment must be fair.

⁶ *Lowe v Associated Newspapers* [2006] EWHC 320 (QB) at para. 74.6

⁷ Cox, N. 'Defamation Law', 2007 at 184

⁸ *Kemsley v Foot* [1952] AC 345

⁹ McMahon and Binchy, 'Law of Torts', 4th Ed. (Bloomsbury, 2013)

¹⁰ *Ibid.* at paragraph 34.287

¹¹ *Spiller v Joseph* [2010] UKSC 53

¹² *Kemsley v Foot* [1952] AC 345

¹³ *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699

¹⁴ *Kemsley v Foot* [1952] AC 345

¹⁵ A Victorian Supreme Court decision, *HWT v Buckley* (2009) 21 VR 661 suggests that the requirement to state the facts as part of the defence is carried over from the common law, but this decision has been criticised by an authoritative writer as being "plainly wrong", and the logic of the criticism is convincing – see Collins, M, *The Law of Defamation and the Internet*, 3rd ed, Oxford University Press, 2010, p 179 fn 90.

¹⁶ *Mitchell v Sprott* [2002] 1 NZLR 766

¹⁷ Draft Defamation Bill Summary of Responses to Consultation CP(R) 3/11

¹⁸ New Zealand Department of Justice, Committee on Defamation *Recommendations on the Law of Defamation - Report of the Committee on Defamation* (Wellington, NZ: Government Printer, 1977).

¹⁹ [2008] NZCA 350 at 114. In this case one of the defendants had pleaded honest opinion with the inclusion of the public interest element.

²⁰ Referring back to its earlier statement of the legal principles pertaining to the defence in *Mitchell v Sprott* [2002] 1 NZLR 766 and *Television New Zealand v Haines* [2006] 2 NZLR 433 (CA) at 87 – 93 which did not include any requirement that the matter be in the public interest.

²¹ Mitchell, P., 'The Making of the Modern Law of Defamation', (2005, Hart Publishing) at 190

Explanatory Memorandum to the Defamation Act 2009

Purpose of the Act

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

Section 1 – Short title and commencement

This is a standard provision and proposes that the Act shall come into operation on such day or days as the Minister may appoint by order.

Section 2 – Definitions

Section 2 provides for a number of definitions relevant to this Act. This is a standard provision in legislation.

Section 3 – Saver

Section 3 has two purposes. Subsection (1) ensures that the Act will not have retrospective effect, i.e. it will only be relevant to actions which arise after the commencement of the Act. Subsection (2) is designed to ensure that the general law relating to defamation (for example as to what constitutes publication) shall remain in force unless expressly abrogated or superseded by the Act.

Section 4 – Repeal

This section repeals the provisions of the Defamation Act 1961.

Section 5 – Review of operation of Act

This section provides for a review mechanism to oversee the development of the law in this area. The review clause will facilitate an assessment of the operation of the legislation. This review would take place no later than 5 years after the enactment of the Bill. Section 5(2) provides that the review must be concluded within 1 year of its commencement.

Section 6 – Defamation

This section collectively describes the tort of libel and the tort of slander as the tort of defamation. It defines the essential elements of the tort of defamation and provides that the tort is actionable without proof of special damage.

Section 7 – Amendment of certain enactments

The section provides for amendments to the Courts Acts to substitute the tort of defamation for references to slander and libel. It also provides for amendments of a technical nature to the Civil Liability Act 1961.

Section 8 – Verifying affidavit

This section provides:

- a mechanism whereby both the plaintiff and the defendant are obliged to verify the particulars of any pleading containing assertions, allegations of fact within a specific timeframe, which may be extended at the discretion of the Court.
- that the contents of the verifying affidavit could also form the subject matter for cross-examination of both the plaintiff and the defendant.
- for an offence if a person makes a statement in an affidavit that is false or misleading in any material respect or that he or she knows is misleading.

Section 9 – Imputation

The section abolishes the existing rule of law under which each innuendo in a statement gives rise to a separate and distinct cause of action. Only one cause of action will arise irrespective of the number of defamatory imputations contained in the statement.

Section 10 – Defamation of class of persons

The section seeks to clarify the existing law by providing that a member of a class of persons shall have a cause of action in regard to a defamatory statement if

- by reason of the number of persons who are members of that class or
- by virtue of the circumstances in which the statement is published,

the statement could reasonably be understood to refer in particular to the member concerned.

The “in particular” requirement means that the statement must refer to a particular person within a class of person.

Section 11– Multiple publication

This section provides for a general rule (subject to the court granting leave otherwise in the interests of justice) that only one cause of action will lie in respect of a multiple publication (as defined in subsection 11(3)) by a person of the same defamatory statement whether contemporaneously or not.

It does not affect the multiple publication by a number of different persons of the same or a similar defamatory statement. In that instance, more than one cause of action would result.

Section 12 – Defamation of a body corporate

The section provides that a body corporate may bring a defamation action whether or not it has incurred or is likely to incur financial loss as a result of the publication of a defamatory statement. No definition of a body corporate is required on the basis that the Interpretation Act 2005 applies.

Section 13 – Appeals in defamation cases

This is a new provision which provides that the Supreme Court, when hearing an appeal in a defamation action, may substitute its own award of damages or make any other order it considered appropriate.

Section 14 – Meaning

The section provides for a preliminary application to the court

- as to whether or not the matters complained of in defamation proceedings are reasonably capable of carrying the imputation pleaded by the plaintiff and,
- if so, whether that imputation is reasonably capable of bearing a defamatory meaning.

Where the court decides otherwise on these two considerations, it shall dismiss the action in so far only as it relates the imputation concerned.

Section 15 – Abolition of certain offences

This section abolishes any defence that might have been pleaded in a libel or slander action under the common law immediately before the commencement of this Part.

The Act then provides for a range of defences in defamation actions in Part 3 which will apply to causes of action which might arise following enactment of this Bill.

Section 16 – Truth

The section effectively restates the existing defamation law relating to the defence of justification which is now renamed the defence of truth. The purpose of subsection 16(1) is to give statutory form to the defence of truth. Subsection 16(2) is a restatement of the existing defamation law.

Section 17 - Absolute privilege.

Section 17 provides for an updated and extended range of statements under the existing law which attract absolute privilege.

Section 18 -Qualified privilege.

Section 18 (and the associated Schedule 1) provides a statutory definition of qualified privilege as recommended by the Law Reform Commission. It replaces and updates section 24 of the Defamation Act 1961 and the associated Second Schedule.

Section 19- Loss of defence of qualified privilege.

This section deals with the circumstances in which a defendant loses the defence of qualified privilege. It essentially restates the common law provision in this regard concerning “malice”, (as defined in L.J in *Clark v Molyneux* (per Brett LJ).

Subsection 19(1) makes the loss of the defence of qualified privilege solely dependent on proving that the defendant acted with malice.

Subsection 19(2) extends a degree of latitude to the defendant who has the mistaken belief that the recipient of the information is “an interested person” to whom such information should be conveyed.

Subsection 19(3) deals with the scenario where there are multiple defendants. Should one defendant fail in their attempt to use the defence of qualified privilege, this does not presuppose that all defendants will fail, as recommended by the LRC.

Section 20 – Honest opinion.

The defence of “honest opinion” replaces the defence of “fair comment” as set out by Section 23 of the 1961 Act.

It shall be a defence in a defamation action for the defendant to prove that in a statement consisting of an opinion, the opinion was honestly held. It shall be successfully invoked by a defendant if the opinions expressed were believed to be true. The defence will not fail if the opinion was based on allegations of fact *contained* in the original statement or if the allegations of fact ought reasonably to be known by the recipient(s) of the opinion.

Section 21 – Distinguishing between allegations of fact and opinion.

This section provides for the matters a court hearing a defamation action shall have regard to for the purposes of distinguishing between a statement consisting of allegations of fact and a statement consisting of opinion.

Section 22 – Offer to make amends.

This section replaces Section 21 (“unintentional defamation”) of the 1961 Act. The provisions in this section have the potential to facilitate an early settlement of cases where defamatory matter has been published perhaps innocently by a defendant.

Section 23 – Effect of offer to make amends.

This section sets out in detail the provisions to apply where an offer to make amends is accepted by the aggrieved party.

Section 24 – Apology.

This section reforms the existing law, as set out in Section 17 of the Defamation Act 1961, in regard to apologies. It now provides the defendant with the opportunity to issue an apology to mitigate the distress of the plaintiff and the apology is not to be construed as an admission of liability on the part of the defendant, but serves to mitigate the severity of damages that may be awarded.

Subsection (1) requires that the apology be given the same or similar prominence as was given to the original defamatory statement. The defendant must make the apology as soon as practicable after the plaintiff makes complaint to the defendant concerning the statement to which the apology relates or after the bringing of the action, whichever is earlier. Where the defendant intends to seek to use evidence of the apology in mitigation, this must be included at the time of filing the defence and the plaintiff must be notified of the fact.

Section 25 – Consent to publish.

This section provides that it shall be a defence in a defamation action to prove that the defendant consented to the publication of the statement in respect of which the action was brought.

Section 26 - Fair and reasonable publication on a matter of public interest (formerly “public importance”).

Section 26 introduces a significant new defamation defence into Irish law - **the defence of fair and reasonable publication on a matter of public interest**. The new defence is essentially designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place. The defence is subject to the criterion of fairness and reasonableness and a range of matters - which are non-exhaustive - are specified which a court shall take into account in determining whether or not the publication of a statement is fair and reasonable in the circumstances.

Section 27 - Innocent publication

Section 27 develops, in a more comprehensive way in statute, the existing common law defence of innocent publication which has traditionally been available to distributors.

Section 28 – Declaratory Order

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

The Circuit Court on application shall make the declaratory order if it is satisfied that the statement is defamatory and that no defence will succeed and that an apology had been requested and ignored. The Court in granting the declaratory order may also make a correction order and an order prohibiting the publication of the statement.

Subsection (3) clarifies, for avoidance of doubt, that the applicant is not required to prove that the statement concerned was false. This is consistent with the presumption of falsity approach taken in this Act.

Section 29 - Lodgement in Court

Section 29 allows for the defendant to lodge in court with the defence a sum of money in satisfaction of the plaintiff's claim. The critical reform here is that such lodgement may be made without admission of liability. This brings defamation proceedings into line with other actions for damages.

Subsection 29(3) is intended to facilitate a plaintiff who may wish to ensure that some measure of public recognition attaches to the fact that the defendant was willing to settle the case before the trial of the action was concluded, by so informing the court. However, the section as such does not require the defendants to offer and or publish an apology where the lodgement is accepted.

Section 30 – Correction order

This section provides that where there is a finding that the statement in respect of which the action was taken was defamatory and the defendant has no defence to the action, the court may on the application of the plaintiff make an order directing the defendant to publish a correction of the defamatory statement. This correction order is a new remedy.

Section 31 – Damages

This section provides that parties in a defamation action may make submissions to the court in relation to damages. Where an action is brought in the High Court, the judge shall give directions to the jury in the matter of damages.

Subsection (4) sets out a number of (non-exhaustive) factors to which the court shall have regard to in making an award of general damages. Subsection (6) provides that the defendant may give certain evidence concerning the plaintiff for the purpose of mitigating damages. Subsection (7) provides for the award of “special” damages to the plaintiff.

Section 32 - Aggravated and punitive damages

This section is a broad restatement of the current law by which the court has power to award aggravated and punitive damages in addition to general damages where the defendant has conducted his defence in a manner that aggravated the injury caused to the plaintiff's reputation.

Section 33 – Order prohibiting the publication of a defamatory statement

This section sets out the grounds on which a court may grant or refuse an order prohibiting the publication or further publication of defamatory matter.

Section 34 - Summary disposal of action

This section provides a mechanism whereby defamation proceedings may be disposed of in a summary fashion, on the application of the plaintiff, where the court is satisfied that the statement was defamatory and the defendant has no defence that is reasonably likely to succeed. The Court may also dismiss the action, upon the application of the defendant, where it is satisfied that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning. An application under this section must be heard without a jury.

Section 35 – Abolition of certain common law offences

This section currently provides for the abolition of the common law offences of defamatory libel, seditious libel and obscene libel.

Section 36 – Publication or utterance of blasphemous matter

This section provides for the offence of blasphemous libel. The section updates the provisions contained in section 13 of the Defamation Act 1961 and is based on the constitutional obligation in regard to the offences contained in Article 40.6.1.i. of the Constitution, which states as follows: *“The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.”*

The provision removes the sanction of imprisonment contained in the 1961 Act and imposes a monetary penalty of €25,000. It includes a defence for proceedings for an offence under this section for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates.

Section 37 – Seizure of copies of blasphemous statements.

This provides for the seizure of blasphemous material that may be ordered by the Court following a successful prosecution under section 36.

Section 38– Limitation of actions

This section provides that a 1 year limitation period (currently up to 6 years is allowed) shall apply in respect of defamation proceedings and related matters.

Provision is also made in subsection (1) for the court to extend the period for commencement of proceedings to 2 years in exceptional cases.

Clarification is also provided as to when the cause of action accrues in respect of the matters which are dealt with in this section.

Section 39 - Survival of cause of action on death

This section does not provide for a cause of action for defamation of a person who is already deceased. It provides that a cause of action for defamation vested in a person immediately before his death should survive the death of the person for the benefit of his estate. As a consequence, the section also provides that a cause of action in defamation should survive the death of the person alleged to have made the defamatory statement.

The section provides that, where a person who is the subject of an alleged defamatory statement and would have a cause of action, dies, within the new limited period under this Act of 1 year, that cause of action, within the limitation period now proposed, shall survive. However, the damages potentially recoverable by a person's estate shall not include general, punitive or aggravated damages, i.e. no monetary damages.

Section 40 - Agreements for indemnity

This section is effectively a restatement of section 25 of the Defamation Act 1961 in regard to the lawfulness of indemnifying a person against civil liability for defamation.

Section 41 - Jurisdiction of Courts

Section 41 provides that, notwithstanding current jurisdiction limits, all defamation cases where the amount of the claim does not exceed €50,000 may be taken in the Circuit Court.

Section 42 - Malicious falsehood

Section 42 is intended as a replacement for section 20 of the Defamation Act 1961. The provision clarifies both the basis of the tort and the circumstances where special damage is, or is not, required to be shown.

It will be necessary for a plaintiff in an action for slander of title, slander of goods or other malicious falsehood to show that the matter complained of;

- was false,
- was published maliciously and referred to the plaintiff, and
- referred to the property of the plaintiff, or
- to an office, profession, calling, trade or business held or carried on by the plaintiff at the time of publication.

It should also be necessary for a plaintiff to show that special damage has followed as a direct and natural result of the publication complained of except in certain limited cases, for example, where the publication was calculated to cause and was likely to cause pecuniary damage to the plaintiff.

Section 43 - Evidence of acquittal or conviction

This section amends and clarifies the existing law relating to the admissibility of evidence of acquittals and convictions in defamation proceedings.

Section 44 – Press Council

This section provides for the Minister to make an Order, subject to the approval of both Houses of the Oireachtas granting recognition to the Press Council. The Minister shall be satisfied that the applicant body complies with the provisions set out in Schedule 2. No more than one such body shall be recognised and the order may be revoked.

Schedule 1 – Statements having qualified privilege

Schedule 1 provides for statements having qualified privilege.

Part 1 provides for statements privileged without explanation or contradiction. These include determinations or statements by the Press Council or Ombudsman. Part 2 provides for statements privileged subject to explanation or contradiction.

Schedule 2 – Minimum requirements in relation to Press Council

Schedule 2 provides for minimum requirements required of a body seeking recognition as the Press Council. These requirements concern, the objectives of the Council, its composition, its independence, the appointment of independent directors, financial arrangements, the role and operation of the Office of Press Ombudsman and a code of standards.

*Department of Justice, Equality and Law Reform.
August, 2009.*

NOTE - This document is provided for guidance only and does not purport to be a legal interpretation.

Defamation Act 2009

Fair and
reasonable
publication on
a matter of
public interest.

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

(a) the statement in respect of which the action was brought was published—

(i) in good faith, and

(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,

(b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and

(c) in all of the circumstances of the case, it was fair and reasonable to publish the statement.

(2) For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:

(a) the extent to which the statement concerned refers to the performance by the person of his or her public functions;

(b) the seriousness of any allegations made in the statement;

(c) the context and content (including the language used) of the statement;

(d) the extent to which the statement drew a distinction between suspicions, allegations and facts;

(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;

(f) in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;

(g) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in *paragraph (f)*;

(h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;

(i) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and

(j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

(3) The failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not—

(a) constitute or imply consent to the publication of the statement, or

(b) entitle the court to draw any inference therefrom.

(4) In this section—

" court " means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury;

" defamation action " does not include an application for a declaratory order.



Defamation Act 2013

2013 CHAPTER 26

Defences

Publication on matter of public interest

4 Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

Defamation Act 2009

Absolute
privilege.

17.— (1) It shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law in force immediately before such commencement as having been made on an occasion of absolute privilege.

(2) Subject to section 11(2) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 , and without prejudice to the generality of *subsection (1)*, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was—

- (a) made in either House of the Oireachtas by a member of either House of the Oireachtas,
- (b) contained in a report of a statement, to which *paragraph (a)* applies, produced by or on the authority of either such House,
- (c) made in the European Parliament by a member of that Parliament,
- (d) contained in a report of a statement, to which *paragraph (c)* applies, produced by or on the authority of the European Parliament,
- (e) contained in a judgment of a court established by law in the State,
- (f) made by a judge, or other person, performing a judicial function,
- (g) made by a party, witness, legal representative or juror in the course of proceedings presided over by a judge, or other person, performing a judicial function,
- (h) made in the course of proceedings involving the exercise of limited functions and powers of a judicial nature in accordance with Article 37 of the Constitution, where the statement is connected with those proceedings,
- (i) a fair and accurate report of proceedings publicly heard before, or decision made public by, any court—
 - (i) established by law in the State, or
 - (ii) established under the law of Northern Ireland,

- (j) a fair and accurate report of proceedings to which a relevant enactment referred to in section 40 of the Civil Liability and Courts Act 2004 applies,
- (k) a fair and accurate report of proceedings publicly heard before, or decision made public by, any court or arbitral tribunal established by an international agreement to which the State is a party including the Court of Justice of the European Communities, the Court of First Instance of the European Communities, the European Court of Human Rights and the International Court of Justice,
- (l) made in proceedings before a committee appointed by either House of the Oireachtas or jointly by both Houses of the Oireachtas,
- (m) made in proceedings before a committee of the European Parliament,
- (n) made in the course of proceedings before a tribunal established under the Tribunals of Inquiry (Evidence) Acts 1921 to 2004, where the statement is connected with those proceedings,
- (o) contained in a report of any such tribunal,
- (p) made in the course of proceedings before a commission of investigation established under the Commissions of Investigation Act 2004 , where the statement is connected with those proceedings,
- (q) contained in a report of any such commission,
- (r) made in the course of an inquest by a coroner or contained in a decision made or verdict given at or during such inquest,
- (s) made in the course of an inquiry conducted on the authority of a Minister of the Government, the Government, the Oireachtas, either House of the Oireachtas or a court established by law in the State,
- (t) made in the course of an inquiry conducted in Northern Ireland on the authority of a person or body corresponding to a person or body referred to in *paragraph (s)*,
- (u) contained in a report of an inquiry referred to in *paragraph (s)* or *(t)*,
- (v) made in the course of proceedings before an arbitral tribunal where the statement is connected with those proceedings,
- (w) made pursuant to and in accordance with an order of a court established by law in the State.

(3) Section 2 of the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976 is amended by the insertion of the following subsection:

“(3) In this section ‘utterance’ includes a statement within the meaning of the *Defamation Act 2009* ;”.

(4) A defence under this section shall be known as, and is referred to in this Act, as the “defence of absolute privilege”.

Defamation Act 2009

Qualified
privilege.

18.— (1) Subject to section 17, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately before such commencement as having been made on an occasion of qualified privilege.

(2) Without prejudice to the generality of *subsection (1)*, it shall, subject to section 19, be a defence to a defamation action for the defendant to prove that—

(a) the statement was published to a person or persons who—

(i) had a duty to receive, or interest in receiving, the information contained in the statement, or

(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and

(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.

(3) Without prejudice to the generality of *subsection (1)*, it shall be a defence to a defamation action for the defendant to prove that the statement to which the action relates is—

(a) a statement to which Part 1 of Schedule 1 applies,

(b) contained in a report, copy, extract or summary referred to in that Part, or

(c) contained in a determination referred to in that Part.

(4) Without prejudice to the generality of *subsection (1)*, it shall be a defence to a defamation action for the defendant to prove that the statement to which the action relates is contained in a report, copy or summary referred to in Part 2 of Schedule 1, unless it is proved that the defendant was requested by the plaintiff to publish in the same medium of communication in which he or she published the statement concerned, a reasonable statement by way of explanation or a contradiction, and has refused or failed to do so or has done so in a manner that is not adequate or reasonable having regard to all of the circumstances.

(5) Nothing in *subsection (3)* shall be construed as—

(a) protecting the publication of any statement the publication of which is prohibited by law, or of any statement that is not of public concern and the publication of which is not for the public benefit, or

(b) limiting or abridging any privilege subsisting apart from *subsection (3)*.

(6) A defence under this section shall be known, and is referred to in this Act, as the " defence of qualified privilege ".

(7) In this section—

"duty" means a legal, moral or social duty;

"interest" means a legal, moral or social interest.

Defamation Act 1996	Defamation Act 2013
Absolute privilege under s.14	
<p>Only applied to:</p> <ul style="list-style-type: none"> a) any court in the United Kingdom; b) the European Court of Justice or any court attached to that court; c) the European Court of Human Rights; and d) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party. 	<p>Now applies to:</p> <ul style="list-style-type: none"> a) <i>any court in the United Kingdom;</i> b) <i>any court established under the law of a country or territory outside the United Kingdom;</i> c) <i>any international court or tribunal established by the Security Council of the United Nations or by an international agreement</i>
Qualified privilege under s.15 and Schedule 1 for fair and accurate reports	
<p>Para 9 – Only applied to a copy of or extract from a notice or other matter issued for the information of the public by or on behalf of—</p> <ul style="list-style-type: none"> a) a legislature in any member State or the European Parliament; b) the government of any member State, or any authority performing governmental functions in any member State or part of a member State, or the European Commission; c) an international organisation or international conference. 	<p>Now applies to <i>a copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of —</i></p> <ul style="list-style-type: none"> a) <i>a legislature or government anywhere in the world;</i> b) <i>an authority anywhere in the world performing governmental functions;</i> c) <i>an international organisation or international conference.</i>
Para 10 – a copy of or extract from a document made available by a court in any member State or the European Court of Justice (or any court attached to that court), or by a judge or officer of any such court.	Now applies to <i>a copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.</i>
	New para 11A for <i>proceedings at a press conference</i>

	<i>held anywhere in the world for the discussion of a matter of public interest.</i>
Para 12 – proceedings at any public meeting held in a member State.	Now applies to <i>proceedings at any public meeting held anywhere in the world.</i>
Para 13 – proceedings at a general meeting of a UK public company.	Now applies to <i>proceedings at a general meeting of a listed company.</i>
Para 14 – finding or decision of certain kinds of associations, formed in the UK or another member State.	Now applies to such associations <i>formed anywhere in the world.</i>
	<p>New para 14A for a:</p> <p><i>a) report of proceedings of a scientific or academic conference held anywhere in the world; or</i></p> <p><i>b) copy of, extract from or summary of matter published by such a conference.</i></p>

Defamation Act 2009

Damages.

31.— (1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.

(2) In a defamation action brought in the High Court, the judge shall give directions to the jury in relation to the matter of damages.

(3) In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case.

(4) Without prejudice to the generality of *subsection (3)*, the court in a defamation action shall, in making an award of general damages, have regard to—

- (a) the nature and gravity of any allegation in the defamatory statement concerned,
- (b) the means of publication of the defamatory statement including the enduring nature of those means,
- (c) the extent to which the defamatory statement was circulated,
- (d) the offering or making of any apology, correction or retraction by the defendant to the plaintiff in respect of the defamatory statement,
- (e) the making of any offer to make amends under *section 22* by the defendant, whether or not the making of that offer was pleaded as a defence,
- (f) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement,
- (g) the extent (if at all) to which the plaintiff caused or contributed to, or acquiesced in, the publication of the defamatory statement,
- (h) evidence given concerning the reputation of the plaintiff,
- (i) if the defence of truth is pleaded and the defendant proves the truth of part but not the whole of the defamatory statement, the extent to which that defence is successfully pleaded in relation to the statement,

(j) if the defence of qualified privilege is pleaded, the extent to which the defendant has acceded to the request of the plaintiff to publish a reasonable statement by way of explanation or contradiction, and

(k) any order made under section 33, or any order under that section or correction order that the court proposes to make or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation.

(5) For the purposes of *subsection (4) (c)*, a defamatory statement consisting of words that are innocent on their face, but that are defamatory by reason of facts known to some recipients only of the publication containing the defamatory statement, shall be treated as having been published to those recipients only.

(6) The defendant in a defamation action may, for the purposes of mitigating damages, give evidence—

(a) with the leave of the court, of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement,

(b) that the plaintiff has already in another defamation action been awarded damages in respect of a defamatory statement that contained substantially the same allegations as are contained in the defamatory statement to which the first-mentioned defamation action relates.

(7) The court in a defamation action may make an award of damages (in this section referred to as “special damages”) to the plaintiff in respect of financial loss suffered by him or her as a result of the injury to his or her reputation caused by the publication of the defamatory statement in respect of which the action was brought.

(8) In this section “court” means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury.