Review of the Defamation Act 2009 - Submission by Journal Media

Journal Media is a digital publisher of news. It publishes TheJournal.ie, one of the main digital sources of news in Ireland[1], as well as sport, entertainment and business news titles. It was set up in 2010 and today employs 68 people, the vast majority of whom are journalists.

Defamation actions are a serious threat to media organisations. The unpredictable level of awards, the very significant legal costs and the lengthy process that defending an action takes make defamation claims one of the most serious dangers to journalists and publishers. This danger undermines the role of Journalism in our society by creating a disincentive in reporting or pursuing certain journalistic endeavours which would be in the public interest. It also puts small and medium media companies at risk of insolvency.

Introduction of the requirement of serious harm

The ease in bringing a defamation claim against a publisher - in contrast to the cost, time and resources required to defend such a claim - creates an imbalance that incentivises financial settlements. This lack of balance also acts as a deterrent to possible resolutions without a drawn-out legal process.

The introduction of a requirement for potential claimants to consider the seriousness of their claim before initiating an action would help reduce unnecessary claims or claims without foundation.

The requirement of serious harm introduced in the Defamation Act 2013 in England and Wales is an example of a recent reform in another jurisdiction that would help address this issue and offer a process that can strike out trivial cases at an early stage.

Section 1 of the Defamation act 2013 reads:

> ***Serious harm***
>
> *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
>
> *(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.*[2]

[1] Digital News Report Ireland 2016 - FuJo Institute, p. 51

[2] Defamation Act 2013 England and Wales. Chapter 26 Section 1
http://www.legislation.gov.uk/ukpga/2013/26/crossheading/requirement-of-serious-harm

If a defendant believes that the claimant's case does not meet the serious harm threshold it can, at a very early stage (i.e. after Particulars of Claim and before the Defence is served) make a preliminary application to determine the issue of serious harm. The court will decide whether the words complained of are capable of causing the claimant serious harm. The burden of proof is on the claimant to establish that the capability exists. If the application succeeds, the defendant can apply to strike out the claimant's case, on the basis that the claim constitutes an abuse of process and/or cannot hope to succeed.

The introduction of a requirement of serious harm like that of the Defamation Act 2013 will reduce the cost of defending cases that don't meet the serious harm threshold. It will also discourage people from initiating claims that are unfounded or that can be resolved without the use of a legal process.

Case management

The duration of the process of a defamation claim is significant and adds to the uncertainty and cost that a defendant has to bear. A proactive case management procedure aimed at expediting and controlling the litigation process would help in reducing the time and resources required.

When compared to England and Wales the duration of the process in Ireland is significantly longer[3]. In the neighbouring jurisdiction, once the defence is filed, the court will fix a date for the Case Management Conference (CMC). Ahead of the CMC, the parties are required to file Directions Questionnaires. The parties must file draft Directions to Trial with their questionnaires, which contain dates for the various stages to trial. The parties are encouraged to agree those dates and if they can't be agreed, the court will set them at the CMC.

As a result, a trial date gets fixed shortly after the Case Management Conference. A trial date is expected to be fixed for about a year to 1.5 years after proceedings were issued.

A similar proactive case management procedure could help expedite the litigation process in Ireland and would likely bring down the cost of litigation.

Level of awards

The sums awarded in defamation cases in Ireland can be very significant (often a multiple of those awarded in neighbouring jurisdictions such as the UK).

[3] While the duration of claims in England and Wales is less than two years in most cases, the duration in Ireland in general is significantly longer and can exceed 5 years - See Appendix

The largest libel award in the history of the Irish state was recorded at €10 million in 2010. In contrast, the UK has a “ceiling figure” for libel damages of around £275,000[4]. There have been no awards approaching that level since the Defamation Act 2013 came into effect[5].

A guide - including caps to the value of defamation awards - would help reduce the severity of risk that a defamation action puts on media companies, without affecting the protection of people’s right to good name and reputation.

User Generated Content

Comments sections, social media, online fora and other internet services fulfil an important role in making opinions and material accessible to the public. This is a recent development and one that brings significant complexity when trying to strike a balance between freedom of expression and the right to a good name and reputation.

Like many online news publications, TheJournal.ie (and the rest of our titles) acts as an online intermediary by providing a comments section that enables readers to express themselves underneath the stories we publish. Clarity on responsibilities and liabilities in comments sections - and similar services provided by internet intermediaries - is required.

In Ireland, the introduction of the new defence of “innocent publication” in the 2009 Act deals with some of the issues arising from the way people use the internet (in particular for internet providers[6]), but has not brought enough clarity for internet intermediaries[7].

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[4] England and Wales Court of Appeal Decision reads “In *John v MGN Ltd* this court offered guidance about practical steps which might be adopted to assist in the assessment of damages. It was said, for example, that jurors could properly be informed as to earlier libel awards approved or substituted by this court, and also take into account brackets suggested by counsel or by the judge as appropriate to the facts before them. Hitherto, the convention had been to refrain from mentioning such figures to a jury. It was also suggested that reference could be made to the current conventional scale of compensatory damages being awarded in respect of pain and suffering in personal injury cases, not because there could be any precise correlation, but merely as one check on the reasonableness of any figure being considered as an award in libel proceedings. It has now become conventional also to recognise in effect a "ceiling" figure, allowing periodically for inflation, corresponding to the current maximum level of damages for pain and suffering and loss of amenity in personal injury cases. In 2002, in *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB), it was taken to be approximately £200,000. A few months earlier, such a ceiling seems to have been recognised as appropriate by Simon Brown LJ (as he then was) in *Kiam v MGN Ltd* [2003] QB 281, 299E-F. The present equivalent, allowing for inflation, and without taking account of any uplift consequential on what are usually described as the Jackson reforms taking effect in April 2013, would be of the order of £275,000. These steps have made for greater consistency in and more predictable libel awards.” Cairns v Modi [2012] EWCA Civ 1382 [25], http://www.bailii.org/ew/cases/EWCA/Civ/2012/1382.html

[5] Fieldfisher Scandalous!, “Claimant awarded ‘top bracket’ defamation damages”, December 13, 2016 http://defamationlawblog.fieldfisher.com/2016/claimant-awarded-top-bracket-defamation-damages/

[6] The 2003 report of the Legal Advisory Group on Defamation recommended that a “*Specific provision should be made to deal with internet service providers”* (Appendix I, Summary of Recommendations, XIV, p. 41) and that “[...] *regard must be had to the new framework created by the entry into force of the E-Commerce Directive*” (Innocent dissemination, 48, p.28)
http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf

Neighbouring jurisdictions recognise the importance of internet intermediary services and the need for clarity in this area. In June 2016, the report on Reform of Defamation Law in Northern Ireland[8] by Dr Andrew Scott said:

> *"In the new media environment, courts have had to grapple with the question of how far internet service providers and other online intermediaries – of whom there is a very significant range – can and should be assimilated to traditional publishers and made potentially liable for defamatory comment posted by others online. This has entailed extensive, and not always consistent, analogising by the courts as they have been presented with entities performing different types of online function."*

The Scottish Law Commission Discussion Paper on Defamation (March 2016) describes how some of the issues around online publication by intermediaries have been addressed[9] and concludes that:

> *"This all may tend to suggest that the law in this area is lacking in clarity in some important respects. There may be an argument that the relevant legislation should be fundamentally reviewed with a view to designing a scheme which is focussed on the activities of internet intermediaries and the extent to which they have control over the published material."* [10]

In England, the need for a defence like Section 5 of the 2013 Act was outlined In the Explanatory Memorandum to the Defamation Regulations 2013:

> *"[However] the current law can lead to website operators automatically removing material on receipt of a complaint to avoid the risk of being sued. This chills free speech, as it means that material which is not genuinely defamatory may often be removed from circulation. It also means that, where defamatory material is posted, action is usually taken against the operator rather than against the person who was actually responsible for posting the statement."* [11]

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[7] Eoin O'Dell, Cearta.ie "Reform of the law of defamation - the defence of innocent publication (Muwema v Facebook part 2), September 2016
http://www.cearta.ie/2016/09/reform-of-the-law-of-defamation-the-defence-of-innocent-publication-muwema-v-facebook-part-2/

[8] Reform of Defamation Law in Northern Ireland, Recommendations to the Department of Finance
https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf

[9] Scottish Law Commission, Discussion Paper on Defamation, Responsibility and defences for internet intermediaries in England and Wales, p. 52
http://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf

[10] Scottish Law Commission, Discussion Paper on Defamation, The need for reform, 7.33 p.55

[11] Explanatory Memorandum to the Defamation (Operators of Websites) Regulations 2013, Policy background, 7.2, p.2 http://www.legislation.gov.uk/ukdsi/2013/9780111104620/pdfs/ukdsiem_9780111104620_en.pdf

Section 5 of the 2013 Act[12] creates a new defence for website operators where a defamation action is brought against it for a statement posted on the website. It provides additional protection for internet intermediaries and encourages disputes to be resolved directly between the complainant and the poster (where possible).

Although it is not clear whether this new defence would make a real difference, the intention, approach and considerations made are certainly worth noting. A similar defence with a simple process that enables complainants to resolve disputes directly with the poster would help support the role of comments sections, internet fora and social media.

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[12] Defamation Act 2013 England and Wales. Chapter 26 Section 5
http://www.legislation.gov.uk/ukpga/2013/26/crossheading/defences