

ISME,
17 Kildare Street,
Dublin 2.
5th March 2019

Mr Charlie Flanagan TD,
Minister for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Mr Flanagan,

I am writing to you following the conclusion of two high profile defamation cases in the superior courts last week; O'Brien V the Sunday Business Post, and Kinsella V Kenmare Resources and Carvill, and the need to reform the Defamation Act 2009. While marquee cases such as these will attract very significant media attention, our concern in ISME is a substantial increase in defamation cases being taken in the lower courts against small businesses, for what we would see as the most trivial of reasons, which would not attract civil action in any other jurisdiction. While conscious that most of the issues raised regarding the Defamation Act concern the media and freedom of expression, defamation is also hitting those SMEs which deal with members of the public in the hospitality and retail sectors.

There is a significant increase in the number of solicitors advertising for defamation business, typically for services to clients who have been 'wrongly accused' of (this is not an exhaustive list):

1. Shoplifting.
2. Driving (or attempting to drive) from a fuel forecourt without paying.
3. Leaving a restaurant without paying.
4. Paying for goods with a counterfeit note.
5. Refusal of admission to premises.

It is not unusual for (1) and (2) above to be accompanied by an allegation of unlawful detention. We have raised this issue with the National Strategic Retail Theft Forum, which is hosted by An Garda Síochána in Harcourt St., in particular where plaintiffs have involved Gardaí as witnesses in their cases. Many of the solicitors who specialise in this activity have defamation web pages outlining in detail the scenarios described above. Most actions appear to be taken in the Circuit Court, and most awards appear to be in the €5k to €30k range.

The asymmetry between the value of stock protected, and the awards currently available in court, present small business with a serious dilemma. They can chose to ignore the suspected theft of a packet of razors or a dress from the store, and accept the loss; or they can intervene with the suspect, and risk a substantial four or five figure award plus costs. This is a patent injustice.

Regarding the issue of counterfeit currency, and as you know, passing or tendering a counterfeit note or coin is a criminal offence under Sec 34 (1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. For an individual in receipt of a counterfeit note or coin, the Central Bank guidance on suspected counterfeit currency is as follows:

If you believe you are in possession of a suspect counterfeit you are obliged to submit it to your local financial institution, the Gardaí, or the Central Bank's National Analysis Centre (NAC) or Coin National Analysis Centre (CNAC). A receipt should be obtained to confirm your submission of the suspect counterfeit as no refund will be given at this time.

As legal tender, commercial premises are obliged to accept paper and coin currency, unless it is damaged. It is therefore most unfair for, say, owners of licensed premises, to be expected to convey privately to a person tendering a suspected counterfeit in a public place why they are refusing to accept it. In our members' experience, it is frequently the case that the plaintiff has a witness very close at hand, irrespective of the level of tact and diplomacy with which the potential detection of a counterfeit has been communicated.

It is our strongly-held view that the framers of the Constitution never intended defamation to be used as a counter-claim to being searched for suspected theft, or checked upon for suspected counterfeits, when they set down Art 40.3.2. Our courts and legal system are being called into disrepute by this vexatious use of the Defamation Act.

We therefore ask you, and as a matter of urgency, to amend the Defamation Act as follows:

1. The defamation alleged must be material and demonstrable.
2. It must cause serious harm to the plaintiff.
3. It must be damaging; the plaintiff must explicitly set out the quantum of the damage caused; and the plaintiff must pursue their action in a court of appropriate jurisdiction for that quantum.
4. Plaintiffs in defamation actions must be able to give meaningful and reliable undertakings for their costs before they take an action against a defendant; a revised Defamation Act must require this.
5. The Defamation Act must strike a fair balance between the protection of the property rights of one person with the right to a good name of the other, consistent with Art 40. The Act as currently drafted patently and self-evidently fails to do so. This is especially true in those cases where the defendant was doing nothing more than safeguarding store property, or preventing the tender of counterfeit currency; matters which are subject to criminal law. An amended Defamation Act should give no cause for action where a person has simply been searched while leaving a shop, or has been challenged for the tender of a suspected counterfeit.

Yours sincerely,



Neil McDonnell
Chief Executive

CC: Heather Humphreys TD, Minister for Business, Enterprise and Innovation.