

Submission to Defamation Act Review, 2016

From: David Reynolds, [REDACTED].

Note: I am in correspondence with Kieran Fitzpatrick, another person who has made a submission, and, for your convenience, I have arranged that my first 7 recommendations are almost identical to his, to which I add an 8th and 9th, my own. My adapting the form Kieran Fitzpatrick's first 7 recommendations is only an exercise in consolidation for your convenience. Further below I elaborate on the reasoning for all of these 9 recommendations.

1. Generally, the burden of proof (that a statement is defamatory) needs to be placed on the plaintiff.
2. Damages need to capped, preferably at below €150,000.
3. Politicians, judges, and powerful public figures, should enjoy a lower level of defamation protection.
4. Adverse legal costs should be capped at 30% of any award.
5. Punitive and aggravated damages need to be removed.
6. An honest opinion defence, should only be required to be dependent on facts believed to be true, in good faith, and not on actual proven correct facts.
7. QUANGOS, County/City Councils, and all public authorities should be precluded from suing for defamation as a corporate body.
8. Section 10 of the 2009 Act needs clarification and limit on "number of persons" in a class – could a suit be brought under this section if the number of people is 50? Perhaps a numeric limit of 4 should be applied. Further, the awards offered to the members of this class should be divided between them.
9. In addition to point 3, there should even be absolute privilege to criticize the quality of a court decision.

General Principle:

Right to reputation needs to be balanced against Freedom of Speech and other rights

ALL rights have to be balanced against others. For example, we have a right to privacy, but there are societal rights to public order. Rights to privacy imply that our houses cannot in general be searched. But societal rights to public order make a well-crafted incursion into the right to privacy, in the system of search warrants. If there were no way of searching anyone's house, the greatest beneficiary would be wrongdoers.

Irish Defamation law is extremely imbalanced; it seems to treat right to reputation as an absolute as if it needs no balancing against, for example, Free Speech rights, which are necessary for the exposing of wrongs, and the result is a chilling effect on publication and speech which is ultimately too much to the benefit of wrongdoers.

Many defamation suits in Ireland are successful against people who were actually right in what they said, and who were actually only exposing wrongs. This is a terrible thing. The lesson learned is don't bring up any suspicions about anyone, and in that environment, corruption thrives.

Very rich wrongdoers use defamation law to their advantage in Ireland with the result that it gives them impunity from wrongdoing. I don't think any journalist in Ireland would disagree with what I said.

Elaborating the 8 recommendations

1. Generally, the burden of proof (that a statement is defamatory) needs to be placed on the plaintiff.

Anything else has a chilling effect on Free Speech and is to the benefit of wrongdoers.

2. Damages need to capped, preferably at below €150,000.

Isn't it absurd that if someone knocks out someone else's eye, they could likely pay a lot less than if they said something defamatory about someone? Would a plaintiff really prefer to lose an eye than to have been defamed? Doesn't this expose an imbalance?

And the lack of cap also has a chilling effect.

The damages need to be capped, but the cap could be index-linked. Most caps and fines should be index-linked, so that inflation does not over time damage the value of legislation.

3. Politicians [and powerful public figures], should enjoy a lower level of protection.

This lower level of protection could be the same as 'qualified privilege'.

The Federal Courts in the USA, in Sullivan vs NY Times, determined (in my words) that the US First Amendment right to Free Speech had to make a crafted incursion into the reputation rights

of public figures. They essentially decided that people have what we call qualified privilege to criticize politicians.

This makes sense from the reasoning behind qualified privilege. In a sense, we all are in a position of needing to hear about what politicians, and also other powerful people, are doing.

4. Adverse legal costs should be capped at 30% of any award.

Right now, the legal costs could be much worse than the award. For example, someone could take a defamation action against you and the jury is not happy to award them any more than Euro 1,000, but the adverse legal costs could easily be Euro 500,000.

This means in effect that the effective penalty for a small libel can be huge. This is not fair, and the chilling effect is obvious. Further, it positions a very rich plaintiff to be a bully who cannot be challenged on anything.

5. Punitive and aggravated damages need to be removed.

Aggravated damages are a thoroughly wrong concept; effectively it can mean that a defamation defendant is punished for defending himself/herself.

Punitive damages, while they may make sense in extreme cases, bring too many uncertainties into the process of publication, and have too excessive a chilling effect.

6. An honest opinion defence, should only be required to be dependent on facts believed to be true, in good faith, and not on actual proven correct facts.

I think that one is self-explanatory, so I won't elaborate.

7. QUANGOS, County/City Councils, and all public authorities should be precluded from suing for defamation as a corporate body.

If an individual in such a body is defamed, he or she should be able to sue for it, but not the corporate body itself. Currently it can.

This provision is necessary to properly enable the democratic right of criticism of government.

8. Section 10 of the 2009 Act needs clarification and limit on "number of persons" – could a suit be brought under this section if the number of people is 50? Perhaps a limited number of 4 should be used. Right now, there is uncertainty, and uncertainty is chilling. Further, the awards offered to the members of this class should be divided between them.

Theoretically, if you defame a group containing 50 people right now, all 50 could sue you independently, and you have to pay 50 times the normal damages. While it is unlikely that the court would accept something so absurd, many absurd things are accepted in law, and clarification is needed. The lack of clarity in this provision has a bad chilling effect.

9. In addition to point 3, there should even be absolute privilege to criticize the quality of a court decision.

The reasoning behind this is obvious. Even within the last few years, Irish newspapers have been relatively mute or circumspect about shockingly bad court decisions, likely because a judge can sue for defamation for comments related to his or her decision, and the risks of criticizing are therefore too high. In one case, the due public criticism printed in newspapers only eventually came from another judge, who did have privilege to criticize it openly.

Once a person takes the role of a judge, they should lose any right not to have their decisions criticized. This is the only thing consistent with democracy actually, since the courts are a powerful arm of government (government in the broad sense as the term is used in the USA).