

Defamation Law and the 2009 Defamation Act

Introduction

In the rather drawn-out lead up to the original publication in Bill form of what would become the Defamation Act 2009, there had been considerable speculation as to what the new law would represent in terms of an ideological shift in Irish defamation law. The reports of various reform and advisory groups – the Law Reform Commission and the Legal Advisory Group on Defamation for example – over twenty years had appeared to recommend changes that would operate to the benefit of defendant publishers in these cases; and indeed when the then Minister for Justice, Mr McDowell had looked to construct a new defamation statute, it appeared likely that such changes would occur.

By contrast, there were also many voices arguing that the nature of *some* contemporary journalism was such that, in fact, what was needed was a heightened protection *against* defamation and indeed against related concerns such as invasion of privacy. In the heel of the hunt, and in the context of oversight by two other Ministers for Justice, the Defamation Act, in its final form, generated virtually no ideological shift. Rather it codified the law, taking into account important developments within the courts and it introduced various measures that were, arguably, aimed at the expeditious resolution of defamation actions, rather than anything else.

One can understand the reticence on the part of lawmakers radically to alter the way in which competing rights are balanced within the law. In the first place, there is a clear constitutional tightrope to be walked. Unlike, for instance, the European Convention on Human Rights which does not explicitly protect the right to a good name (but in the context of which, rather, protection of reputation has been viewed either as a potential justification for restricting the right to freedom of expression (under Article 10(2) or, in particular cases, as an element of the right to privacy under Article 8), the Irish constitution lists the right to a good name as one of the very few personal rights that should ‘in particular’ be protected. In other words defamation law, which of course exists for the *purpose* of protecting reputation, must appropriately balance the two recognised constitutional rights of reputation and free

speech. In the second, and perhaps more importantly still, there is no settled or demonstrable consensus on whether one of these rights is more important than the other, and there will be people and cohorts of people who will vociferously argue in favour of one or the other.

This is a crucial point and one worth bearing in mind. The arguments in favour of heightened journalistic freedom are well canvassed and media representatives are in a unique position in terms of being able to disseminate these arguments extremely widely and, indeed, to present them as if they were settled and incontrovertible objective propositions. This is not in any sense to undermine these arguments, it is simply to say that the most common defendants in defamation actions (media outlets) who naturally have a high vested interest in defamation law being more 'publisher friendly' will also have the perfect platform to mainstream their arguments throughout Irish society. On the other hand, there *is* another side to the story. The impact of being the victim of a defamatory publication can be horrific - both in terms of *societal* impact and also in terms of psychological well-being. It may, in other words, be all very well for the media to stress their role as the 'bloodhounds and watchdogs' of society (and in very many cases this is what they are, and society is indebted to them), but many will balk at the idea that the law, in striving to give greater protection to the role of investigative journalism in rooting out corruption, might also give greater protection to the publication of salacious and untrue stories about those in the public eye or, indeed, to the more localised publication, by non-media publishers, of malicious gossip about others.

These two diametrically opposed ideological positions about the appropriate direction of Irish defamation law are, thus, deeply held and of course neither can be proved to be true but both are compelling. In the circumstances, in other words, it is understandable that the legislature, in enacting the 2009 Act, eschewed the idea of making a major ideological shift in Irish defamation law.

Finally, by way of introduction, there were two further things that the Defamation Act did *not* do, that it might possibly have considered doing. First, it retained the jury in High Court defamation actions – and thus defamation is one of the very few tort actions where a jury is involved. Many of the concerns that people have with Irish defamation law – its unpredictability and the very high quantum of damages that can be awarded in defamation cases – arguably stem from this fact. I return to this issue later in this paper. Secondly, there is a strong argument that the development of internet technology, for any number of reasons,

has simply rendered long-standing principles of defamation law obsolete and thus that a defamation law should construct bespoke rules for online forms of publication (rules that might deal with issues of liability of, for example, search engines for publication, jurisdiction, and quantum of damages). The 2009 Act, however, did not do this – but rather spoke of publication and defamation generally with internet publication being simply another category of publication. Again I return to this issue later.

As such, the Act was not particularly revolutionary but represented, I would submit, a useful tidying up of the law and the introduction of a number of mechanisms aimed at incentivising speedy resolution of defamation cases. Unsurprisingly, therefore, the caselaw arising under the Act has also not been particularly revolutionary. Of course there are interesting judicial observations in relation to defamation generally, and indeed useful and interesting observations in relation to matters that impact on defamation cases but that are not covered by the Act (for example in relation to applications for discovery and so on). But I am conscious that this conference relates to a review *of the Act*, and I would suggest that in so far as this review is concerned, there are a few elements of the Act that merit attention arising out of caselaw, but not very many. Of course there are also the far broader ideological issues considered above, and the question of whether the review of the 2009 Act should be about more than merely tidying up issues that have arisen in the caselaw, but should also take these issues on.

As such, I am going to structure this paper in two distinct sections. In the first, I will look at what I see as the significant issues of interpretation that have arisen during the lifespan of the 2009 Act that may signal the need for reform of particular sections. Obviously this is not a review of recent developments in Irish defamation law generally, nor indeed, more specifically, an account of how flesh has been put on the bones of various terms of the Act. Rather, and given the nature of the reforms that are under discussion, it is an assessment of particular terms of the Act may, possibly, have been shown up as needing reform or clarification as a result of judicial developments.

In the second, I will look at some broader ideological concerns that might inform a more far-reaching reform of the law. The one issue that I will not deal with in this context, however, is the treatment, by the Act, of the crime of blasphemy. No doubt the outcome of last year's constitutional referendum on the subject will be in the minds of reformers, but s.

36 of the Act really was a dead letter law anyway, and to the extent that it is not an aspect of defamation law, it would not be appropriate for me to deal with it in this context.

Section 1: Judicial Developments since the 2009 Act

As the number of defamation cases whose cause of action accrues since the commencement of the Act increases, so, logically, there have been more judicial interpretations of the terms of the Act. In most cases, however, whether or not this interpretation has been controversial, certainly it has not signalled the need for statutory reform. Thus for example, there has been a good deal of caselaw dealing with the question of when a defamation action might be struck out for delay¹, because it is frivolous, vexatious or discloses no cause of action², or for want of prosecution or abuse of process³, and, in particular, of whether and when a discretionary extension to the limitation period under s. 38 of the Act might be warranted⁴. There have also been useful judgments dealing with issues such as when a judge might strike out claims that particular words bear alleged defamatory meanings under s. 14; the single meaning rule;⁵ the concept of an occasion of privilege for the purposes of the defence of qualified privilege⁶; whether the meanings of one publication can be contextualised by other earlier publications;⁷ the issue of what might be termed ‘partial truth’ under s. 16(2) of the Act⁸; the operation of the defence of innocent publication;⁹ the manner in which the defence of absolute privilege protects fair and accurate reporting of court judgments;¹⁰ and complexities surrounding the

¹ *Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8;

² *Jones v. Coolmore Stud* [2019] IEHC 652; *Kelly v. Irish Allied Bank plc* [2019] IESC 72; *VK v. MW and Others* [2018] IECA 290; *Barrett v. Joyce* [2018] IEHC 823

³ *O’Beirne v. Bank of Ireland Mortgage Bank and Others* [2016] IEHC 364; *Corrigan v. Kevin P Kilrane & Co. Solicitors* [2017] IEHC 488

⁴ *Morris v. Ryan* [2019] IECA 86; *Oakes v Spar (Ireland) Ltd* [2019] IEHC 642; *O’Brien v O’Brien* [2019] IEHC 591; *O’Sullivan v. Irish Examiner Limited* [2018] IEHC 625 *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684; *Hynes v. Allied Irish Banks plc* [2018] IEHC 229

Rooney v. Shell E&P Ireland Ltd [2017] IEHC 63; *Watson v Campos and MGN* [2016] IEHC 18

⁵ *Speedie v. Sunday Newspapers Ltd*

⁶ *Kinsella v. Kenmare Resources plc* [2019] IECA 54

⁷ *Gilchrist v. Sunday Newspapers Ltd & Others; Rogers v. Sunday Newspapers Ltd & Others* [2017] IECA 191; *Bradley v Independent Star Newspapers* [2011] 3 IR 96

⁸ *Speedie v. Sunday Newspapers Ltd* [2017] IECA 15

⁹ *Jones v. Coolmore Stud* [2017] IECA 164

¹⁰ *Tracey v. Irish Times Ltd and Others* [2019] IESC 62

defence of qualified privilege¹¹. These judgments put flesh on the bones of the statutory terms but, to my mind, do not raise concerns in relation to the terms themselves.

On the other hand there are three areas where this is not the case, but rather where the interpretation of particular sections of the Act can be seen as throwing up issues that might warrant even minor changes to the sections in question.

1. The Offer of Amends Procedure

It is my view that this is the stand-out aspect of the law that, in light of judicial developments, merits legislative consideration.

It will be remembered that, under s.22 and 23 of the 2009 Act a new statutory defence of ‘offer of amends’ was introduced¹². The ‘defence’ is, in effect, a statutory mechanism incentivizing settlement: thus a defendant makes an offer of amends, which will include an offer to make an apology/correction and an offer of compensation. If the Plaintiff accepts this offer (and under the act the consequences for not doing so save in very limited circumstances is that the Defendant will have a full defence) then [s]he may either agree with the compensation offered or, if [s]he does not, then it falls for determination by *the Court* which will take into account the extent to which the harm suffered has been or will be mitigated by the apology and correction of the Defendant. In both Britain and Ireland, the approach has been for the Court to assess what the damage *would normally* be worth and then to discount it in percentage terms having regard to the effectiveness of the defendant’s actions in mitigation¹³.

The critical issue for interpretation is whether, under ss. 22 and 23 of the 2009 Act, when an offer of amends has been made and accepted, but where there is no agreement as to the compensation to be paid, the determination of this important issue should be made by a judge sitting alone or by a jury. This is a question on which the 2009 Act is, regrettably, uncertain, in that it simply says that this should fall to be determined by ‘the Court’. The problem, however, is that, as is discussed below, there is no singular definition of the term

¹¹ *Nolan v. Laurence Lounge (t/a Grace’s Pub)* [2018] IEHC 352

¹² The 1961 Act had contained a defence called offer of amends, but this was entirely conceptually distinct from the defence in the 2009 Act.

¹³ *Ward & Anor v. The Donegal Times Limited* [2016] IEHC 711; *Christie v. TV3 Television Networks Limited* [2017] IECA 128

‘the court’ in the 2009 Act; on occasion it refers to a jury but, on other occasions, it *must* be taken to refer to a judge alone.

There are arguments both ways on this issue. Thus the English model on which the Irish law is based was clearly aimed at *incentivising* use of the procedure as an alternative to full-blown litigation. In reality, the biggest incentive for a defendant to make such an offer in many cases, will be so that it can avoid a situation where the quantum of damages to be awarded is to be determined by a jury. On the other hand, the relevant English law, unlike the Irish, specifically made it plain that this *was* a matter for a judge only. S.23, in its treatment of the issue of assessment of damages, by contrast, refers to this as being a matter for ‘the Court’ – in other words it is not explicit that the jury is excluded from this aspect of the matter. Alternatively, it can be argued that if these matters *was* intended to be determined by a jury, then s.31 of the 2009 Act (dealing with damages) would logically contain some guidance on how a jury was to be instructed in such cases. After all, if it is occasionally difficult to direct juries on the issue of quantum of damages *simpliciter*, it will surely be even *more* difficult also to direct them on how their initial calculation of damages has to be discounted in percentage terms having regard to what the defendant has done. As against this, however, the issues referred to in the previous sentence are, clearly, questions of fact, so perhaps the tribunal of fact in High Court defamation cases (the jury) *should* be entrusted with these difficult evaluations. Finally, it might be possible to infer the legislative intention on this point from the fact that it ‘borrowed’ virtually the entirety of the English statutory defence, while excluding the specific reference to this question being resolved by a judge sitting alone.

In other words, there are diverse arguments relating to how the section should be interpreted, that would both support and oppose the idea that the assessment of damages in this context should be for a judge sitting alone. There is, therefore, simply no certainty as to what is required by the section. As Hogan J, rather delicately put it in the Court of Appeal in *Higgins v. Irish Aviation Authority*, the law on this point ‘...might well have been clearer’.¹⁴

Hogan J, in this case, did not agree with the High Court that the difference between the English and Irish statutes was of particular relevance. Rather he preferred to approach the matter taking, as his starting point, his own decision in *Lennon v. Health Service*

¹⁴ Para 2

Executive.¹⁵ In that case, and having traced the development of the role of the jury in Irish tort law generally and defamation law specifically, he had concluded that it was not possible for a High Court judge, in effect, to abrogate that role, even if, in pragmatic terms, there would be merit in doing so. In other words the notion that a jury would determine questions of fact in a High Court defamation case, unless it was clearly specified that they were *not* to, was the paramount starting point. Moreover, this linked to the presumption against unclear changes in the law that should guide the process of statutory interpretation¹⁶. In other words, according to Hogan J, if the starting norm is that juries will try questions of fact in defamation cases, then this could only be interfered with by a law that, quite clearly, made it plain that a change was intended – and that was not the case with s.23. As he put it¹⁷

All of this is really to say that if the Oireachtas wished to abrogate the right to jury trial in respect of the assessment of damages in s. 23(1)(c), then, given the long standing and embedded nature of that right, clear statutory language would have been required for this purpose. It is only in that way that the intention of the Oireachtas to effect such a change - if that was indeed the intention - could have been plainly ascertained from the language of the 2009 Act as a whole. In the absence of such language, I find myself coerced to conclude that the plaintiff's right to a jury for the purposes of assessing damages in cases coming within s. 23(1)(c) remains unaffected by the changes effected by the 2009 Act.

In its consideration of the matter (on appeal from the Court of Appeal), the Supreme Court started by assessing the context in which the term was used within s. 23 of the Act. So, for example, s. 23(1)(a) of the Act refers to the making of an order by 'the court' to enforce compliance with the terms of the offer of amends. Naturally this could only refer to a judge sitting alone, and thus to the extent that the words of a statute gain meaning from context, this might suggest that the term 'the court' throughout s.23 should be deemed to refer to a judge rather than a jury¹⁸. Equally, as the Court noted¹⁹ there are other sections of the Act where the reference to 'the Court' might invariably involve *either* a judge or a jury (for example in the application of the defence of honest opinion under s. 20 or the defence of fair and reasonable publication on a matter of public interest under s. 26 or the defence of

¹⁵ [2015] IECA 92

¹⁶ Para 32

¹⁷ Para 36

¹⁸ Para 20. For similar analysis in the context of s. 23(1)(b), see Para 21.

¹⁹ Paras 22 *et seq.*

innocent publication under s. 27). Furthermore there are sections where the reference to 'the Court' could only apply to a judge sitting alone (for example in the making of correction orders under s. 30). Finally, under s. 31(8), in dealing with damage awards, it is expressly provided that, in a High Court case, the reference in the section to 'the Court' means a jury (albeit that as Dunne J in the Supreme Court rightly pointed out, even this was slightly odd given that assessment of damages in defamation cases where there is a jury present is always a jury function anyway)²⁰.

The analysis by the Supreme Court in *Higgins* suggests a potentially important necessary reform of the Defamation Act that is more general than in the specific context of the offer of amends defence to which we will return shortly. As Dunne J put it 'It seems to me that the one thing that can be said about the use of the phrase "the court" is that there is a lack of consistency in the approach to the provision of a definition of "the court" in the course of the Act'²¹. It might be respectfully suggested that any amended version of the Act should make it clear from the outset that references to "the Court" would refer either never to the jury or always to the jury unless the opposite was expressly specified. Certainly this would avoid confusion.

What though of the specific question at issue of whether the assessment of damages when the offer of amends defence is pleaded should fall to be calculated by a jury? Dunne J, in the Supreme Court, had concluded that because the term 'the court' was not used uniformly throughout the Act, therefore its meaning in s.23 could not be interpreted by reference to the rest of the statute.²² Rather she took as her starting point the reality that assessment of damages in High Court defamation actions has always been a jury function. Like Hogan J in the Court of Appeal, she reasoned that, in the absence of an explicit statement that juries did not have a role in assessing damages under s 23 (of a kind that was present in the equivalent English law), it must be concluded that they *did* have such a role.

It is submitted that whereas the reasoning of Dunne and Hogan JJ is unimpeachable, nonetheless their conclusion does mean that the defence of offer of amends is very considerably less attractive than its English counterpart from a defence perspective (and of course it is only pleaded by a defendant, thus if it is not useful for the defence then it is not

²⁰ Para 32

²¹ Para 32

²² Para 33

useful *per se*). It is not necessarily a bad thing that defendants should not have a mechanism available to them that, in effect, coerces plaintiffs away from a full hearing of their cause of action, but it does beg the question of why the defence was included in the statute if it was not intended to be useful. In any event, it can be strongly argued that clarification on this point would be most welcome as part of the Department of Justice review into the law. As Dunne J concluded²³

Undoubtedly, the Act of 2009 was intended to reform the law of defamation by, *inter alia*, the introduction of a new “offer of amends” procedure aimed at facilitating early and speedy resolution of defamation proceedings. Apart from the lack of clarity about the central issue which has led to these proceedings and appeals, it is not at all clear from the provisions of the Act of 2009 how it was envisaged that the new procedure was meant to work in practice to achieve its objective. It is surely desirable that where changes are proposed which may have very far reaching effects, that they should be carefully tailored to achieve their intended object and be clearly expressed. These proceedings, on an issue of statutory interpretation of one provision, which could have been resolved decisively one way or another by a single phrase, have been the subject of hearings in three Courts over a period of more than two years and cannot claim to have resolved all the issues raised by the limited statutory delineation of a novel procedure, having potentially far reaching impact on defamation proceedings. If this matter is to be the subject of further review or amendment it would be very desirable that consideration is given to setting out very clearly the mechanism envisaged and how it would function in a range of different circumstances

2. Aggravated Damages

In *Ward v. The Donegal Times* the High Court dealt with the question of whether a subsequent publication that carried the same imputation as the publications that were the subject of the current action could be taken into account in determining whether aggravated damages should be awarded in the case.

Prior to the coming into force of s. 32 of the Defamation Act 2009 this was a relatively complex question. On the one hand, at common law, if the defendant’s conduct since

²³ Para 49

publication had compounded the harm generated by the publication this could result in aggravated damages – and, in the current case, the subsequent publications had certainly done so. On the other, however, subsequent publications can, of course generate their own causes of action (and their own defences) and hence, at least in theory should not factor into the damages analysis in previous cases. Thus the tendency was to see subsequent publications as relevant but only in assessing malice specifically or the state of mind generally of the publisher as it published the initial publication.²⁴ This is why, in *Ward* the Court declined to award any kind of aggravated damages for the subsequent publications but, quite correctly, allowed them to play into the analysis (under s.23 of the 2009 Act) as to the extent to which the defendant's offer of amends should result in the putative quantum of damages in the case being discounted.

What is surprising, however, is the fact that, in *Ward* there does not appear to have been any consideration of the significant change which s.32 of the 2009 Act appears to have wrought in this area. S. 32 provides as follows

“Where in a defamation action

- (a) the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement, and
- (b) the defendant conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement,

the court may, in addition to any general, special or punitive damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as "aggravated damages") of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury.

This is, it is submitted, a very significant change. Of course aggravated damages in defamation cases could always be awarded having regard to the manner in which a defence was conducted; what s.32, however, does is to say that it is *only* this that can warrant such an

²⁴ Para 50

award being made; in other words, the motivation of the defendant in publication and further post-publication events that do not relate to the defence of a defamation action are simply not relevant to this question under the Act.

The question that arises, therefore, is whether the common law approach to aggravated damages survives the enactment of the 2009 Act. Some support for this suggestion can be found in the decision of the Court of Appeal in *Kinsella v. Kenmare Resources*. In the course of a lengthy judgment that deals very helpfully with a number of issues of complexity in defamation law, Irvine J, in assessing whether the relevant publication merited an award of aggravated damages concluded as follows²⁵

Whilst aggravated damages are now dealt with under s. 32(1) of the Defamation Act 2009, at common law any adverse conduct on the part of a defendant between publication and trial that increased the harm suffered by the plaintiff might result in an award of aggravated damages. Relevant in this regard is the motive and conduct of the defendant. If there is evidence of malice or evidence to show that the defendant acted in a high-handed or malevolent manner with the result that the plaintiff's self-esteem was further damaged, then aggravated damages may be awarded. An award of aggravated damages may also be justified if the plaintiff is subjected to an unduly prolonged or hostile cross-examination or if the trial is managed by the defendant in a manner calculated to attract further widespread publicity to the detriment of the plaintiff. These are but a few examples of the type of circumstances that may attract an award of aggravated damages...

Finally, the overall damages figure awarded by the jury should reflect the harm suffered as a result of the initial wrongful act and also the extent to which that harm was aggravated by subsequent actions of the defendant

The cause of action in this case, of course, preceded the commencement of the 2009 Act – and it may be that Irvine J was simply noting that, whereas this case would be assessed under the common law vision, equally from here on the concept of aggravated damages would be determined by the terms of s. 32. By contrast, however, *Ward v Donegal Times* concerned a matter where the cause of action succeeded the coming into being of the Act, but the approach in this case implies that the common law concept of aggravated damages may still have role to play. This is, perhaps, something that would merit clarification in any reform of the law.

²⁵ Paras 130 and 132

3. Burdens of Proof in relation to Declaratory Relief, Injunctive Relief, Correction Orders and Summary Disposal

One of the principal developments, at least in theory, arising out of the 2009 Act was the creation of new forms of relief for plaintiffs. Thus, under s.28, s/he might look for declaratory relief in the Circuit Court (and in circumstances where s/he would be foregoing his or her chances of receiving damages) and, for the first time, a judge could make an order (under s.30) requiring a particular correction to be made to the relevant publication. In addition, either party could apply for summary disposal (s. 34) and there was specific provision for the rules surrounding the grant of injunctive relief (s. 33).

Significantly, the criteria for granting the reliefs in question differ. Thus the sections variously speak of the Court being of the opinion that a threshold has been met²⁶, being satisfied thereof,²⁷ or reaching a finding to that effect²⁸. Whether these differences in terminology meant, or should mean that different standards were envisaged is unclear. In *Gilroy & Byrne v. O'Leary*²⁹, as is discussed shortly, Allen J concluded that the same test should apply under all sections. This is, arguably, a very sensible conclusion, but it remains puzzling why, if this *is* the case, different terminology was used.

More problematically, the test for Injunctive relief and summary relief is that 'the defendant has no defence to the action that is reasonably likely to succeed'. By contrast, declaratory relief and correction orders will only be made if 'there is no defence to the action'. The absence, in these two latter contexts of the words '...that is reasonably likely to succeed' would seem to imply that if there was a defence that was not reasonably likely to succeed – indeed even a defence that was fanciful or specious – then the relief could not be granted. Naturally, however, this greatly limits the potential relevance of these reliefs – in that they can, unless consented to, be resisted simply by the defendant offering up any kind of defence – even one that is not likely to succeed. Moreover in *Lowry v. Smith*³⁰ Kearns J, speaking of both the concept of summary dismissal *and* the concept of declaratory relief under the Act

²⁶ S. 33

²⁷ S. 34, s. 28

²⁸ S. 30

²⁹ [2019] IEHC 52

³⁰ [2012] IEHC 22

stressed that a high threshold had to be met by the applicant and that s/he as plaintiff, would have to satisfy the Court that the Defendant had no arguable case to suggest that his or her defence either was reasonably likely to succeed (for the purposes of summary disposal) or that s/he had *any defence* (for the purposes of declaratory relief).

What this means is that there are huge obstacles for a plaintiff seeking any of these four reliefs. First, the threshold in all cases is very high, though, Kearns P suggested that in *Lowry*, in the case of declaratory relief/correction orders the test ‘...must necessarily be at the very highest, being that of no defence at all’³¹. Secondly, Kearns P made it clear (though I am not sure that this is necessarily clear from the terms of the sections) that the burden here rests with the plaintiff – that s/he must, in other words, prove the absence of an arguable case to be made by the defendant (something which may simply be impossible for example where applications for interlocutory injunctive relief is concerned).

The issue was recently discussed by Allen J in what, I would suggest, is an excellently reasoned and very detailed judgment in *Gilroy & Byrne v. O’Leary*.³² After much deliberation and a very interesting review of authorities, Allen J concluded, notwithstanding the difference in language used in the sections, the tests under ss. 28, 30, 33 and 34 (that is for all of the reliefs mentioned above) were in fact the same and, because of the seriousness of what was at stake, would necessarily entail the applicant for the relevant relief demonstrating that the statement was defamatory and that the defendant had no defence³³. Again there is great sense in this proposition, but it does beg the question of why the words ‘reasonably likely to succeed’ were used in some sections but not others if they were *not* intended to have some impact. Furthermore, in Allen J’s view, the threshold test for applications for injunctive relief under the Act was the same as that which had previously existed under common law³⁴.

There are thus two concerns that might be raised in relation to these four sections that might profitably be addressed as part of any amendment of the legislation. In the first, the terminological differences as between the four sections has caused confusion and, *per* Allen J’s approach discussed above, may now have no impact. It would be helpful for this

³¹ Para 33

³² [2019] IEHC 52

³³ Para 55

³⁴ Para 58

confusion to be remedied. Secondly, the tests for all four forms of relief is extremely high under the Act and has, I would suggest, been rendered even higher as a result of judicial interpretation. This may well be the legislative intention, but if so, one can reasonably wonder why the new reliefs were introduced given how difficult they are to obtain. Again this is something to which legislative attention might be directed in any review of the Act.

Finally, and tangentially, it is notable that, whereas under s. 34, a plaintiff can obtain summary disposal of the action if s/he can show that the material is defamatory and the defendant has no defence that is reasonably likely to succeed. The defendant by contrast can only obtain summary disposal if s/he can show that the statement is not reasonably capable of being found to have a defamatory meaning. There is no provision, in other words, for a defendant to obtain an order for summary disposal if s/he can show that the plaintiff was manifestly not identified in it, or the statement was manifestly not published, or if there is some defence that must, inevitably succeed. It might be worth considering whether this is something that should be included within the Act. Indeed more generally it is perhaps, unclear, how to reconcile the summary disposal power of the Court under s. 34 *as it benefits defendants* with its inherent power to strike out an action as an abuse of process or as manifestly ill-founded.

Section 2: Broader Potential Changes to the Law

These then, as I see it, are the major interpretative issues that have arisen out of the operation of the Defamation Act within the Courts and that merit evaluation in any reform of the law – that is, they disclose problems with the wording of the law that have either generated uncertainty or have led, arguably, to the law operating in a way other than was intended. They are, however, reasonably discrete areas and certainly if they and they alone were to be tidied up, this would represent nothing in the way of any far reaching reform. In the following section, however, I consider four potentially more significant issues that might be considered. In the case of one such reform (the specific issue of internet publication), I believe that this is necessary irrespective of which ideological slant one approaches the concept of defamation law from. The others, however, are mentioned because they represent widely expressed

concerns. I do not necessarily agree with these proposed suggestions, but rather mention them simply because they *are* reasonably widely expressed.

1. Specific Rules for Internet Publication

There are a number of contexts in which the concept of internet publication has received specific consideration in recent and relatively recent court judgments. In *Tansey v. Gill*³⁵, the High Court expressed concerns at the greatly enhanced risk of damage to reputation arising out of the nature of internet publication – instantaneous and world-wide in its nature and scope. Jurisdictional concerns thrown up by internet publications were dealt with in *eDate Advertising GmbH v. X and Martinez v. Societe*³⁶ and *CSI Manufacturing Limited v. Dun and Bradstreet*³⁷. The very complex question of the liability of non-author publishers (search engines, website operators, newspaper portals, social media outlets and so on) was dealt with in *Fred Muwema v. Facebook (Ireland) Limited*³⁸. Indeed in this context, the decision of the European Court of Human Rights in *Delfi AS v. Estonia*³⁹ is particularly stark for its conclusion that the obligation on states to protect reputation and private life is such that they *must* provide a remedy for the victims of online publications that will entail imposing liability on ‘non-author publishers’ in circumstances where the identity of the poster of defamatory material cannot be determined.

Of the issues raised above, the fact that s. 31 of the 2009 Act, in dealing with damages awards, specifically lists the extent of publication as a relevant factor in assessing quantum should at least in theory mean that concerns with the inherent breadth of internet publication would be covered (albeit that this might conceivably be expressly dealt with in any recast version of the 2009 Act). Issues of jurisdiction will, presumably, continue to be dealt with at a European level, though it is notable that s. 9 of the United Kingdom’s Defamation Act of 2013 makes specific provision that, in the case of publishers not domiciled in the UK or in another EU member state, or in a state that, for the time being, is not a party to the Lugano Convention, the Courts should only accept jurisdiction in defamation cases if it is satisfied that

³⁵ [2012] IEHC 42

³⁶ [2011] EUECJ C-161/10

³⁷ [2013] IEHC 547

³⁸ [2016] IEHC 519

³⁹ [2015] ECHR 586

the UK is the most appropriate place for the case to be heard. It may be that it would be appropriate for such a step to be considered in Ireland.

The standout issue, however, concerns the potential liability of website operators, search engines and so on for content posted on the internet. The position of internet service providers appears to be clear under the E-Commerce Directive/Regulations⁴⁰, but the point is that there are multiple other kinds of entity that are involved in the publication process online but that have no realistic control over material posted by others. Indeed in this regard one might include not merely businesses involved in internet provision, but also private individuals who have, for example, Facebook pages on which other people might make defamatory comments. To some extent it can be suggested that the defence of innocent publication under s. 27 of the 2009 Act could, in theory, cover this, but I would submit that the application of this defence to the issue of online publication poses huge interpretative difficulties⁴¹. On the other hand, because the development of internet technology is so rapid and so unpredictable, any effort to specify in any detail the parameters of 'secondary responsibility' for internet publication runs the risk of becoming out of date very quickly.

The response in the 2013 UK Act is, perhaps instructive. S. 5 of the Act provides as follows:

Operators of websites

(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

⁴⁰ Directive 2000/13/EC; S.I. 68 of 2003.

⁴¹ This was the approach in *Fred Muwema v. Facebook (Ireland) Limited*. I respectfully criticize the application of the defence to the facts of this case in

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may-

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which-

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section-

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section "regulations" means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

In effect what this section does is to say that, where a defamatory comment is posted on a website and the poster is unidentifiable, the website operator is obliged to remove the statement expeditiously once a complaint has been made. In theory it may be suggested that such an approach would be an appropriate one for any amended version of the 2009 Act to take – and especially if the breadth of the section was extended so that it applied not merely to website operators but to other entities that could be regarded as part of the publication process but were not the posters of the defamatory statement. Having said that, there are, perhaps two objections to such a step. First, for many search engines and website operators, there may be contractual difficulties with simply removing material about which a complaint has been made and in the absence of any definitive proof (typically in the form of a court judgment) that the material *was* indefensibly defamatory. Secondly, and from the plaintiff's perspective, the reasoning of the European Court in *Delfi AS v Estonia* suggests that merely removing defamatory material from a website after a complaint has been made may be insufficient to protect the privacy or good name of the alleged victim of the defamation (in *Delfi*, after all, the newspaper portal removed the offending post as soon as a complaint was made about it). In other words, it is arguable that a defence of the kind outlined in s. 5 of the UK Act, if it were to be European Convention compliant, should only be available to defendants if (a) they had some mechanisms in place to take reasonable steps to prevent defamatory postings in the first place and (b) if such reasonable mechanisms could not have prevented the postings in question.

2. The Issue of Damages

For obvious reasons the quantum of damages that can be awarded in defamation cases is a constant concern *inter alia* for the media. It is argued that this is a factor that can discourage public interest journalism and particularly in an era when print journalism is under unprecedented financial pressure. It is also argued that the quantum of damages awarded in some defamation cases is wildly out of sync with that awarded in personal injury actions, and that this indicates that it is disproportionate and inappropriate. Finally, it is argued that, despite the reforms in this area wrought by the defamation act, the level of direction that a trial judge can give to a jury in relation to damages is simply inadequate to protect against disproportionate awards⁴², and, whereas an appellate court can substitute its own award of damages for that reached by a jury (and, I would suggest, appellate courts are doing so more regularly now than was previously the case⁴³, presumably bolstered by the express statement in s. 13 of the 2009 Act that this is permitted), equally (a) this puts a defendant publisher to the trouble and cost of taking such an appeal and (b) the starting point for the appellate court will be the jury award and hence even if it *does* substitute its own award for that of the jury, this may still lead to an excessive ultimate award of damages⁴⁴. Thus, so it is argued, there is a need for a more significant constraint on the jury's power to award damages, in the form, for example, of a statutorily imposed ceiling on damages that can be awarded.

There have been a number of cases since 2009 focusing on the issue of damages – cases in which the Court of Appeal and Supreme Court have significantly reduced the quantum awarded by the jury (most recently and most dramatically, in *Kinsella v. Kenmare Resources*, where a jury award of €9m was reduced on appeal to €250,000). There has been regular discussion in these cases as to the propriety of an appellate court either overturning a jury finding of fact (on quantum) in the first place, or substituting its award for that of the jury rather than sending the matter back for retrial. I would suggest that a rather brief and simplistic summary of the approach of the appellate courts in these cases would be that

⁴² On the other hand at Para 143 in *Kinsella v. Kenmare Resources* Irvine J said “One would certainly hope that the effect of s. 31 of the 2009 Act, which not only allows the parties make submissions to the Court in relation to the matter of damages in a defamation action, but which also requires the trial judge to give directions to the jury in relation to the matter of damages, will in early course result in the making of awards which are not only proportionate to the injury sustained in any individual case but which will also be proportionate when considered in the context of awards of damages in other proceedings including personal injury actions”.

⁴³ *McDonagh v. Sunday Newspapers Ltd (No.2)* [2017] IESC 59

⁴⁴ For a very strong response to this concern see the judgment of O'Donnell J in *McDonagh v. Sunday Newspapers Ltd (No.2)* at Para 28

- (a) They have always reaffirmed the sanctity of jury verdicts and will only set them aside if they are demonstrably unreasonable⁴⁵. Indeed in *Nolan v. Sunday Newspapers (t/a Sunday World*⁴⁶, Peart J evinced a similar respect for findings of fact of a trial judge sitting alone and in *Kinsella v Kenmare Resources*⁴⁷ the Court of Appeal extended this respect to the manner in which a trial judge summed up the evidence after a long defamation trial. Furthermore, in *Kinsella* Irvine J reasoned that it would be more of an uphill battle for an appellant seeking to set aside a determination as to quantum on appeal in a defamation case than in a personal injuries action and not least because the manner by which damages in the former are computed is more complex and less formulaic than in the latter.⁴⁸
- (b) In similar vein, there is discussion of whether it would be more appropriate to remit the matter back for retrial rather than for an appellate court to substitute *its* award of damages. On the one hand, there is some reluctance for appellate courts to take on what is, normally, a jury function. On the other, appellate courts are rightly concerned with both the costs implications of such a step and also the negative impact of prolonging litigation that might be long running. The decision of the Supreme Court in *McDonagh v. Sunday Newspapers Ltd (No.2)* is perhaps the best example of this discussion, with three judges prepared to substitute their award for that of the jury and in the name of ending protracted litigation, and two judges preferring to remit the matter to a new trial.
- (c) The key concern for Appellate Courts, operating under the shadow of the approach of the European Court of Human Rights (discussed below) is that awards of damages should be proportionate – with the relevant issues in assessing quantum being (a) the extent of publication (b) the gravity of the defamation (c) the conduct of defendant and plaintiff (d) the impact on the plaintiff.
- (d) Appellate Courts are prepared, albeit cautiously so, in assessing whether an award is proportionate, to have regard to quantum of damages awarded in personal injury

⁴⁵ See for example the judgment of McKechnie J in *McDonagh v. Sunday Newspapers Ltd (No.2)* Para 37

⁴⁶ [2019] IECA 141

⁴⁷ [2019] IECA 54 at Para 49

⁴⁸ Para 140

actions and in previous defamation cases. These are also, under s. 31 of the 2009 Act, issues to which a jury may be directed.

In the background, of course there is also the decision of the European Court of Human Rights in *Independent Newspapers (Ireland) Ltd v. Ireland*⁴⁹. As is well known, this decision involved a claim that the decision of the Supreme Court in *Leech v. Independent Newspapers*⁵⁰, in which a jury award of €1.872 million was reduced to €1.25 million represented a breach of the defendant's right to freedom of expression, *inter alia* because of the chilling effect of an award of this kind. The applicants noted in this case that Dunne J's award was significantly greater than that awarded in *De Rossa v Independent Newspapers*⁵¹ and despite the fact that she had suggested that the gravity of the libel at issue was not as serious as that in *De Rossa*.

The European Court found for the applicants but on relatively narrow grounds. There was no suggestion that the continued use of the jury to determine quantum of damages was problematic, nor indeed that the award in the case was, inherently, disproportionate. Rather its concern was, simply, that Dunne J, in its view, should have been more explicit in her reasoning as to why the award that she eventually made was, in fact, proportionate. It is difficult to know precisely what this will entail for future defamation cases or what it should mean for any reform of the Defamation Act. It is arguable though that the approach of the Court of Appeal in *Kinsella v. Kenmare Resources* is instructive, not so much for the fact that the jury award in this case was so significantly reduced, but rather for the fact that the Court was so explicit (and, as was noted, *repetitively* so) in its rationalisation of its decision.

What should this mean, then, for any amendment of the Defamation Act in so far as quantum of damages are concerned. At one level, it will be suggested that the best approach would be either for a judicially imposed convention of capping damages awards in defamation cases, or alternatively for the legislature to impose such a cap. Either approach would, however, be problematic; the quantum of damages in such cases is, after all, a question of fact and thus not one on which the court should rule, as a matter of law. Moreover, the reality remains that the purpose of damages in defamation cases, while nominally compensatory, is

⁴⁹ [2017] ECHR 567. It should be noted that the author represented the state in this case.

⁵⁰ [2015] 2 IR 114

⁵¹

multifaceted and must be part vindictive, part deterrent and part punitive⁵². Indeed the undoubted reality is that the quantum awarded is also a signal to the public as to the falsity of the publication and the damage that has been caused. Thus there is a concern that if judges were to take over the business of assessing quantum and if, as a result, damage levels were to fall, this could signal to the general public that what had happened to a particular plaintiff as a result of a defamation was not particularly serious – and this might represent an inadequate protection of the right to a good name. As McKechnie J put it in *McDonagh v. Sunday Newspapers (No.2)*

“It is hard to believe that a routine redetermination of damages by this Court would result otherwise than in the reduction of the value of awards in the vast majority of such cases. If this case is any barometer, such reduction may be very significant. I would be most reluctant to countenance a situation whereby a successful appeal as to the size of the award would likely have the effect of the Supreme Court substituting in its place an award of an altogether smaller order. Such would very quickly deprive the law of defamation of its teeth. Awards must of course be fair to both parties but I would not overlook the potentially positive dissuasive effects of larger awards. Such are likely to ensure that the publisher makes sure to verify the truth and veracity of the content, thoroughly checks the sources, and generally takes every available precaution prior to publication. The retention of juries in defamation cases and their concomitant power to assess the award of damages is itself part of the appropriate balance that has been struck in this jurisdiction between the freedom of expression and the right to one’s good name. What protective value is there left in the law of defamation if awards are routinely liable to be reduced, particularly in such a way that the predicted level of compensation is unlikely to outweigh the expected circulation figure resulting from the inclusion of the untruthful information? If that were generally to occur, the risk would simply be assessed by way of a cost-benefit analysis.

“In making these observations, it might be thought that I am suggesting there should as a matter of course be some punitive aspect to damages: this is not really the point which I intend to make. What the law is trying to do is to compensate for harm and injury to good name, not to police the newspaper industry. If, however, the start point even for an untarnished reputation should be pitched at a level of little or no concern to the industry, then the inherent respect for one’s good name which the constitution demands could be seriously diminished as a matter of routine, certainly if the defamed has any antecedent reputational harm. In such circumstances there would be no point in suggesting that the industry might be sanctioned for its unethical behaviour: in any event that is not what the law of defamation aims to do. Consequently, at the level of principle, damages play a key role in the balance between good name and free expression⁵³.

⁵² *Nolan v. Sunday Newspapers Ltd* [2017] IEHC 367

⁵³ See also MacMenamin J at 26 *et seq.*

An alternative approach would be to accept that there are two different protections against disproportionate awards and for any legislation to ensure that they are both operative and effective. One, the scrutiny for proportionality at the appellate stage, is, at least arguably, robust – the judgment of the Court of Appeal in *Kinsella* is testament to this. On the other hand, the decision of the European Court in *Independent Newspapers (Ireland) Ltd v. Ireland*⁵⁴ still presents concerns. It will be remembered that the essence of the conclusion in this case was that whereas there was no inherent difficulty either with the Supreme Court (or any appellate court) substituting its award on quantum for that of a jury, nor with an award of €1.25m being made *if this was appropriate*, equally there was a need for the Court to be explicit in its reasoning as to how the particular figure was reached. The Supreme Court, in its judgment in *McDonagh v. Sunday Newspapers (No.2)*, handed down in the aftermath of the European Court’s decision, respectfully made the point that, to the extent that Dunne J’s decision in *Leech* had, actually, been relatively clear as to the factors on which she was basing her assessment of quantum of damages, it was difficult to see what, exactly, was being required by the European Court⁵⁵. It might be helpful, in a recast version of s.13 of the 2009 Act to provide guidance on this issue to appellate courts, but of course such an approach might be constitutionally suspect.

The other, the directions to the jury at trial is, arguably in need of some reform. As things stand, it is simply provided in the legislation that the judge should direct the jury as to quantum – and the Act then references the kinds of things that might be relevant in assessing quantum. There is, I believe, a case for suggesting that the legislation should be more explicit as to what such directions should entail, and specifically how references to previous awards and to awards in personal injury actions should be used in such cases. Again the comprehensive judgments of the Supreme Court in *McDonagh (No.2)* are instructive. Denham CJ reasoned that the factors that would be relevant in determining a figure were the gravity of the libel, its effect on the plaintiff, the extent of the publication and the conduct of the newspaper – in essence the same factors as had been relevant for Dunne J in the *Leech* case.⁵⁶

⁵⁴ [2017] ECHR 567. It should be noted that the author represented the state in this case.

⁵⁵ McKechnie J at Para 55

⁵⁶ Para 71

In addition, it was relevant for her that the plaintiff had a blemished reputation.⁵⁷ Finally, she said that it was helpful to bear in mind factors such as the value of money⁵⁸, the average wage and the cost of a car⁵⁹. In addition, O'Donnell J pointed to the explicit protection of the right to a good name in the Irish constitution,⁶⁰ the nature of defamation cases which, unless settled, will involve the defendant persisting in the view that publication was lawful⁶¹, and the role of an award in *vindicating* reputation⁶², especially in a digital age where the law of libel was the only 'pro-reputation' counter-balance to the tendency to seek attention in a crowded marketplace through lurid headlines and outrageous stories.⁶³ Similarly in *Kinsella v. Kenmare Resources*, Irvine J in the Court of Appeal, endorsed the notion of juries being referred to the fact that damage awards are not taxed and being asked how long it would take someone to earn such an amount of money⁶⁴. It might be suggested that an amended version of s. 31 of the 2009 Act might list factors such as these as things to which a jury might explicitly be referred.

What though of directing a jury in relation to (a) damages in personal injury actions and (b) damages in previous defamation cases? The broad statement in s. 31 that judges will provide directions to juries on quantum would certainly seem to permit this, but should it be something that *invariably* happens – should it indeed be *required*? There are I would suggest, arguments both ways. On the one hand, it can be suggested that the benefit of such an approach is that it can give a jury a sense of perspective – contextualizing the current situation by reference to existing patterns in defamation law and allowing it to reach a result that fits within the overall moral compass of society (that is, an holistic view that, if an act of negligence that renders someone paralysed is worth X, then an act of publication that gravely hurts someone's good name should be worth Y). The counter argument is that matters are not this simple. In the first place, conclusions of fact (e.g. as to quantum) in cases should not set precedents for future cases and not least because of the hugely fact dependent nature of

⁵⁷ *ibid.* O'Donnell J (at Para 24) also referred to the fact that the plaintiff was not identified by name nor well known to the public prior to the publication.

⁵⁸ O'Donnell J (at Para 24) referred to the very significant purchasing power of the money awarded at trial.

⁵⁹ Para 72

⁶⁰ Para 38

⁶¹ Para 41

⁶² Para 41

⁶³ Para 42

⁶⁴ Para 152

defamation trials. Secondly, as has been discussed, the functions of damage awards in defamation cases are conceptually different to those in, for example personal injury actions.

Again the approach of the Supreme Court in *McDonagh (No.2)* is instructive. On the comparison with personal injury awards, the Chief Justice suggested that such awards ‘have some relevance’ – but that the comparison was clouded by the fact that, in personal injury cases, unlike defamation cases, there might be very high special damages awarded (and it can be suggested that it would be very difficult to instruct a jury meaningfully on the difference between special and general damages if it were asked to decide on quantum in a defamation cases by reference to standard norms for awarding general damages in a personal injuries case). Similarly O’Donnell J recognized the possibility of broad comparisons being made with personal injury awards, but felt that they simply did not provide anything in the way of precise guidance.⁶⁵ Perhaps most emphatically, Judge McKechnie, in a passage that is worth quoting at length, outlined what were the key reasons why the differences between personal injury and defamation actions were so stark that comparisons were, in general, not appropriate

“This raises the question of why a distinction has been created between defamation actions and personal injury actions. There is, in the first instance, an important difference between both causes of action in this respect. The courts have, for the most part, come up with a reasonable idea of what a broken leg is worth, the value of a lost arm, and so on. There is a market which bears this out. Such is not solely dependent on court judgments or related to the Book of Quantum, but in substantial part reflects the notorious practice, which has been commonplace now for decades or more, of settlements being reached between indemnifiers and plaintiffs, thus creating information which can readily be obtained within this market. There is also reasonable similarity between like cases. Accepting, of course, that a person’s age, profession, trade or calling and one’s physical and other characteristics will have a bearing (as they will on special damages, *e.g.* injury to a footballer’s leg, a pianist’s fingers, or the like), nevertheless, in general one will not have to search too far to find a reasonable comparator in respect of most personal injuries claims. Adjustments or variations may be required but in most instances such can be achieved. The comments of Geoghegan J. at p. 42 of *O’Brien* are very much to the same effect. By contrast, by virtue of both the relative infrequency of defamation cases and the extent to which they necessarily turn on their own facts, the same cannot be said of defamation.

In addition, defamation actions feature a much more nebulous injury than that as found in personal injuries cases: one must be compensated for damage to

⁶⁵ Paras 44-45

reputation, injured feelings, hurt, distress, humiliation, a violation of privacy and dignity, as well as any other consequence of the harm thereby inflicted. In that context I refer to what I said in *Leech* regarding the difficulties which may face an appellate court in substituting its own view of damages. These problems are particularly acute in defamation cases. As stated in that judgment:

- “How can a transcript convey the depth of a person’s feelings who has been publicly humiliated; whose sense of esteem and personal worth have been undermined, even shredded in some cases; whose presence even amongst strangers may result in being shunned or rebuffed? How can a cold print give a sense of that person’s hurt, perhaps touching the essence of who she is, of her character and personality, without which her sense of value could well be shattered? I very much doubt that without observing, assessing or listening to the essential witnesses, in particular the successful plaintiff, and without seeing her perform in the witness box, the members of an appellate court, deprived of such a facility, can truly feel the gravity of the injury, of the harm and of the damage for which that plaintiff is fully entitled to compensation. Such is a major handicap of significant proportions.” (Para. 102 of the report).

There is a further point of considerable substance, which is the underlying basis upon which damages are assessed in such actions, as distinct from that which drives awards in personal injuries cases. The genesis for this difference is dealt with at some length at paras. 35-41 of my judgment in *Leech* and accordingly I will not further repeat what was said there. However, there is one aspect of this which should be mentioned: it is reflected in the following short passage from the judgment of Windeyer J. in *Uren v. John Fairfax & Sons Pty. Ltd.* (1966) 117 C.L.R. 118, 150:

- “For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.” (Emphasis added)

This element of damages, which is policy motivated, is based on the courts’ view that the defamed must be able to demonstrate to the world at large, by reference to the award, that the publication was utterly spurious. See also *Broome v. Cassell & Co. Ltd* [\[1972\] AC 1027](#) at 1071, where Lord Hailsham L.C. said very much the same thing⁶⁶.

O’Donnell J took a similar approach to the relevance of previous awards in defamation cases – namely that whereas they *might* be relevant, nonetheless there was a serious risk of comparing apples with oranges so to speak. Thus he held that

⁶⁶ Para 42 *et seq.*

There is no market for defamatory publications and no reasonable proxy to provide a separate basis for assessing an award in a defamation case. Some guidance can be obtained from other substantial awards in defamation cases, particularly those which have been upheld on appeal, and to the extent where the Court of Appeal or Supreme Court substitutes its own award, then these may also provide some guidance. However, a note of caution is appropriate here too. While the monetary amounts awarded are readily comparable and can be placed on a scale, it is a much more difficult task to compare defamations than it is to compare personal injuries. A clean break may be less serious and may heal more quickly than a comminuted fracture. A fracture which enters an articular joint and gives to a risk or probability of future arthritis is more serious than one which does not. An injury to a young and active person may be different to the same injury sustained by someone older with a more sedentary lifestyle. These relativities should be reflected in awards. It is however more difficult to measure defamation in cases on any set scale.

These are, then, difficult issues, and it might be worth laying out some parameters for directions to juries on quantum of damages in any amended version of the 2009 Act. Equally, the points made in the introduction hold true. No doubt there are many who would argue that awards in defamation cases are often inappropriately high; but equally for those who regard the right to a good name as of paramount value and the impact of defamatory publications as uniquely awful, such awards are what they are – reasonable responses judged by reference to societal standards.

3. Jury Trial

One of the defining features of the caselaw that has arisen under the 2009 Act has focused on the fact that, in Irish High Court defamation actions, trial is still before a jury. As has been discussed above, this has arisen, in particular, in two contexts namely (a) the role of the jury in assessing damages where the offer of amends defence is pleaded and (b) the various cases in which appellate courts have set aside jury awards of damages or determinations on other questions of fact. In both contexts, the approach of the appellate courts – even when reversing findings of fact – has been to stress the need to respect the sanctity of jury verdicts and the fact that they should only be set aside in the most extreme circumstances⁶⁷. Thus

⁶⁷ See especially the decision of the Supreme Court in *McDonagh v. Sunday Newspapers Ltd (No.1)* [2017] IESC 46

Irvine J in *Kinsella* expressly stated her unease at characterising a jury finding as unreasonable⁶⁸.

More generally, many legal practitioners will point to the impact of the fact that defamation trials are jury determined in generating unpredictability. Of course no trial, even if heard before a judge, is entirely predictable, but, so it is argued, this unpredictability is exponentially heightened when a jury is present. I would suggest that this impacts on *both* sides in a defamation case and is a strong incentive to settle cases. Most famously, this uncertainty manifests itself in the controversy surrounding assessment of quantum of damages. Put simply, a judge will have experience and intuitive understanding of the kinds of quantum of damages that tend to be awarded in civil actions generally and thus will have a perspective on what a 'large award' should mean. A jury simply does not have this perspective, and whereas more detailed directions may assist, this absence of perspective will invariably be present – and in particular given the multi-faceted functions of damages in defamation cases.

Of course the counter-argument is that defamation is an unusually societal-focused tort. Grounded in 'reasonableness' (what meaning would the reasonable person give to the statement, would the reasonable person deem it to be defamatory; would the reasonable person find that the plaintiff was identified therein?) it seeks to protect and vindicate people from loss of reputation *in society*⁶⁹ (rather than in theory) and thus, so it is argued, it requires the presence of 12 members of society to make the key factual judgments in these cases. On the other hand, however, it can be argued that the same concerns underpin other kinds of civil actions as well – nuisance cases for example – and that all tort law is, ultimately, shot through with the language of reasonableness; thus, if a judge can be trusted to determine questions of fact in these other kinds of case, why can she not be trusted to determine questions of fact in defamation cases? In addition, in medical negligence cases (for example), judges determine questions of fact in relation to matters of specialisation that may be well beyond their experience or knowledge. Thus, again, it can be argued that if judges can be trusted to do so in these complex cases, through the normal process of weighing up the

⁶⁸ Para 226

⁶⁹ See for example the judgment of McKechnie J in *McDonagh v. Sunday Newspapers Ltd (No.2)* at Para 45

testimony of witnesses and the submissions of parties, why can they not be trusted to do the same in defamation cases (and bearing in mind that they too are members of society).

It will be remembered that the UK Defamation Act 2013 removed the jury from defamation trials. Whether or not such a step is taken, I would suggest that there is a case, in any reform of the 2009 Act for considering seriously the merits of taking an equivalent approach. Alternatively, it would be worth considering the 1991 recommendation of the Law Reform Commission, that, whereas a jury should be retained to answer the critical questions of fact that go to the issue of liability (including the question of whether aggravated or punitive damages were warranted), the assessment of quantum of damages in all cases should be a matter for judges. I am not necessarily recommending such a step, but merely positing it as something that is worth consideration.

4. Truth, Falsity and Burdens of Proof

As things stand, the plaintiff must prove that a statement with a defamatory meaning, in which [s]he was identified has been published, but need not prove that that statement was false. Rather its falsity is presumed, and the burden falls on the defendant to prove that it was true. Naturally for investigative journalists who are relying on confidential sources (and are known to be so relying), this can be impossible – and even if the statement *is*, in fact, true. Moreover, of course, the risk that a failed plea of truth will result in increased damages or aggravated damages being awarded is, obviously, a real one.

The alternative approach, one that might be only or else especially applicable in cases where what is at issue is public interest publication and where the standards of reasonable journalism outlined in s. 26 of the 1999 Act have been followed, is to reverse the burden of proof on this key issue and to make falsity an element of the tort to be proved by the plaintiff. Once again, I am not necessarily recommending this step – but merely pointing out that, to the extent that this appears to be an issue that represents an impediment to sound investigative journalism, it is something that, arguably, merits consideration.

Finally, it is worth noting that there is a difference between the approach in the 2009 Act and in the UK 2013 Act to the defence of truth generally. Under s. 16 of the 2009 Act, in order to avail of the defence of truth the defendant must prove that the statement is true ‘in all material respects’. Under s. 2 of the 2013 Act, the defence will apply if the defendant can prove that the statement is *substantially* true. Whether this difference in wording will have

much impact in practice is uncertain. Nonetheless it does suggest a different focus in so far as the defence of truth is concerned, and thus might warrant legislative attention.