



LAW SOCIETY
OF IRELAND

General Scheme of the Defamation (Amendment) Bill

Submission to the Joint Oireachtas Committee on Justice

4 May 2023

Introduction

1. The Law Society of Ireland (“the **Society**”) appreciates the opportunity to respond to an invitation from the Joint Committee on Justice (“the **Committee**”) to make a submission on the General Scheme of the Defamation (Amendment) Bill.
2. The Society is the educational, representative, and co-regulatory body of the solicitors’ profession in Ireland.
3. This submission has been prepared by the Society’s Litigation Committee, various members of which are experienced practitioners who provide expert legal advice in matters related to defamation law. We have focussed only on areas where we disagree with the legislative proposals or where we have specific comments/concerns in relation to same.

Head 3 - Abolition of juries in High Court actions

4. We disagree with this proposal and maintain that juries should be retained in defamation actions.
5. It is notable that, a week following publication of the *Report of the Review of the Defamation Act 2009* (on 1 March 2022), the Supreme Court delivered judgment in [Higgins -v- Irish Aviation Authority](#). The judgment is of significant relevance on both the assessment of damages and on directions to jurors on damages. As such, the judgment removes many of the concerns raised in the context of arguments in favour of the abolition of juries in defamation actions.
6. The judgment also highlights how jurors had the opportunity to assess the demeanour of witnesses, bringing their life experience and judgement to the task of adjudication, and applying values as members of the community.
7. In the same judgment, Judge McMenamin stated that:

“When the 12 Jurors, as members of the community, came to deal with the issues in this Defamation action, they had before them material which showed the evidence emerged, as well as what it proved. The Jurors had the opportunity to assess the demeanour of the witnesses, and the myriad of other ways in which each Juror could bring their life experience and judgement to bear in the task of adjudication, and public accountability. The Jury could also discern not only how both parties sought to address the issues to be determined, but what was not addressed. The task of the Jury was to apply its values as members of the community”.
8. The pros and cons of *Jury -v- Judge* hearings have been considered in many jurisdictions and are worthy of note as part of this reform of defamation laws.

Trial by Jury – Pros	Trial by Judge – Pros
Jurors too compassionate	Judges are unbiased
Jurors easier audience	Judges are experts
Defamed to community at large/vindication by community at large	Quicker and more efficient
Juries fair to Defendants upholding right to free speech or not	Court of Appeal Est. 2014
Combined wisdom of 12 -v- 1	Circuit Court – no Jury – Damages €75k
Trial by Jury – Cons	Trial by Judge – Cons
Jurors too emotional	Only a Judge decides
Jurors unpredictable	Judge sees all evidence (including inadmissible evidence)
Jurors lack expertise	Judge cannot carry the same weight as a 12 member Jury
Defamation – excessive awards	Judges “live in rarefied atmosphere”
Inefficiencies, failure to understand legal proof of probabilities	Generous/conservative Judges

9. Most common law jurisdictions allow for Jury Trials by right for Civil Defamation cases. Notably, in criminal matters the Supreme Court has held that a Criminal Trial must involve a Jury that is representative across a section of the community – **De Burca & Anderson -v- Attorney General¹**. Similar considerations arise in the context of an assessment as to whether a person’s reputation has been defamed in the eyes of reasonable members of society.

¹ [1976] IR 38

Head 4 - Serious harm test – bodies corporate

10. We disagree with this proposal.
11. It will be difficult to prove a causal link between the alleged defamation and the serious harm/financial loss where any number of external factors could be responsible for that financial loss. It will also increase the costs incurred in prosecuting/defending such claims where 'serious harm' is a requirement.
12. There may be a delay in evidencing financial loss for a corporate entity which (given the one year limitation period to bring such claims) may create difficulties for litigants to the extent that it may create a new barrier to justice.

Head 4 - Serious harm test – public authorities

13. We do not support the proposal for either a serious harm or a public interest test in relation to public authorities being able to bring defamation proceedings.
14. Public policy may favour a position where public bodies could not use State resources to issue defamation proceedings.
15. A defamatory statement can impact the reputation of, and undermine public confidence in, a public authority. In that regard, defamation actions provide such bodies with a mechanism to restore public confidence – particularly in respect of malicious, irresponsible or scandalous comments.
16. A number of defences are already available under the Defamation Act 2009 (“the **2009 Act**”) - e.g. fair and reasonable publication on a matter of public interest at section 26 - which should provide sufficient defences for the media in respect of investigative journalism into public authorities. It can be argued that the 2009 Act already strikes the correct balance between the right to freedom of expression and the right to a reputation/good name.
17. In practice, defamation proceedings by public bodies are rare, and it is difficult to argue that the press or public in this jurisdiction are reluctant to enter into robust criticism and debate on the actions/policies of public bodies.
18. Rights to legal remedies should be available to all bodies, including public bodies.
19. Access to justice for all bodies must be ensured.

Head 4 – Serious harm test – transient retail defamation

20. In the event that the legislature decides to proceed with this proposal, it will be essential to ensure that specific and prescriptive guidance is provided in order that the test has proper effect in practice.

Head 7 – Obligation on Solicitors (alternatives to legal proceedings) and Head 8 – Obligation to consider mediation

21. These proposals are wholly unnecessary given that existing statutory obligations require that solicitors advise clients on alternative dispute resolution mechanisms prior to the institution of legal proceedings.

Head 10 – Choice of Jurisdiction

22. We do not support this proposal which essentially amounts to a threshold provision, requiring a court to consider the appropriateness of Ireland as a forum for a defamation action, where the plaintiff has more substantial links with another jurisdiction.
23. There appears to be no clear data on whether there has been an increase in the number of defamation cases brought in Ireland by plaintiffs based in other jurisdictions.
24. Any changes to the requirements of the [Brussels I Recast Regulation](#) appear to be a matter for EU (as opposed to domestic) law.
25. [Ireland for Law](#) is actively encouraging the bringing of legitimate cases in this jurisdiction.
26. There is a risk that this would result in increasing costs and delays as it may require preliminary applications to establish jurisdiction.

Head 16 - Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)

27. Defining what is reasonably responsible by a Defendant in verifying a relevant fact or issue could prove difficult, or impossible.
28. We agree that this area requires simplification to ensure that this defence is available in the course of proceedings however, we do not consider that the UK model is necessarily the correct example to adopt.

Head 20 - Damages

29. We agree with these proposals.
30. Section 31 of the 2009 Act should be amended to keep pace with common law principles and should include factors set out in Head 20 which are not already captured in section 31.
31. In assessing whether or not awards for damages in defamation cases are excessive, appellate courts currently consider the following:
 - the gravity of the defamation;
 - the effect on the plaintiff;
 - the extent of the publication;
 - the conduct of the defendant; and
 - the conduct of the plaintiff (where relevant).

32. In the 2014 case of [Leech v Independent Newspapers](#), McKechnie J. stated:

“The following are some of the factors which will require consideration in any assessment of damages in this type of case, to be viewed in the context in which such matters have arisen:-

- *The extent of the wrong, of the harm inflicted and of the injury done;*
- *The damage to one’s reputation and standing in the eyes of reasonably minded members of the community;*
- *The restoration of that reputation and standing to a degree that will withstand any future challenge by any random member of the public who suspects that there is “no smoke without fire”;*
- *The degree of hurt, distress and humiliation suffered and any other aspect of one’s feelings that has been affected;*
- *The extent of the intrusion into one’s personal, business, professional or social life, or any combination thereof, to include the invasion of one’s privacy;*
- *Any other harmful effect, causatively resulting from the wrongdoing, not above mentioned;*
- *The gravity of the libel;*
- *The extent of the circulated publication;*
- *The response and reaction to the allegations as made; retraction and apology; reaffirmation of truth and justification – even with different meanings to those as pleaded;*
- *The overall conduct of the defendant, including those examples identified in Conway as constituting aggravation and even extending to matters of exemplary condemnation on occasions; and*
- *Any other factor specific to the individual case which falls within the parameters of the principles as outlined.”*

33. In [McDonagh v Sunday Newspapers](#), Denham C.J. noted that *“it is helpful to keep in mind factors such as, including but not limited to, the value of money, the average wage, and the cost of a car”*. She also suggested that while the awards in personal injury cases have some relevance, the fact that high special damages can be awarded in cases of serious injury may cloud the comparison. She further noted that, in assessing the issues of proportionality and reasonableness of damages in the future, the 2009 Act is relevant.

34. Other potential paths of reform were considered to address the issue of damages which were ultimately not recommended. We agree with the exclusion of these items which include:

- Providing for a cap on damages (likely to be dealt with by the bands set out by the Court in *Higgins*);
- Drawing up a book of quantum or guidelines (also likely to be dealt with by the bands set out by the Court in *Higgins*);
- Setting out rules in relation to closing instructions to a Jury; and
- Requiring the plaintiff to explicitly set out the quantum of the damage caused (already dealt with in the Plaintiff’s evidence by their legal representative making submission to the Court on damages).

Conclusion

35. We appreciate the extensive process which has been undertaken in order to bring about much needed reform to this area of law and practice and will further appreciate the Committee's consideration of these submissions in advance of next stage of the legislative process.
36. In that regard, we remain available to assist the Committee in any way we can.

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