

REVIEW OF THE DEFAMATION ACT 2009

SUBMISSION OF WILLIAM FRY

William Fry welcomes the opportunity to make a submission in respect of Irish defamation law as requested by the Department of Justice, pursuant to the obligation on the Minister for Justice contained in the Defamation Act, 2009 (the "Act") to review the provisions of the Act within a 5 year period.

The following contains a summary of our views arising from our experience of the Act on some of the relevant issues and is designed to assist the Minister for Justice in her review of the provisions of the Act. We would be happy to elaborate on our submission if required.

CHANGE TO THE RESPECTIVE ROLES OF THE JUDGE AND JURY IN HIGH COURT DEFAMATION CASES

Ireland is one of the sole remaining jurisdictions in which a jury determines defamation cases. We are of the view that this has contributed on occasion to very high defamation awards, which in turn has led to difficulties for the parties (in particular we would argue on the defendant side) in predicting the size of the award of damages that may ultimately be made and advising a client accordingly.

The function of the jury is to decide what the true facts of the case are. While arguments in favour of the jury are that they are in a position to best reflect the views of society as they represent a random selection from a wide range of the population in practical terms, in practice the Plaintiff is rarely met with a jury of his or her peers.

Furthermore, over the years and certainly since the introduction of the Act, the law of defamation has become much more technical and complex. Given the technical nature of defamation and the fact that the 12 jurors are uneducated in law, we are of the view that it is difficult for them in certain situations to understand complex legal and technical arguments. A judge is an expert both in the law and in fact finding and we would submit is the better placed to assess whether a plaintiff has been defamed or not and to quantify the damages to be awarded. We would submit therefore that defamation cases should be heard by a Judge sitting alone.

JURISDICTION OF THE CIRCUIT COURT IN DEFAMATION CASES

Section 28 of the Defamation Act 2009 introduced the Declaratory Order whereby a plaintiff can make an application to the Circuit Court seeking a declaration that the statement the subject matter of the proceedings is false and defamatory. While we believe that this is a major advancement in terms of both dealing with cases in a timely manner and reducing costs, the fact that no other proceedings can be brought if the application fails is we believe a deterrent to a plaintiff in availing of such an order. We are aware of one such order having been made, in the case of Barry Watters, a convicted child porn user (*Watters v Independent Star Ltd [2010] IECC 1*). In that case Judge Joseph Mathews held that Mr Watters had a residual reputation and deserved protection from defamation. We can see in a case such

as this how it was attractive for Mr Watter's to seek a Declaratory Order. However, in the case of a plaintiff with no issues as to his/her reputation, the fact that no other proceedings can be brought and no damages awarded may be a deterrent.

SUMMARY DISPOSAL

Under Section 34 of the 2009 Act, Summary Disposal of a defamation case was introduced. This allows for a plaintiff to apply to the High Court for Summary Disposal in circumstances where it is alleged that the defendant has no defence to the action that is reasonably likely. Mr Justice Kearns in the case of *Lowry v Smith [2012] IEHC 22* held that the phrase "*the Defendant has no defence to the action that is reasonable to succeed*" imports a test similar to that for a summary judgment:

"In my view, the fundamental questions to be posed on an application such as this remain: is it very clear that the Defendant has no case? Are there no issues to be tried or only issues which are simple and easily determined? Do the Defendants' Affidavits fail to disclose even an arguable defence?"

It was held by Judge Kearns that Mr Lowry had not proved that Sam Smyth, journalist, had no defence to the action. We would submit that the bar to be reached is very high and many plaintiffs will take their chances on bringing their case to trial.

LEVEL OF DAMAGES AWARDED IN DEFAMATION CASES

There has been much media criticism of the nature of defamation awards. There is particular discontent that too much value is placed on a plaintiff's "*reputation*" by both judges and juries. The current record for damages in a defamation action in this jurisdiction is the sum of €10 million which was awarded in November 2010 in a case involving a press release by a company that defamed a former employee, *Donal Kinsella v Kenmare Resources Plc (High Court, de Valera J, 17 November 2010)*. This was over five times greater than the previous record amount that was granted in an Irish defamation case that of *Monica Leech v Independent Newspapers (Ireland) Limited [2014] IESC 78*. Ms Leech, a PR advisor/communications consultant who brought an action against a newspaper that had implied that she was having an affair with a government minister. On appeal, the Supreme Court substituted an award of €1.87 million for one of €1.25 million. Although there was a reduction in damages, it had been widely anticipated that the reduction would have been more significant. More recently, the Supreme Court reserved judgment on a man's appeal against the overturning by the Court of Appeal of an award of damages of €900,000.00 made in the High Court arising from a newspaper article that described him as a "*Traveller Drug King*" (*McDonagh v Sunday Newspapers Limited trading as Sunday World [2016] IESC 27*). The jury in the High Court had found that the newspaper had failed to prove that he was a drug dealer and had therefore libelled him in the article. However, the Court of Appeal found that the evidence overwhelmingly pointed to the man being a drug dealer and quashed the jury's findings. In the *Monica Leech* case, the Defendant sought to make an analogy to damages for personal injuries with the newspaper urging the Supreme Court to have regard to the highest level of general damages that may be awarded in the most serious personal injuries case, which is significantly lower than the €1.7 million

awarded by the High Court. The Supreme Court, however, found the personal injuries damages are not an appropriate analogy for damages to reputation and held that damages for defamation are to compensate the plaintiff for injury to feelings and to vindicate the plaintiff's name in respect of the public at large. It found that this element of vindication is not present in personal injuries action. The Book of Quantum, recently revised, sets down how much compensation should be paid to someone for personal injury. There is no such mechanism available when reputation is damaged. The Court of Appeal has recently held that damages for personal injury should be just and reasonable and assessed by reference to a spectrum of damages from minor to catastrophic/life changing that have a cap of €450,000.00. In an earlier Supreme Court decision, Ms Justice Denham, in the case of *MM v SM [2005] IESC 17* advised that damages can only be fair and just if they are proportionate not only to the injuries sustained by the plaintiff but also proportionate when assessed against the level of damages commonly awarded to other plaintiffs who have sustained injuries of a significant greater or lesser magnitude. She held that it was important that minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into lesser categories. In the case of *Payne v Nugent [2015] IECA 268*, the High Court awarded €65,000.00 for general damages in a road traffic claim where a back seat passenger was injured when her car was rear-ended. On appeal the injuries in this case were held to be relatively modest and damages were reduced to €35,000.00. The principles outlined by the Court in deciding to reduce the award are of interest. It held that it is important that compensation in respect of pain and suffering should be reasonable and proportionate and that an award of one sixth of the top end of damages was not proportionate in this case. In *Nolan v Wirenski [2016] IECA 56* the Court of Appeal again spoke about damages having to be just and reasonable and assessed by reference to a spectrum of damages from minor to catastrophic/life changing injuries that have a cap of €450,000.00. The Court held that damages should be:

- fair to the plaintiff and the defendant
- objectively reasonable in light of the common good and social conditions in the State
- proportionate within the scheme of awards for personal injuries generally

The Court also stressed that the Book of Quantum must be referred to. We would submit that a similar approach could be taken to damages which would lead to awards that are more fair and objectively reasonable and proportionate.

OFFER OF AMENDS

The offer of amends procedure was introduced by Section 22 of the Defamation Act. It was anticipated that it would lead to the settlement of defamation claims on a cost effective basis and, even where an offer of amends was not accepted, would lead to a discount of the damages awarded at trial. Where the parties do not agree as to damages or costs following an offer to make amends, those matters must be determined by the High Court under Section 23(1)(c) of the Act. The question arises as to whether

there is a right to a jury trial in respect of this matter. In the recent case of *Padraig Higgins v Irish Aviation Authority* [2016] IECA 322 the Court of Appeal upheld the High Court decision that where an offer of amends was made pursuant to Section 22 and this offer has been accepted, the plaintiff is nonetheless entitled to have his claim for damages pursuant to Section 23(1)(c) determined by a jury where the parties cannot agree on an appropriate figure. The only case prior to this where an amount of damages pursuant to Section 23(1)(c) failed to be determined was in the case of *Christie v TV3 Television Network Limited* [2015] IEHC 694. Ms Justice O'Malley sat without a jury and her entitlement to do so was not questioned. Mr Justice Gerard Hogan felt that the issue presented was a difficult and troubling one, with no completely satisfactory or clear answer, he held that on balance the right to a jury trial in respect of the determination of damages had been preserved for the following reasons:

- although the offer of amends procedure is innovative and novel, it does not fundamentally alter the nature of the task of assessing damages which essentially remains the same and one which regularly confronts juries in contested defamation actions. The only new element is the level of discount or damages to be granted by reason of the timely and fulsome offer to make amends and this is a matter on which a jury could be readily instructed.
- It does not necessarily follow that the reference to the High Court in Section 23(1)(c) of the Act insofar as it relates to the award of damages means that this must also be a reference to a High Court judge sitting alone without a jury. There is no fundamental inconsistency in concluding to the High Court in one context (costs) must be to a judge sitting alone while in another (the award of damages) it must refer to a judge sitting with a jury.
- Although it might have been better had the Oireachtas taken an opportunity to put the matter beyond doubt by use of clear and express language in the section including or excluding (as the case may be) the role of the jury, the role of the jury in the award of damages in defamation cases is embedded in the fabric of the common law and that right was expressly preserved by Section 48 of the Supreme Court of Judicature (Ireland) Act 1877 and Section 94 of the Courts of Justice Acts 1924.

We would submit that it is questionable whether a defendant would as readily consider making an offer of amends as they have previously done. The offer of amends was expressly inserted in order to make jury trials more cost effective. However, we believe that this recent Court decision will deter many defendants from utilising it. Furthermore, in the case of *Christie v TV3 Television Network* [2015] IEHC 694 the reduction in damages was in the region of 30%. It had been anticipated that it would be in or around 50% which is normally the discount afforded in UK Courts has been higher. Again, the offer of amends in theory is a means of expediting actions, but the level of discount must be high enough to prove an incentive to make the offer of amends.

LODGMENT

We would submit that the defendant should be afforded the opportunity to make a tender similar to what is provided under Civil Liability and Courts Act 2004, Section 17, which requires both plaintiff and defendant to serve a Notice of Offer of Settlement on each other. These offers are lodged in Court but the judge would not be aware of the terms of the offers until judgment has been delivered. The judge can have regard to the offers and reasonableness of the conduct of the parties when considering the question of costs in the action. There has been a difficulty in the provision of Section 17 and how it is drafted in circumstances where it is unclear whether the plaintiff has to make a Section 17 offer first or whether there is to be an exchange of the Section 17 offer at the same time. In practice it is common place that there is simultaneous exchange of offers. We would submit that if a similar provision was introduced in the law of defamation that the plaintiff should have to make the formal offer first in order to avoid trial by ambush.

ARE THE ACT'S PROVISIONS ADEQUATE AND APPROPRIATE IN THE CONTEXT OF DEFAMATORY DIGITAL OR ONLINE COMMUNICATIONS

The emergence of social media and its omnipresence in the daily lives of many has drastically changed the landscape since the Act was envisaged. With a click of a button, a defamatory statement can be disseminated across many jurisdictions. Although many of the social media giants were in existence at the time the Act was enacted their user bases have expanded at a phenomenal rate since then. Facebook now has 1.79 billion active users, YouTube has 1 billion active users and Twitter has 317 million active users. We would submit that the Act needs to be amended to reflect the potential for a comment to go viral in hours and irreparably destroy a person's reputation to the point where compensation is not an adequate remedy.

Although Section 2 of the 2009 Act recognised for the first time in statute that a statement includes a statement published on the internet and an electronic communication, there is a noticeable absence of specific provisions dealing with defamation and social media. We would submit that there should be a more time and cost efficient way of having comments taken down from social media as time is of the essence with this type of defamation.

Social media also often brings problems of identification; in many instances, individuals can post anonymously or under a pseudonym. However, for an offended party to get any sort of relief in a court, he or she must be able to identify the person making the comment. The Irish Courts have in a number of cases shown themselves willing to make the necessary Norwich Pharmacal Orders against social media organisations requiring them to disclose details of the poster. In the case of *Stephen Walsh v Twitter International Company (High Court, Mac Eochaidh J, 2 October 2015)*, the plaintiff a whistle blower took part on RTE Prime Time, a leading current affairs television programme. He alleged that he was subsequently defamed by a tweet on social media and sought an order from the High Court directing that Twitter International provide information which would assist in identifying the anonymous twitter user and author of the allegedly defamatory tweet. The High Court granted the Norwich

Pharmaceutical Order sought and Twitter International provided the Twitter user's email address to the Plaintiff. The best known Irish case to date on social media defamation is the case of *Eoin McKeogh v John Doe and others* [2012] IEHC 95. In December 2011, a video of a male allegedly evading a taxi fare in Dublin on the night of 13 November 2011 was posted online on YouTube, Facebook and a number of other websites. This video was viewed by a large number of people and the plaintiff was identified online as the person evading the taxi fare. However, at the relevant time, the plaintiff was studying in Japan and was not in the country on the night in question. There was therefore no doubt that this was a question of mistaken identity. In January 2012, the plaintiff successfully obtained an injunction prohibiting re-publication of the video. He was also granted orders that all material be removed from the internet and a Norwich Pharmaceutical Order identifying the users who had identified him as the person in the video. This injunction was appealed to the Supreme Court by a number of the defendants due to its far reaching implications. This case was ultimately settled on undisclosed terms. However we submit that the route of having to seek Norwich Pharmaceutical Orders is draconian in the age of social media. Not only is such a route prohibitively costly for an injured Plaintiff it is also far too slow and the damage will have been caused by the time the Orders are obtained and enforced.

Cases involving defamation through social media websites are on the rise and can be expected to continue to increase. Many of the provisions of the 2009 Act have been tested by the Irish courts already in a social media context, with the offer of amends (*Christie v TV3 Television Network Limited* [2015] IEHC 694) and the correction order (*Tansey v Gill* [2012] IEHC 42) in particular being used to good effect. However, the fundamental problem is that complainants must engage the legal process to seek relief. It is prohibitively expensive and it also takes time; a commodity which many victims of defamation do not have if they wish to limit the number of persons who can view an offending post on social media. To adequately address this issue, some form of amendment to the 2009 Act may be necessary as the only suitable legal mechanism at present is the injunction. A rapid take-down solution is what social media users in Ireland and across the world need to protect their good name and reputation in this era of social media.

Fiona Barry, Partner

Mary Cooney, Solicitor