



**Submission to the Statutory Review of  
Defamation Act 2009**

22 December 2016

## **Introduction**

At the Socio-Legal Research Centre in DCU, we recognise that law does not exist in isolation but is part of a broader set of social, economic and political processes. In light of this, we adopt a holistic, contextual and interdisciplinary approach to our study of law.

Working in this way, enables us to embed the study of law in society and to link theory to practice, by focusing on the lived experiences of people subject to the law. By combining legal analysis with perspectives from other disciplines and methods, the research generated by the members of the Centre offers the means to investigate and more effectively address the interaction of legal problems with their social, economic and political contexts.

### **1. Quantum of Damages**

We submit that quantum of damages is an area of the Defamation Act 2009 that is in particular need of reform. The Act does address damages, principally in sections 13, 31 and 32, however the guidelines are vague and have resulted in inconsistent, and in certain cases, extremely high awards. We submit that the Act, in situations where a successful case for defamation has been established, is not appropriate and effective for securing its objectives. It is submitted that the substantial damages that have been awarded under the 2009 Act and the effect of such awards, do not reflect the purpose of a defamation claim: to ensure that a person's reputation is not injured in the eyes of reasonable members of society. Excessive awards create the potential for actions taken purely for the purposes of enrichment. A further difficulty of the excessive awards that have taken place under the 2009 Act is the chilling effect on freedom of speech of the media. A clear objective of defamation law is to ensure effective protection for the right to good name guaranteed by Article 40.3.2 of the Constitution, while also ensuring due regard for the right to freedom of expression contained at Article 40.6.1(i). Excessive damages have the potential to distort the balance between these two constitutional rights in favour of the right to a good name. There is also a problem of consistency of awards granted under the 2009 Act with wide variations occurring between cases leading to an unpredictability of the awards likely to be granted.

Some possible reforms which would help establish more consistent and less excessive awards would be to provide more detailed guidelines in legislation. This specifically relates to section 31 of the Act, which, in its current form, is extremely broad. In particular subsection 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.’ No further guidelines are provided as to the role of the judge which facilitates wide discrepancies between the directions given in different cases. A better defined role for the judge, in directing the juries, with clearer guidelines would be likely to increase the consistency of awards. For example, a requirement to have the judge state to the jury what in their view would be an appropriate award may help curtail excessive awards. There are also judicial opinions available on the nature of directions to be given to the jurors as the Supreme Court have examined this in numerous cases prior to the enactment of the 2009 Act. A ceiling of awards for defamation claims may be worth consideration and if not a ceiling, stricter guidelines as to the harm necessary for awards above a certain figure could help limit the instances of excessive quantum of damages.

## **2. Application of the Defamation Act to the Internet and Online Communications**

The 2009 Act should be reformed to more effectively regulate online publications regarding defamation, particularly concerning the role of secondary internet publishers.

The need for this reform is pressing. In *McKeogh v Doe*, an internet video clip falsely portraying the plaintiff as a taxi fare evader in Dublin when the plaintiff was in fact in Japan.<sup>1</sup> In May 2016, the Supreme Court allowed appeals by Google, YouTube and Facebook Ireland, on consent, against injunctions requiring them to permanently remove the relevant Youtube video clip. The appeals highlighted the issue of whether internet hosting sites may be sued over defamatory material posted on them and whether the companies had a responsibility to monitor their sites for such material. This issue remains unclear in Irish law and the review of the 2009 Act provides a suitable opportunity to more effectively regulate this area of law.

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<sup>1</sup> *Mc Keogh v John Doe 1 & Ors* [2012] IEHC 95

Contrasting approaches to this issue are taken in other jurisdictions, in European Union law and under the European Convention on Human Rights. At European Union level the existing legal framework governing online service provider liability is enshrined in the Electronic Commerce Directive 2000.<sup>2</sup> The general theme of the ECD is to provide service providers with immunity from liability for unlawful activities taking place on their networks so long as they remain passive and neutral in the transmission and hosting of unlawful material.<sup>3</sup> Articles 12, 13 and 14 of the ECD confer immunity from liability for online intermediaries concerning their mere conduits, caching and hosting activities respectively. In *Google France v Louis Vuitton* the European Court of Justice held that operators of commercial search engines will not qualify for the Article 14 hosting defence unless their role remains “neutral, in the sense that the conduct is merely technical, automatic and passive ... pointing to a lack of knowledge or control of the data which it stores”.<sup>4</sup> In *L’Oreal v Ebay*, the European Court of Justice stated that the service provider would cross the line from being a neutral host to an “active role, such of the kind as to give it knowledge of, or control over, the data ....” in instances where the service provider “offered assistance which entails optimising the presentation of the offers for sale ... or promoting those offers”.<sup>5</sup> The primary Irish decision considering these issues, *Mulvaney v Betfair*, does so only in a cursory manner.<sup>6</sup>

However, there is now evidence of a trend across Europe whereby courts are imposing greater responsibility on online service providers for the user generated content. In 2013, the United Kingdom enacted the Defamation Act 2013. Section 5(2) of the Act provides a defence for ‘website operators’ who may be liable as publishers by omission of the defamatory publications of third parties. Section 5 provides:

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<sup>2</sup> European Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular Electronic commerce, in the Internal Market (Directive on ECD commerce) OJ (2004) L178/1

<sup>3</sup> Rob Frieden, “Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and The Balance of Power Between Intellectual Property Creators and Consumers” (2008) 18 Fordham Intellectual Property Media & Entertainment Law Journal 633

<sup>4</sup> Joined Cases C-236/08 to C-238/08 *Google France v Louis Vuitton* OJ C134/2

<sup>5</sup> Case C-324/09 *L’Oréal SA and Others v eBay International AG and Others* [2011] OJ C269

<sup>6</sup> *Mulvaney v The Sporting Exchange Trading as Betfair* [2009] IEHC 133; Hugh McCarthy, “Is The Writing on the Wall for Online Service Providers? Liability For Hosting Defamatory User-Generated Content Under European and Irish Law” *Hibernian Law Journal* 2015, 14(1), 16-55, 22-25

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that –

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.<sup>7</sup>

Section 10 of the Defamation Act 2013 provides an additional protection to the defence in section 5 that may exclude the creators and operators of online platforms from liability for defamatory material published by third parties. Section 10 contains a defence for persons who were: “not the author, editor or publisher of the statement complained of [as defined in section 1 of the Defamation Act 1996 (UK)] unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.” The approach adopted to the definition of author, editor and publisher is largely the same in Ireland and the United Kingdom.<sup>8</sup> The 2013 Act incentivises entities that currently allow for third-party publication on their online platform to implement a system by which users are able to be identified by other users so as to entitle them to a defence to defamation.<sup>9</sup>

However, the decision of the Grand Chamber of the European Court of Human Rights in *Delfi AS v Estonia*, may necessitate an alteration of English law in this area.<sup>10</sup> The adoption of the English position alone may therefore not provide a suitable basis for reform of Irish law. In *Delfi*, the news portal Delfi was found liable for violating the rights of a plaintiff who had been grossly insulted in about 20 comments posted by readers on the Delfi news platforms’ field for comments, although Delfi had removed the comments as soon as it had

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<sup>7</sup> Defamation Act 2013 (UK) s 5

<sup>8</sup> Section 1(3)(c) of the Defamation Act 1996 (UK); Section 27(2)(c) Defamation Act 2009 (Ireland)

<sup>9</sup> Ryan Turner, "Internet Defamation Law and Publication by Omission: A Multi-jurisdictional Analysis" [2014] UNSWLawJl 2; (2014) 37(1) University of New South Wales Law Journal 34

<sup>10</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013); Neville Cox, *Delfi AS v Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights* (2014) 77(4) MLR 619-629, 628

been informed of their insulting character. The Court concluded that Delfi was liable for having made accessible for some time these comments. In June 2015, the Grand Chamber of the ECHR confirmed this approach concluding that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the news portal's freedom of expression, in particular because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis.<sup>11</sup> The Grand Chamber also concluded that the impugned comments constituted hate speech and speech that directly advocated acts of violence. The approach of the Court in this case is broader and more demanding than the UK 2013 Act, requiring greater proactivity on the part of service providers to envisage circumstances in which defamatory material may be published. It may be possible to restrict the decision to circumstances involving hate speech and/or news portals operated on a commercial basis, but this remains to be seen in subsequent ECHR jurisprudence: at present a broad approach for all online speech is advocated. In considering domestic legislative reforms reflecting the need to address both defamation and hate speech arising out of the context considered above and this judgment, an appropriate reform may be to consider a specific regulation of hate speech or illegal online content in addition to reform of the Defamation Act.

We therefore suggest that consideration should be given to adopting an equivalent provision to Section 5 of the 2013 Defamation Act UK in Irish law, clarify the application of section 27 of our 2009 Act regarding secondary publishers and agree with the recent recommendation of the Law Reform Commission in their Report on Harmful Communications and Digital Safety that: "reform of online hate speech laws needs to be undertaken as part of an overarching reform of hate crime, as the problems with Ireland's hate crime laws extend beyond the potential difficulty with applying them in the online setting."<sup>12</sup>

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<sup>11</sup> <https://strasbourgobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms-liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/> last visited 21 December 2016

<sup>12</sup> Law Reform Commission, *Report on Harmful Communications and Digital Safety (LRC 116 2016)* para 2.254

### 3. Honest Opinion

Section 20 and 21 of the Defamation Act, 2009, introduced a defence of honest opinion. The defence of honest opinion replaces the defence of fair comment at common law. This position at common law is concisely summarised by Lord Diplock in *Silkin v. Beaverbrook Newspapers Ltd. and Another*<sup>13</sup> whereby the fairness or otherwise of a comment is determined by what right-thinking members of society would view as fair comment. Insofar as it re-phrases the common law position, it has been described as a "...an old friend in new clothes".<sup>14</sup> The impetus behind the substitution of fair comment by honest opinion was that the common law position had become clouded with, in particular, the distinction between fact, and inferences drawn from facts difficult to determine. Section 20(2) provides the essence of the defence:

- (a) 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.

Despite its similarities with fair comment at common law, the new defence arguably does not strike an appropriate balance between freedom of expression and restraint. As Mohan and Murphy argue the new defence is, at least on its face, more restrictive than the position at common law because:

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<sup>13</sup> [1958] 1 WLR 743, 749.

<sup>14</sup> H Mohan & MW Murphy 'Defamation Reform and the 2009 Act: Part I' (2010) 15(2) *The Bar Review* 33, 37. Compare EM Higgins 'The Defamation Act 2009: A Practical Guide to the Substantive and Procedural Reform in the Act' (2010) 28 *Irish Law Times* 137-43 who disagrees: 'Apart from the change in name, the new defence operates in essentially the same manner as fair comment.'

‘... to establish that he/she honestly held the opinion, the defendant must establish that he/she believed in the truth of the opinion at the time of publication. Heretofore, fair comment could be relied upon by showing that the statement represented commentary rather than fact which was fair in an objective sense. Fairness did not have to be reasonable, but rather was simply required to have some minimum level of relevance to certain true facts upon which it was based.’<sup>15</sup>

By introducing a subjective test that requires the defendant to a defamation action to prove that she believed the truth of her opinion,<sup>16</sup> the new definition is arguably more restrictive than the position at common law, which contributes to a chilling effect on public discussion. Whereas the position at common law focused on whether an opinion was motivated by malice, or whether it was one that an honest person could reasonably hold, the new position places a greater justificatory burden on the defendant. It would be preferable to adopt the position of UK Defamation Act 2013, section 3 of which provides a defence of honest opinion as follows:

“Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
  - (a) any fact which existed at the time the statement complained of was published;
  - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
  - (a) a defence under section 4 (publication on matter of public interest);
  - (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

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<sup>15</sup> *ibid.*

<sup>16</sup> s 20(2).



(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.”

The UK approach is preferable as it clarifies the evidential barrier to a more objective approach than that under the Irish 2009 Act.

Secondly, it is submitted that the distinction between fact and opinion as to facts remains unresolved. While the Defamation Act provides a defence of honest opinion, section 21 no more than signals factors to be taken into account when distinguishing fact from opinion. Section 21(1), additionally, seems to shift focus from the reasoning process of the individual making inferences as comment to the verifiability of the opinion held.<sup>17</sup> While it is accepted that distinguishing fact from opinion is a notoriously difficult question, even a philosophical one, it is one that requires urgent clarification by elaboration, because of the legal uncertainty it generates. The delineation of fact and opinion is to a large extent left to the courts, but this is unsatisfactory because uncertainty generates cost which in turn chills debate and more detailed guidance is required. This is particularly relevant in an internet age because, while traditionally a defence used by print-media defendants, it will be increasingly invoked by citizens who publish blogs and contribute to review websites.

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<sup>17</sup> This parallels the subsequent UK Act, namely, the Defamation Act 2013, and certain worrying trends in UK case-law, which seem more restrictive than the position at common law. For a full discussion see J Bosland et al ‘Protecting inferences of fact in defamation law: fair comment and honest opinion’ (2015) Cambridge Law Journal 234, 236-37.