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INTERNET DEFAMATION AND IRISH LAW

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ABSTRACT

The purpose of this dissertation is to assess the statutory protection outlined in the 2009 Defamation Act for the citizens, corporations and Internet intermediaries of Ireland in respect of Internet defamation. I will analyse the 1961 Defamation Act and note the improvements adopted into current legislation. I will also examine whether the 2009 reform offers sufficient protection and defences in instances of actions taken in respect of online defamation. I will support my claims with statements from some of Ireland's most well respected media law experts, and solicitors from some of the country's most prestigious law firms, as well as considering how the statute has dealt with online defamation in comparison to that of other jurisdictions. Following this, I will draw conclusions from my observations and will make suggestions for reform to bring the current legislation in line with contemporary communication and new media technologies. Because the 2009 Defamation Act was only recently enacted, there is very little available in the way of academic research and literary material relating to the subject of Internet defamation under the new statutory regulations. I believe this to be one of the first comprehensive studies of the new legislation that scrupulously examines and challenges the ethical, constitutional and commercial concerns raised by the Act's lack of provision for modern information and communication technology.

CHAPTER 1: THE 1961 DEFAMATION ACT

A History and Analysis of the Legislation Prior to Reform

Legislation regarding the publication of libellous statements came into existence in Ireland with the introduction of the Defamation Act in 1961. The statute, which was enacted on 1st of January 1962, was the first means of protection available for the public against the torts of libel (publication in permanent form) and slander (the spoken word). Prior to this, defamation was not recognised under Irish law. The original delineation of defamation was set out in case law. McMahon and Binchy define it as:

The wrongful publication of a false statement about a person, which tends to lower that person in the eyes of right-thinking members of society, or tends to hold that person up to hatred, ridicule or contempt, or causes that person to be shunned or avoided by right-thinking members of society.¹

The original Irish Defamation Act was very similar to the Defamation Act of 1952 in the United Kingdom; both Acts reflected the media practice and technology of the 1950s. The British updated aspects of their Act in the Defamation Act 1996. Although the 1961 Irish Defamation Act clearly failed to adequately provide for the ever-changing advancements in technology, and despite repeated recommendations for a reform, it remained unchanged until 2009.

A dramatic increase in the popularity of social networking sites, blogs and online forums has meant that the number of defamation cases arising from publication on the Internet has risen significantly. McGonagle defines publication as “the making or communicating of a statement about a person to a third party, that is, someone other

¹ Bryan McMahon & William Binchy, *Irish Law of Torts 3rd Edition*, (Dublin: Butterworths, 2000), 882.

than the person himself/herself.”² Publication by the media is in permanent form and thus was regarded as libel.

Libel can be in the form of words, visual images, gestures and other methods of signifying meaning.... The capacity for internet [sic] material to endure and to be very widely accessed in written, photographic, or audio-visual form puts it into the same category.³

The 2009 reform of the Act has abolished the distinction between libel and slander and replaced them with the new tort of defamation, which is actionable *per se*. This means that the plaintiff is not required to prove they suffered special damages to constitute a cause of action.

The multi-platform nature of the Internet means that text, images, sound recordings, video, and various other types of new media that can be uploaded online, have the capacity to incite litigation. Computer-assisted digital manipulation of photographs is also a growing concern. For example, in the case of *Dustin Hoffman v. Capital Cities/ABC, Inc (2000)*,⁴ Hoffman filed a complaint in California State Court against Capital Cities/ABC, Inc when the company’s publication, *Los Angeles Magazine*, published a defamatory image of him in the March 1997 *Fabulous Hollywood Issue!*. The magazine featured a digitally manipulated image of the actor without permission from either Hoffman or Columbia Pictures, the copyright holder. The plaintiff was awarded over \$3,000,000 in damages and compensation before the verdict was eventually overturned by the court in July 2001. The potential for images such as this to be reproduced online is a very real threat, not only to those in the public eye, but to members of the general populace as well.

² Marie McGonagle, *Media Law 2nd Edition*, (Dublin: Round Hall Ltd, 2003), 74.

³ *Ibid.*, 75.

⁴ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001)(US).

Accidental publication is also an issue. Material not intended for publication can be momentarily available in error. This is worrying considering the “global nature of the medium, which makes it difficult to control.”⁵ In case of accidental publication, the

1961 Defamation Act ensured:

An offer of amends procedure was introduced for the purpose of dealing with unintentional defamation. As defamation is a tort of strict liability, the intention of the tortfeasor has traditionally been regarded as irrelevant. To balance the harshness of this rule, it was thought that a person who accidentally published a defamatory statement should be given an opportunity to apologise for their error and to publish a suitable correction.⁶

NUI Galway lecturer and media law expert Marie McGonagle speculated that in the instance of accidental publication on the Internet, it would have been likely that the old-common law rules would have applied, and no liability would result in the absence of negligence. In regards to momentary publication, she believed:

The defendant could dispute publication and the onus would lie with the plaintiff to prove that in the circumstances publication did occur, and that publication was by the defendant.⁷

Another concern is that the defamer may be anonymous or untraceable. There are many reasons why a plaintiff may choose to pursue the company that provides Internet access to the public or the host of the website, known as intermediary service providers (ISPs), rather than the author responsible for posting the material online. These include the inability of the defamed party to identify the author of the libelous message, the ISP may be better able to meet an award of damages, or the author may be resident in a jurisdiction where there is a more liberal legal regime than the ISP.

There is a limited common-law defense [sic] available to distributors, who are not liable unless they knew or ought to have known that material they were distributing was defamatory, and their lack of knowledge was not due to negligence on their part.⁸

⁵ McGonagle, *Media Law 2nd Edition*, 171.

⁶ Simon McAleese, ‘Defamation Act 2009’. *Parchment: The Dublin Solicitor’s Magazine* Autumn 2009: 8-9.

⁷ McGonagle, *Media Law 2nd Edition*, 75.

⁸ *Ibid.*, 76.

The European E-Commerce Directive (2003/31/EC) states under article 12 that Internet service providers will not be liable for defamatory material transmitted on their sites, provided they:

Do not initiate the transmission, select the recipient or modify the information contained in it. Under article 14, they will not be required to monitor content but if defamatory matter on it is brought to their attention, they will be required to remove it.⁹

This directive was incorporated into Irish law by the Electronic Commerce Act 2000, section 23 of which, states that all provisions of existing defamation law shall apply to all electronic communications within the state. This was updated in February 2003 to limit the liability of ISPs, including limiting their responsibility for defamation.

Regulation 16 of the European E-Commerce Directive (2003/31/EC) states:

An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if -
 (a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or
 (b) a relevant service provided by him or her consists of the provision of access to a communication network,
 and, in either case, the following conditions are complied with –
 (i) the intermediary service provider did not initiate the transmission,
 (ii) the intermediary service provider did not select the receiver of the transmission, and
 (iii) the intermediary service provider did not select or modify the information contained in the transmission.

*Godfrey v. Demon Internet Ltd. (1999)*¹⁰ was a landmark case in the United Kingdom, which demonstrated the responsibilities an ISP is expected to uphold. On 13th January 1997, an anonymous user from the United States posted an inappropriate message on the Usenet newsgroup “soc.culture.thai”. The message had been attributed to Dr.

⁹ Ibid., 77.

¹⁰ *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342: [2001] QB 201 QBD.

Laurence Godfrey, a physics lecturer based in London. In Internet discourse, this is considered to be a form of ‘trolling’, a term used to describe someone who intentionally posts provocative and incongruous material on a website to offend other users. On 17th January 1997 Godfrey contacted Demon Internet Ltd, who carried and stored the service, advising them that the comments were forged and requesting that the post be removed. Demon Internet neglected to remove the message and it remained available to access on their server until it expired on 27th January 1997. Demon Internet was obliged to remove the post as soon as Dr. Godfrey alerted them of its defamatory nature, but they declined to do so. Moreover, the ISP made no attempt to remove the notice at all; it was only erased following its expiry a fortnight later. Demon Internet settled with Godfrey out of court for £15,000 in damages, plus almost £200,000 in legal fees.¹¹ Following this, Godfrey succeeded in several more libel actions against a number of organisations.

Distributors can handle many thousands, even millions of titles, and therefore the opportunity for control, or knowledge of content is limited. The common-law defence for distributors, which was utilized prior to the introduction of the 2009 Defamation Act, did not apply to printers. In this and other respects the law was outdated and failed to provide for modern technology. “Printers nowadays are often just contract printers who receive copy online and have little or no opportunity to check content.”¹² The UK has tackled this problem by adding a defence for printers, who are not the authors of defamatory material in the 1996 Defamation Act.

How the directive will operate in practice remains a moot point. Will an ISP be given notice by a solicitor’s letter, as in *Godfrey v. Demon Internet Ltd*.

¹¹ BBC News, 30th March 2000, ‘Demon settles net libel case’, *news.bbc.co.uk*, accessed 10th May 2010.

¹² McGonagle, *Media Law 2nd Edition*, 76.

(1999)? Will the removal of the material in those circumstances represent a breach of the ISP's contract with a subscriber?¹³

Given the worldwide reach of the Internet, complications can also arise in regards to jurisdiction. Plaintiffs in both the US and Australia have sued successfully in their home states, although the defamatory material was posted on websites from elsewhere. In accordance with the 'double actionability' rule, the claimant must have a reputation in the country and be able to recover damages for defamation there. As of yet there is no direct authority on jurisdiction in cross-border Internet cases in the EU. However, in *Shevill v. Alliance (1995)*¹⁴ the European Court of Justice reached the conclusion that a defamed person may bring an action against the publisher either in the country in which the publisher is established or has his main place of business, or in each of the countries where the publication has been distributed and where the victim claims to have suffered damage. If the plaintiff sues under the terms of the former, they can claim there for all damages resulting from the publication. If they sue under the terms of the latter, they can only claim for harm caused in the state in question. This is also outlined in the Brussels I Regulation (Council Reg (EC) 44/2001), which is subject to interpretation by the European Court of Justice. The *Shevill v. Alliance (1995)*¹⁵ case concerned an action for damages resulting from the distribution of a newspaper containing a defamatory article.

To date, there have been relatively few email and Internet defamation cases in Ireland.

The reason for which may have been the "uncertain state of the law, difficulties in identifying authors of cyberspace defamations, and question marks over the potential

¹³ William Fry Solicitors, 2003, 'Defamation on the Internet – An Irish Perspective', www.williamfry.ie, accessed 26th February 2009.

¹⁴ *Fiona Shevill v. Presse Alliance* [1995] ECR I-415, Case 68/93.

¹⁵ *Fiona Shevill v. Presse Alliance* [1995] ECR I-415, Case 68/93.

liability for employers for e-mail abuse by those who work for them.”¹⁶ But with the 2009 reform of the Defamation Act, and over 2,830,000¹⁷ Internet users in Ireland and counting, litigation is likely to increase.

¹⁶ William Fry Solicitors, ‘Defamation on the Internet – An Irish Perspective’,

¹⁷ Internet World Stats, 2010, ‘Internet Usage in Europe: Internet User Statistics & Population for 53 European Countries and Regions’, www.internetworldstats.com, accessed: 12th May 2010.

CHAPTER 2: THE 2009 DEFAMATION ACT

Why the New Statute Fails to Sufficiently Provide for Online Defamation

The 2009 Defamation Act was signed into Irish law on 23rd July 2009. Section four of the 2009 Act repeals the 1961 version, rendering it a restatement of Irish defamation legislation. The law came into effect on 1st January 2010 and has received a mixed reception from media law experts, ISPs and the public alike. Many have argued that the purpose of a reform was to bring the Act up to date with new technological innovations and they view the amendment as a missed opportunity that has failed to outline sufficient provisions for Internet defamation.

Senior Lecturer in Law at Trinity College and author of a well-known Irish rights blog,¹⁸ Eoin O’Dell said the new Act: “ducks some important reforms and bungles others, while some of its most significant provisions raise constitutional problems.”¹⁹ He also noted, “in some important respects, the Act raises as many questions as it has answered.”²⁰

There are many aspects of the new Act that have caused both confusion and outrage. One of the most significant failings is that protection for ISPs has not been included in the reform. In the United States legislation, section 230 of the 1996 Communications Decency Act provides ISPs with immunity from liability for defamatory comments published on their websites. In UK law, section one of the 1996 UK Defamation Act reads:

In defamation proceedings a person has a defence if he shows that—
(a) he was not the author, editor or publisher of the statement complained of,

¹⁸ <http://www.cearta.ie/>.

¹⁹ Eoin O’Dell, January 18th 2010, ‘Defamation Act a welcome but imperfect reform for libel cases’, *www.irishtimes.com*, accessed 17th May 2010.

²⁰ *Ibid.*

- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

In Australian law, clause 91(1) of the 1992 Broadcasting Services Act (Cwlth) includes a statutory defence for the ISP provided they were not aware that they were hosting defamatory material.

According to O'Dell "The bad thing [*about the 2009 Defamation Act*] is the absence of accommodation with the defence of innocent dissemination in section 27."²¹

Innocent dissemination is a common law defence first established in the nineteenth century "to mitigate the harshness of the doctrine of strict liability on certain parties, provided they did not intentionally or negligently defame the plaintiff."²² But since its introduction, "it has been difficult to reconcile this rule with other principles applicable to the law of libel."²³ Issues have arisen in relation to reconciling strict liability with a defence that allows parties to escape liability, defining who is entitled to employ the defence, and also whether it is properly regarded as a defence. Prior to the 2009 Defamation Act, there had been much discussion amongst Irish media law experts about a proposed 'innocent publication' defence. A report published in March 2003 by the Legal Advisory Group for Defamation included a recommendation for such a clause, which would replace the common law defence of innocent dissemination. The report went on to state that the Group had considered mimicking the defence introduced into UK law in 1996 and agreed, "a provision of this kind is

²¹ Eoin O'Dell, personal communication, 12th May 2010.

²² David Lindsay, 2000, 'Liability for the Publication of Defamatory Material via the Internet', www.law.unimelb.edu.au, accessed 20th May 2010.

²³ Peter F Carter-Ruck and Harvey Starte, *Carter-Ruck on Libel and Slander 5th Edition*, (London: Butterworths, 1997) 240.

appropriate”,²⁴ but that the terms ‘author’, ‘editor’ and ‘publisher’ should be clearly defined. They believed that statutory guidance was necessary to outline what constitutes reasonable care and it should take into account the extent of responsibility of the defendant for the publication as well as the previous conduct of the author, editor or publisher. They also outlined suggestions directly affecting Internet publication:

In examining the detail of the proposed new defence of innocent publication, the Group was very conscious of the need to have provisions which would address the particular issue of internet [sic] publications insofar as the operators and providers of access to communications systems are concerned. Such persons are covered by the general provisions contained in the 1996 United Kingdom legislation. The Group, however, thought that slightly more comprehensive provisions were warranted.²⁵

The Group felt that it was necessary to clarify what constituted the intermediary being made ‘aware’ of the presence of alleged defamatory material. They also thought that the ISP should be allowed to investigate whether or not the removal of the material was necessary and that this should not be seen as a failure to act. They noted that this would be in line with provisions in the European Convention of Human Rights (ECHR). Every one of these recommendations appears to have been completely ignored by the Oireachtas.

O’Dell also argues that the 2009 Defamation Act should have contained concise clarification stating exactly how Regulations 16 to 18 of the European E-Commerce Directive (2003/31/EC) were to be interpreted. Regulation 16 states that an ISP shall not be liable for information transmitted over their network on the condition that the information had been provided by a customer of the ISP’s communication network, the ISP was not responsible for initiating the dissemination, the ISP did not select who

²⁴ Legal Advisory Group on Defamation, 23rd June 2003, ‘Report of the Legal Advisory Group on Defamation’, *www.justice.ie*, accessed 19th May 2010, 28.

²⁵ *Ibid.*

could view the material and the ISP did not modify its contents. Regulation 17 states that an ISP shall not be liable for the forwarding of the material to other Internet users, provided the ISP does not modify the information, complies with access conditions, follows industry recognized rules regarding updating the information, does not employ unlawful methods to access data on the use of the information and promptly removes or disables access to the information when advised to do so by a court or administrative authority, or when the source of the information has been removed or blocked from accessing the network. Regulation 18 states that an ISP that stores information provided by a recipient of their service shall not be liable for the information stored at the recipient's request provided the ISP is not aware that any unlawful activity occurred, or the ISP immediately removes the material once alerted. The recipient of the service must not be under the control of the ISP. However, as the Legal Advisory Group for Defamation pointed out in their proposal for an innocent publication defence, there has been much confusion over what constitutes a provider being made 'aware' of the existence of the defamatory material.

This lack of certainty discourages internet [sic] providers from taking responsible steps to monitor user comments for fear that, if they do, they will be deemed to be aware of the content and therefore liable. It also creates a problem when someone makes a vague complaint and doesn't specify what is defamatory. The only solution may be to remove all material referring to them.²⁶

This leads to censorship and could impact on freedom of speech. For example, on 11th August 2006, MCD Promotions Ltd. threatened legal proceedings against the popular Internet forum "boards.ie", when MCD's Oxygen festival came under criticism from the not-for-profit website's users. The boards.ie administrators "judged it safest to

²⁶ Digital Rights Ireland, 28th February 2010, 'Why Irish defamation law is still inadequate for the internet', www.digitalrights.ie, accessed 19th May 2010.

completely censor all references to MCD and [their concerts].”²⁷ They went on to state that they “feel it is more sensible to veto all discussion of MCD and related bands, events, venues, dates, festivals, concert dates, ticket sales, competitions and promotions, lest MCD be defamed during these discussions.”²⁸ This caused outrage amongst users of the forum, who argued that many of the comments made were not defamatory because they were factual in nature. Most of the statements were posted by revellers who had attended the festival, and claimed that they had witnessed tent burning and fighting. These allegations had been confirmed by Gardai, who admitted seeing tent owners setting their shelters alight and arresting numerous people for criminal damage and public order breaches.²⁹

Partner at Simon McAleese Solicitors and former member of the Legal Advisory Group on Defamation, solicitor Paula Mullooly also believes that the 2009 Defamation Act could have elucidated how the European E-Commerce Directive (2003/31/EC) reconciles with Irish law:

With regard to ISPs they are covered by the provisions of the E-Commerce Directive which has been brought into law in Ireland. The difficulty with that is that there is a large amount of ambiguity which could have been clarified and probably should have been clarified in the Act.... Where the difficulties arise are more in relation to owners of message boards and chat rooms and whether they are exempted from liability by the E-Commerce Directive or not.³⁰

²⁷ Boards.ie, 23rd July 2006, ‘Discussion of MCD and their concerts = completely banned’, www.boards.ie, accessed 19th May 2010.

²⁸ Ibid.

²⁹ The Sunday Times, 13th August 2006, ‘Desmond’s web war over Oxygen attacks’, www.timesonline.co.uk, accessed 25th May 2010.

³⁰ Paula Mullooly, personal communication, 24th May 2010.

Lecturer in Law at University College Dublin, Chairman of Digital Rights Ireland and author of a blog discussing information technology law,³¹ solicitor TJ McIntyre believes that failing to provide defences for Internet intermediaries could have a detrimental effect on Ireland's appeal to foreign investors.

It's ridiculous because we're advertising ourselves as a knowledge economy and aiming to attract more companies like Google and Ebay here, but we're not giving them the legal protection they need in terms of defamation.³²

He argues that even explicitly implementing Regulations 16 to 18 of the European E-Commerce Directive (2003/31/EC) into section 27 of the new legislation would not constitute sufficient protection:

Austria, Hungary, Portugal and Spain, amongst others, have created additional protections for search engines. The European Commission has also encouraged Member States to extend protection to other internet [sic] intermediaries. The risk for Ireland is that we may become less attractive as a destination for these businesses if Irish law does not follow suit.³³

McIntyre has previously argued about the lack of protection offered by the E-Commerce Directive in Irish cases on his blog. He analysed the case of *Mulvaney v. The Sporting Exchange (trading as Betfair)*³⁴, and Betfair's use of the hosting defence outlined in Article 14 of the European E-Commerce Directive (2003/31/EC). The case involved plaintiffs that alleged they had been defamed by comments posted in Betfair's online chatroom by Betfair customers. The action was taken against the authors of the comments, and also Betfair as publisher of the statements.

The court then considered whether Betfair could be considered to be a host in respect of the chatroom, or more precisely whether it was an "intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service".³⁵

³¹ www.tjmcintyre.com/.

³² TJ McIntyre, 2nd July 2007, 'Defamation, search engines and the E-Commerce Directive', www.tjmcintyre.com, accessed: 18th May 2010.

³³ *Ibid.*

³⁴ *Mulvaney & Others v. Sporting Exchange Ltd (Trading as Betfair) & others* [2009] IEHC 133.

³⁵ TJ McIntyre, 26th May 2009, 'Mulvaney v. Betfair - High Court holds that hosting defence is available to chatroom operators', www.tjmcintyre.com, accessed 24th May 2010.

The court found that under the conditions of the 2003 Regulations, Betfair was classed as an intermediary service provider and that the company was entitled to implement the hosting defence. However, McIntyre expressed his shock at the way in which the conclusion had been reached:

This conclusion - that chatroom operators are hosts as regards user comments - appears to me to be correct, but the underlying reasoning is rather scanty.... There's no discussion, for example, of the fact that the chatroom was subject to terms of use and was (apparently) moderated by Betfair - a surprising oversight, considering that it might have been the basis for an argument that the posters were acting under the control of Betfair which, if successful, would have ruled out the hosting defence.... Equally, there's no reference to the related argument that the hosting defence is intended to cover purely technical (and essentially passive) storage of information, and is lost when a provider exercises a greater degree of control over the information which users provide.... Finally, there's no reference to the cases in other jurisdictions which have challenged the scope of the Article 14 hosting immunity.³⁶

Perhaps a more intensive and investigative judgement would have better outlined the rules applicable to Irish sites hosting user comments, and how successfully they may defend themselves using the 2003 Regulations.

The central defence the new Defamation Act has offered ISPs is that of fair and reasonable publication. According to the legislation, this defence applies when the statement was published in good faith, on a subject of public interest, was for the benefit of the public, the extent of the publication did not exceed what is reasonably sufficient, and it was fair and reasonable to publish it. The court can also take into account the extent to which the statement refers to the concerned persons performance of their public functions, the severity of the allegations, the context and language of the statement, the clarity of the distinctions made between suspicion, allegation and fact, whether exceptional circumstances on the date of publication justified its publication, whether the plaintiffs version of events was adequately represented, the

³⁶ Ibid.

effort the publisher made to obtain and publish a response from the plaintiff and the attempt made to verify the accuracy of the allegations in the statement. According to

Paula Mullooly:

The defence of fair and reasonable publication has been described as the right to be wrong. There is a necessity that there are strict guidelines to the defence because it, in essence provides that you can publish something defamatory about another person... and yet have no liability in relation to it. If there weren't strict guidelines to it, it could lead to an undue infringement of the person's right to their good name. That said the restrictions in Section 26 of the Defamation Act 2009 are significant.... However it should be noted that even in the UK the defence of fair and reasonable publication is seldom really successful.³⁷

Eoin O'Dell believes an alternative defence may be significantly more effective:

There are so many conditions here that it is very unlikely that the defence could ever be successful.... The infeasibly circumscribed statutory defence of fair and reasonable publication is at best a clumsy simulacrum of the less confined defence of responsible journalism. Before the Act, the Irish courts had been edging towards recognising that the Constitution required something akin to a responsible journalism defence.³⁸

The responsible journalism defence is recognised in Australia, Canada, India, South Africa and the UK. In order for the defence to be successful, Meville-Brown states that:

The court will assess whether the publication concerns a matter of public interest ... Then, if the general matter is one of public interest, the court considers whether the inclusion of the defamatory statement itself was justifiable.... Having established that the publication as a whole, including the defamatory material, is in the public interest, the court then undertakes an analysis of whether the publication was responsible and fair.³⁹

It allows for factual errors as long as the journalist in question acted in a responsible manner when reporting the information.

³⁷ Paula Mullooly, personal communication, 24th May 2010.

³⁸ O'Dell, 'Defamation Act a welcome but imperfect reform for libel cases'.

³⁹ Amber Melville-Brown, 16th November 2006, 'Media law', www.lawgazette.co.uk, accessed: 20th May 2010.

The 2009 Defamation Act has also made no change to the controversial decision to exclude defamation cases from the legal aid scheme, as stated under the Civil Legal Aid Act 1995, s.28(9)(a)(i). “Given Ireland’s history of dispossession and poverty, it is understandable that human dignity and good name should occupy a special place in the value system.”⁴⁰ Constantly developing media technology is putting many more ordinary people at risk of being defamed. The Internet is still a relatively new outlet, where social networking sites, online forums and email all constitute new opportunities for defamation. For example, the recent libel action taken by Galway Mayo Institute of Technology lecturer Terry Casey against his colleagues Larry Elwood and Deirdre Lusby, is one of the first civil libel cases for material circulated via email. In January 2005, the defendants circulated an email in which, “they published remarks which were defamatory to Mr Casey in the way of his office, calling and profession.”⁴¹ The defendants admitted that the allegations were unfounded and they accepted responsibility for publishing the remarks. An apology from the defendants was read out in the High Court and costs along with substantial damages in the region of six-figures were paid to the plaintiff. The Constitution affirms that the State is responsible for protecting the good name of each and every citizen. “It is incongruous that a good name should be so highly valued and yet no legal aid provided to enable less well-off individuals access to the courts to seek a remedy for attacks made on their good name.”⁴² McGonagle also explains that it is an inequity that the State willingly pays the cost of civil servants who sue for defamation in respect of their official role, but does not aid the ordinary citizen in protecting their

⁴⁰ McGonagle, *Media Law 2nd Edition*, 72.

⁴¹ RTÉ News, 14th May 2010, ‘GMIT email libel case is settled’, www.rte.ie, accessed 21st May 2010.

⁴² McGonagle, *Media Law 2nd Edition*, 72.

reputation.⁴³ She notes, “State employees constitute the third largest group of people suing for libel. Business and professionals constitute the largest.”⁴⁴

The refusal to provide legal aid for defamation cases could be incompatible with the 2003 European Convention of Human Rights Act and may be unconstitutional. For example, in *McDonald's Restaurants Limited v. Morris & Steel*⁴⁵ (also known as the ‘McLibel’ case), the longest running court action in English history, McDonald’s Corporation filed a lawsuit against Helen Steel and David Morris for distributing a pamphlet, created by environmental group London Greenpeace, on the streets of London City. The pamphlet, entitled ‘*What’s wrong with McDonald’s: Everything they don’t want you to know*’, made a number of allegations against the corporation. Steel and Morris were denied legal aid, in line with policy relating to libel cases, and had no option but to represent themselves. Naturally, there was a huge disparity in funds spent on the trial by McDonalds and the significantly smaller amount spent by Steel and Morris, each of whom lived on an extremely modest income at the time. As a result of their lack of resources, the defendants were prevented from calling many witnesses intended to support their claims. On 19th June 1997, seven years after the initial action was taken, the judge ruled in favour of McDonalds and found that several of the allegations made in the pamphlet were false, though he agreed that some of the statements were true. Following an appeal, Steel and Morris were still dissatisfied with the outcome, and filed a case with the ECHR, challenging the UK Government’s decision to refuse legal aid for defamation cases. The case was heard in September 2004. Representatives for Steel and Morris claimed that their right to freedom of expression and a fair trial had been denied. On 15th February 2005 the

⁴³ Ibid., 73.

⁴⁴ Ibid., 73.

⁴⁵ *McDonald's Restaurants Limited v. Helen Marie Steel & David Morris* [1997] EWHC QB 366.

ECHR agreed, and ruled that Articles six (right to a fair trial) and ten (freedom of expression) of the 2003 European Convention of Human Rights Act had been breached. The UK Government were required to compensate them for damages and legal costs.

The court ruled they did not receive a fair trial as guaranteed under the Human Rights Convention, because of the lack of legal aid available to libel defendants, and that their freedom of expression was violated by the 1997 judgement. The pair were awarded £24,000 damages, plus costs.⁴⁶

Solicitor Peter Bredin, of Author Cox Solicitors, believes that while it has become commonplace for some solicitors to take defamation cases on a 'no win no fee' basis, legal aid should be made available:

As all cases other than excluded cases are considered on their merits by the legal aid board, it strikes me that defamation should also be considered on its merits. A possible explanation for this is the traditionally high cost of bringing/defending a defamation action (the costs are typically amongst the highest awarded. The parties are entitled to brief two senior counsels for a defamation case, which is a rule long since done away with in personal injury cases). Whilst I note that your question relates to defendants, one can well imagine hard cases which would illustrate the unfairness of legal aid not being available from a plaintiff's perspective, but a plaintiff might have little difficulty in finding a solicitor to take on his case on a no foal no fee basis if the case is strong enough.⁴⁷

However, according to the Legal Aid Board, legal aid can cover not only the costs of a solicitor's fee, but also additional costs arising from a civil action. Any cost incurred when, for example calling a witness, is examined and if deemed necessary the legal aid scheme will cover the cost. These costs are then recovered from a settlement if awarded. Even if a solicitor agrees to take a defamation case on a 'no win no fee' basis, the customer may still have to foot the bill for any additional charges incurred during the trial. In the case that an impecunious person may not have the means to pay

⁴⁶ BBC News, 15th February 2005, 'McLibel pair win legal aid case', *news.bbc.co.uk*, accessed: 21st May 2010.

⁴⁷ Peter Bredin, personal communication, 18th May 2010.

for these extra costs, and they cannot find a solicitor willing to do so, that person is left with no option but to forgo legal action. They cannot defend their good name. In the case of a defendant, they will have to defend themselves without legal advice and representation.

Legal aid is not available in defamation cases, despite recommendations that it should be. Its absence means that a defamation action remains the privilege of the rich.⁴⁸

Another issue that has persisted in the new legislation is the fact that once a plaintiff alleges that a statement is defamatory, it is presumed that this is the case. If a defendant wishes to plead justification, they must prove that the statement is true in all material respects. They can also plead 'honest opinion', which has replaced the defence of 'fair comment' in the previous Act. According to section 20(2) of the 2009 Defamation Act, the defence of honest opinion is only applicable to opinion in matters of public interest, generally related to the Government and administration of the State. An opinion is honestly held if the defendant believed the opinion to be true, the opinion was based on allegations of fact, and the opinion related to a matter of public interest. The defendant must also prove that the allegations are true. If the defendant is unable to prove the truth of all of the allegations, the opinion must be honestly held in respect of the allegations that have been proved to be true. The defence has caused some controversy over the definition of an honest opinion:

The question arises, how can the truth of an opinion be established? A statement of opinion is not a statement of fact; only facts are capable of being proved true or false. The terminology of this sub-section is confusing and unclear and should be revisited. It may be desirable for the defendant to believe in the truth of the facts on which the opinion is expressed, but it does not make sense for the legislation to require the defendant to believe in the

⁴⁸ McGonagle, *Media Law 2nd Edition*, 103.

truth of the opinion. An opinion is not susceptible to being proved “true” or “false”.⁴⁹

Paula Mullooly discusses the burden of proof from both viewpoints:

The argument in favour of the burden of proof being on the defendant is that if you are going to publish something which has a tendency to damage somebody else’s reputation you should be able to stand over that and it shouldn’t be for the person about whom the comment has been made to prove their innocence and there is no doubt that there is some merit in that argument. The contrary argument is that this is the only area of law where a Plaintiff does not have to “prove their case”.... And the question remains if you reverse the burden of proof are you then infringing unduly on the constitutional guarantee of a person to their good name?⁵⁰

The burden of proof has been previously challenged by the European Court of Human Rights. In the aforementioned *Steel and Morris v. the United Kingdom*⁵¹ case, the judge ruled that the original case had breached Article 10 of the 2003 European Convention of Human Rights Act, freedom of expression. When concluding the trial, the judge ruled that although some of the statements in the pamphlet were libellous, others were true. In March 1999 the Court of Appeal further ruled the allegations made in the leaflet, which said McDonald’s employees do badly in terms of wages and that if a person eats enough of McDonald’s produce, their diet will become high in fat with a risk of heart disease, were fair comment. In February 2005 the ECHR found that the 1997 judgement had breached Article 10, and ordered the Government of the United Kingdom to pay Steel and Morris a significant amount in compensation.

Another controversial aspect of the 2009 Defamation Act was the decision to change the legislation so that an apology does not amount to an admission of liability and does not impact in any way on the determination of liability. If a defendant can say that they apologised as soon as possible, this may help to mitigate damages if they are

⁴⁹ Andrea Martin, 11th February 2009, ‘Defamation Bill, 2008 (formerly Defamation Bill, 2006)’, www.efc.ie, accessed 24th May 2010.

⁵⁰ Paula Mullooly, personal communication, 24th May 2010.

⁵¹ *Helen Marie Steel and David Morris v. United Kingdom* [2005] EMLR 314 [2005] EMLR 314.

found guilty. An apology is taken into account by the court when making an award. However, in practice, it may be very difficult for a jury not to view an apology as an admission of wrongdoing. This new clause has divided media law experts and solicitors, but it has yet to be determined whether this will, in actuality, generate a significant impact on a jury's decision. Eoin O'Dell says of the clause:

I think that the Act gets it right on an apology. An expression of regret is not necessarily an admission of liability; and there are times when it is the right thing to do. Juries will consider the circumstances, and where the [sic] accept that is sincere, they will be able to reduce damages accordingly.⁵²

Peter Bredin disagrees:

I do not believe it is realistic to expect a jury not to consider an apology as an admission, notwithstanding the terms of the Act and whatever might be directed by the judge. A defendant who discloses to the jury that he has made an apology – in an effort to minimise his exposure to damages – runs a very high risk that the apology will be deemed to be an admission of liability in the minds of the jury, who will then consider the case simply as an assessment of damages.⁵³

Paula Mullooly concurs:

I think it would be very difficult for a jury to distinguish the fact that an apology has been made by saying that legally it is not an admission of liability. I think the practicalities of the situation mean that a jury will probably view it in that regard.⁵⁴

It is human nature to view an apology in any form as an admission of guilt. It would be extremely difficult for a jury to ignore their natural instinct. Perhaps the Act is not realistic in this respect.

The final major issue with the new legislation is that companies are entitled to take defamation cases without actually having to prove damage to their reputation or the potential for loss of profits. The ease with which a company can now take a defamation action could prove to be problematic. The Act provides corporate bodies

⁵² Eoin O'Dell, personal communication, 12th May 2010.

⁵³ Peter Bredin, personal communication, 18th May 2010.

⁵⁴ Paula Mullooly, personal communication, 24th May 2010.

with the same rights as that of a human being. Solicitor Peter Bredin disagrees with this observation:

I think that this is reasonable, not least as a deterrent. Companies often spend enormous amounts on their reputations and should enjoy similar protection to that enjoyed by an individual.⁵⁵

According to Paula Mullooly:

The Act requires that companies are not obliged to prove special damage i.e. financial loss. The rationale behind this decision is that companies can suffer damage to their reputation without the damage necessarily affecting their balance sheet and accordingly, there shouldn't be such a requirement.⁵⁶

However, the worry is that this will lead to more *McLibel* (*McDonald's Restaurants v. Morris & Steel*⁵⁷) style trials, in which the plaintiff (corporate body) has vast sums of money to spend gathering evidence and witness statements, while the defendants have little financial assistance available to them for the same purpose. As a result, in the *McLibel* trial, McDonalds spent several million pounds, while the defendants spent approximately £30,000, most of which was donated by supporters. As previously mentioned, this meant that the defendants did not have the means to gather statements from all of their intended witnesses or fund travel expenses for their witnesses to attest at the trial, thus weakening their defence. They had intended to call several witnesses from South America to support their claims that McDonalds uses beef farmed on ranches located on deforested Central American rainforest land, thus contributing to the destruction of the rainforest. When the judge delivered his verdict on the claims relating to environmental damage, he concluded that the defendants had been unable to produce any evidence that McDonalds had contributed to the destruction of the rainforest. We will never know if this verdict would have differed

⁵⁵ Peter Bredin, personal communication, 18th May 2010.

⁵⁶ Paula Mullooly, personal communication, 24th May 2010.

⁵⁷ *McDonald's Restaurants Limited v. Helen Marie Steel & David Morris* [1997] EWHC QB 366.

had the defendants had the opportunity to call each of their intended witnesses or gather their statements as evidence for their defence.

Given the radical imbalance between the parties, the absence of legal aid for the activists, the presumption that their leaflets were false and the fact that McDonalds did not have to prove actual damage to their reputation – the European Convention on Human Rights was infringed.⁵⁸

Each one of these problems still exists in the 2009 Irish Defamation Act, leaving the people of Ireland openly vulnerable to such inequalities in a court of law.

⁵⁸ O'Dell, 'Defamation Act a welcome but imperfect reform for libel cases'.

CHAPTER 3: COMPARATIVE ANALYSIS

Examining the Act in Respect of Legislation in Other Jurisdictions

To put into context how far behind Irish law is in terms of dealing appropriately with Internet defamation actions, it is necessary to assess the legislation in place in other equally technologically advanced nations. This chapter will contain an analytical comparison of the defamation laws in place in the United States, the United Kingdom and Australia, alongside the 2009 Defamation Act. It will identify the key areas in which Irish law has surpassed legislation in other jurisdictions, but will also determine where the 2009 Defamation Act is deficient and how these other regions may or may not have implemented regulations to overcome such issues.

According to the Economist Intelligence Unit's 2009 E-readiness Rankings,⁵⁹ Ireland is the 18th most technologically progressive country in the world. However, despite having a more superior grasp of new media than 52 other regions on the list, many have argued that the laws Ireland has in place to protect Internet based companies and Internet users fall below the standards of many countries further down the pecking order. For example, both South Africa and India, ranking in 41st and 58th place respectively, recognise the defence of responsible journalism, which Eoin O'Dell argued would be beneficial to the modernisation of Irish Internet defamation law. We tied in 19th place alongside Portugal and Spain in terms of our legal environment and the protection it offers information and communication technology based companies.

The United States, the United Kingdom and Australia are three countries frequently cited by media law experts when comparing Internet defamation laws. These

⁵⁹ The Economist Intelligence Unit, June 2009, 'E-readiness Rankings: The Usage Imperative', *graphics.eiu.com*, accessed 26th May 2010, 5.

countries are culturally similar to Ireland and are also on a par in terms of implementing new technologies. These jurisdictions have each dealt with online defamation in very different ways. While some aspects of their legislation is far more efficient in dealing with such instances than Irish law, other aspects fail to take account of some very basic principles, which are imperative to creating a fair legal environment for both members of the public, web based corporate bodies and intermediary service providers.

THE UNITED STATES

In the United States, defamation law is rather liberal as regards to online defamation. This is in part due to the First Amendment of the Constitution of the United States, which reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The United States like Ireland, and unlike the UK and Australia, has also implemented a single-publication rule, whereby an action may only be taken in respect of the first instance of the publication of an allegedly defamatory statement. The single-publication rule is an imperative provision in any legislation if it is to adequately deal with Internet libel actions. The reason for this is that in the absence of such a clause, each individual time a website with defamatory content is viewed; a fresh tort of defamation is committed and the limitation period starts afresh. As a result, an online publisher faces indefinite liability. The single-publication rule in respect of the Internet, means that the statute of limitations will begin from the date the material first became available online, as opposed to each time it is accessed. In the 2009 Irish Defamation Act, the rule is outlined in section 11, which states that a

person has one cause of action only in respect of a multiple publication. A court may repudiate this rule in exceptional circumstances. This was not factored into the 1961 Act, therefore a plaintiff could potentially have taken a separate defamation action each and every time a web page was refreshed. In regards to the rule's implementation in the US, while California, Georgia, New Jersey, New York and Texas have each explicitly stated that the single-publication rule also applies to online content in their respective states; it remains unclear in many other states whether this rule is applicable to the Internet. This is decided by each individual state government.

Under US defamation law, the burden of proof lies with the plaintiff as opposed to the defendant. It is the responsibility of the plaintiff to prove that the defendant made a false and defamatory statement concerning them, the statement was communicated to a third party and the defendant was at fault or negligent. The plaintiff is not required to prove special damages. However, these rules change when the plaintiff is considered to be a public figure. In this case, the plaintiff must prove that the statement is false and that the defendant had actual malice.

The statute of limitations for defamation varies from state to state. It is usually between one and three years. While some critics worry that this does not give a plaintiff enough time to file a case, most solicitors and experts agree that a reduced statute of limitations is beneficial overall. Speaking about the reduction of Ireland's statute of limitations from six years to one year under the 2009 act, Paula Mullooly noted:

Under Irish Law if you wish to bring a complicated medical negligence claim you have two years to do so – this is in circumstances where you have to get lengthy medical reports. In the vast majority of defamation actions persons are aware of the defamatory material immediately and therefore there is no reason

why if they wish to bring proceedings they can't do so immediately. In relation to the argument that people might not be aware of online material it then does beg the question whether such online material could tend to lower them in the eyes of reasonable members of society if they have been unaware of the existence of the information at all.⁶⁰

Peter Bredin agrees:

The reduction is stark when described as being from six years to one year. Bear in mind, however, that the limitation period for slander (albeit a rarer form of defamation) had been three years. Furthermore, the limitation period can be extended by the court by a further year in certain circumstances, where the court is satisfied that it would be unjust for the one year period to be strictly applied.⁶¹

The definition of what constitutes a defamatory statement is also personal to each state, but it is usually recognised as a false statement that causes harm to a person's reputation and is published with negligence or malice. Some states differentiate between libel and slander, while others have adopted a single tort approach like Ireland.

Section 230 of the 1996 Communications Decency Act provides intermediary service providers with immunity from liability across all states for defamatory comments published on their websites, including statements posted by anonymous users. It protects web hosts even if they edit statements, provided they do not drastically change the commentary. In order to gain immunity from section 230, the defendant must be a user or provider of an interactive service, the cause of action of the plaintiff must treat the defendant as author of the alleged defamatory comments and the defendant must not be the information content provider of the material. This approach has come under criticism from media law experts in the United States for being

⁶⁰ Paula Mullooly, personal communication, 24th May 2010.

⁶¹ Peter Bredin, personal communication, 18th May 2010.

inordinately defendant friendly. Top US Internet law expert and attorney John W.

Dozier says of the clause:

It appears the intent of Congress was commendable when the bill was passed and signed into law. Basically, the argument went, no one should be liable for everything published by third parties on its website since traditional publisher liability implies oversight and editorial control over the content. That does not exist in the online world for the most part. But, I believe the unintended consequences of such far ranging protection are changing the way the Courts interpret the immunity statute.⁶²

While Ireland's defence of fair and reasonable publication is difficult for a defendant to utilize, the US's section 230 of the 1996 Communications Decency Act is not stringent enough. According to Paula Mullooly:

We live in a jurisdiction which protects a person's right to their good name and I believe that is an important protection. We also believe in the protection of freedom of expression. In those circumstances I believe those rights should be balanced as fairly as possible between the parties. Personally, I think Section 230 of the Communications Decency Act in the US goes too far. I am all for protection of pure ISPs but when you are looking at message boards or chat rooms I do not believe the owners of those services can argue that they have no liability in circumstances where their business is encouraging people to post messages on those services. A newspaper is liable for the entire contents of the newspaper including the Letters Page and advertisements – why should the Internet be treated more favourably? The same goes for broadcasters, if somebody rings a broadcaster on air and publishes something over the airwaves the broadcaster is responsible for that – again there is no reason why a website owner needs to be treated more favourably. To me the important distinction is between pure ISPs versus web site hosts. In relation to people who regard themselves as web hosts i.e. owners of message boards and chat rooms, they cannot abdicate responsibility purely because it is the Internet. With great power comes great responsibility.⁶³

Aside from the protection offered by the First Amendment, there are several alternative defences for those not covered by section 230. Many states in the US recognise the defence of qualified privilege, much the same as under Irish law, which can be defeated if the plaintiff proves actual malice. Also comparable to Irish law, a

⁶² Dozier Internet Law, 17th June 2007, 'Dozier Internet Law: Defamation Immunity Isn't Clear', *johndozierjr.typepad.com*, accessed: 26th May 2010.

⁶³ Paula Mullooly, personal communication, 24th May 2010.

defendant can plead truth, an absolute defence to a defamation allegation. Another defence recognised by most jurisdictions in the US is the 'opinion' defence:

Whether a statement is viewed as an expression of fact or opinion can depend upon context - that is, whether or not the person making the statement would be perceived by the community as being in a position to know whether or not it is true. Some jurisdictions have eliminated the distinction between fact and opinion, and instead hold that any statement that suggests a factual basis can support a cause of action for defamation.⁶⁴

It is some ways similar to the Irish law defence of honest opinion, though with not nearly as many prerequisites. The statement must be made about a matter concerning public interest, it must be expressed in such a way that is not true or false and it cannot be reasonably understood as intended to communicate actual fact. There are also the defences of consent and legal obligation to publish, both of which are absolute.

Legal aid in the US is provided by a variety of public interest law firms and community legal clinics funded by either the federal or state government through the Legal Services Corporation, as well as charitable donations. Congress established the corporation with the introduction of the 1974 Legal Services Corporation Act, to distribute resources to the law firms and clinics taking part. Many offer their services only through a means testing system, but unlike Ireland, legal aid may be available for defamation cases. Because there is such little funding available for legal aid, many law firms occasionally offer *pro bono* services. Florida's Orange County Bar Association is the only organization in the United States that employs a mandatory Legal Aid Society. Suggestions to adopt this method across the country have been met with much resistance from law professionals.

⁶⁴ Aaron Larson, August 2003, 'Defamation. Libel and Slander Law', www.expertlaw.com, accessed: 27th May 2010.

THE UNITED KINGDOM

The 1996 UK Defamation Act is very similar to the new 2009 Defamation Act in Irish Law. However, there are several important differences. UK defamation law recognises the separate torts of libel and slander. Defamation is defined as a statement which has the ability to alter a third party's perception of the plaintiff. UK law does not recognise the single-publication rule. In this respect at least, Irish law has better adapted to cope with actions arising from Internet libel. Because the single-publication rule is not accepted in the UK, each time an Internet page is accessed a new tort is committed and a new statute of limitation begins.

In UK law the burden of proof is somewhat balanced. Although the statement is presumed to be false as in Irish law, the plaintiff must prove that the statement in question referred to them and that it was communicated to a third party.

As previously mentioned UK law does explicitly provide protection for intermediary service providers. Section one of the 1996 UK Defamation Act protects the ISP on the condition that the person was not the author, editor or publisher of the statement, they took reasonable care in relation to the statement's publication and they had no reason to believe that their actions contributed to the publication of the statement. Other defences include justification (the material is true), fair comment, absolute privilege and qualified privilege. Justification is absolute. Fair comment is applicable when the defendant can prove that the comment was an expression of opinion on a matter of public interest and is not a statement of fact.

The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that

the underlying facts are true. If he or she is unable to do so, then the defence will fail... the defendant does not have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved.⁶⁵

The defence of fair comment is defeated if the plaintiff can prove actual malice.

Qualified privilege is almost identical to that of Irish law and can be used provided the statement was made under a moral or legal responsibility, the recipient had an interest in receiving the statement and public interest requires that the source and circumstances of publication are protected. Absolute privilege is again similar to that of Irish law, excepting that it refers to Irish Government officials, the Oireachtas and proceedings in an Irish court of law.

As discussed previously, legal aid is not available for defamation cases in the United Kingdom. However, the 1999 Access to Justice Act enables the Lord Chancellor to provide funding for exceptional cases which would usually be exempt from the legal aid scheme. This was introduced to ensure compliance with the European Convention on Human Rights. As of December 2005, this service is also available to those living in Northern Ireland.

AUSTRALIA

Like the US, Australia is divided into several different jurisdictions overseen by a federal government. Australian law abolished the differentiation between libel and slander in 2005. The definition of defamation under Australian law is:

Communication from one person to at least one other that lowers or harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence.⁶⁶

⁶⁵ Your Rights: The Liberty Guide To Human Rights, 18th August 2008, 'Defences to a Claim of Defamation', www.yourrights.org.uk, accessed: 28th May 2010.

⁶⁶ Arts Law Centre of Australia, 2010, 'The Law of Defamation - For Material Published After 1 January 2006', www.artslaw.com.au, accessed: 29th May 2010.

Though the statement is presumed false the burden of proof is relatively balanced, as in UK law. The plaintiff must prove that the allegedly defamatory statement made by the defendant specifically referred to them and that it was published or communicated to a third party. They do not need to prove special damages.

The 2006 Uniform Defamation Law rules that the statute of limitations for a defamation action is one year from the date of publication and the court may extend this limitation up to three years in exceptional circumstances. However, as previously noted, the single-publication rule is not recognised in Australian law. Each time a website is accessed the statute of limitations is renewed.

Under Australian legislation a company generally cannot sue for defamation. There are some exceptions, but the company must not have more than ten employees, it must be a non-profit organisation and it must not be a public body, or related to another organisation or public body.

The law has made explicit provisions to protect ISPs. Clause 91(1) of the 1992 Broadcasting Services Act (Cwlth) includes a statutory defence for the ISP provided they were not aware that they were hosting defamatory material.

The definition of ‘internet [sic] service provider’ is, in effect, limited to providers of services for carrying internet [sic] communications between two or more points, at least one of which is in Australia. ISPs located outside Australia are therefore potentially able to avail themselves of the protection afforded by cl 91(1), provided that the relevant communication originated from, or is destined for, a point within Australia.⁶⁷

⁶⁷ Media & Arts Law Review, September 2000, ‘Australian Defamation Law Update’, www.law.unimelb.edu.au, accessed: 29th May 2010.

However, the clause does not apply to emails, information not kept on a data storage device and information transmitted in broadcasting form (this includes radio and television recordings played online). Interestingly though, information transmitted in broadcasting form is covered by the clause on the condition that it is an 'on demand' service.

If the defendant is unable to avail of clause 91(1), there are several other defences available. The defence of honest opinion in Australian law is very similar to that of Irish law. There is also the defence of justification/truth, which is absolute. Qualified privilege, which again mirrors Irish and UK defamation law. The defence of triviality protects the defendant provided they can prove that the plaintiff suffered no harm as a result of the publication of the alleged defamatory statement. Protected reports of court and parliamentary proceedings is similar to that which is covered under the Irish law defence of absolute privilege. Australian law also recognises the defence of innocent dissemination in the event that the defendant was unaware that the material was defamatory, this lack of knowledge was not due to negligence on the part of the defendant and the defendant published the statement in their capacity as a subordinate distributor or an employee. An Internet service provider is classed as a subordinate distributor.

The individual jurisdictions within Australia each govern a unique legal aid scheme. There are eight independent Legal Aid Commissions and they are funded by the Commonwealth, State and Territory Governments, as well as receiving charitable donations. A person may claim legal aid for a defamation action under each of these schemes.

Comparing the defamation laws in these three countries with that of Ireland immediately identifies a critical area in which the new 2009 Irish Defamation Act has succeeded. The implementation of the single-publication rule is perhaps the most important amendment to the original legislation. The absence of such a law could have potentially facilitated the demise of the Irish media industry, as it would have allowed a single defamatory statement to lead to a multitude of legal actions and an excessive amount of damages for the defendant. In many instances even a single defamation action has ended in bankruptcy for the defendant due to the prodigious costs and compensation involved.

The change in the statute of limitation from one year to six years is also considered a success for the new legislation. Six years for defamation was sufficiently longer than most limitation periods for other actions. This reduction brings it in line with the majority of other jurisdictions and ensures that cases are dealt with in a timely manner. The option for the court to extend the period to two years in exceptional circumstances is also a necessary and scrupulous proviso.

Abolishing the distinction between the separate torts of libel and slander also appears to be a suitable alteration. Defamation cases based on accusations of slander were extremely rare. The majority of defamation cases arise from the media and considering radio and television broadcasts and Internet publications all constitute libel, the tort of slander had become obsolete.

This comparison has also highlighted many remaining inadequacies in the Act. Each of the juxtaposing jurisdictions has some form of legal aid available for members of the public who wish to take a defamation action. Even the UK, whose stipulations regarding legal aid are near identical to those of Irish law, has implemented a scheme of sorts for defamation actions to ensure compliance with the European Convention of Human Rights.

The burden of proof is imbalanced and lies solely with the defendant. Though the US exercises the opposing extreme of placing the burden on the plaintiff alone, both Australia and the UK have adopted a scheme where it is shared in some respects. The statement is presumed false but the plaintiff must prove that the statement referred to them and was communicated to a third party.

Irish law does not provide sufficient protection for intermediary service providers. The US's section 230 of the 1996 Communications Decency Act is unreasonably biased towards the defendant and does not adequately acknowledge the plaintiff. The defence provided for ISPs in section one of the 1996 UK Defamation Act employs reasonable consideration of the position of the ISP and outlines statutory guidance to be taken into account when determining if the ISP used reasonable care. Clause 91(1) of the 1992 Broadcasting Services Act (Cwlth) contains a similar defence for ISPs, but is perhaps not as comprehensive as the UK statute.

Overall the 2009 Defamation Act has failed to correct multiple errors inherited from the previous legislation, despite ample examples of tried and tested alternative measures implemented abroad.

CHAPTER 4: SUGGESTIONS FOR REFORM

Proposed Amendments to Correct the Current Legislation

The 2009 Defamation Act was a missed opportunity to bring Ireland's legislation into the 21st century and in line with modern technologies. Media law experts, solicitors and ISPs have expressed their disappointment and dismay that the Act has left so many inefficiencies uncorrected. Not only has the Act failed to account for existing technology, but it will not sufficiently provide for inevitable future advancements.

Media law expert Paula Mullooly says of the new legislation:

I agree that the 2009 Act is a missed opportunity as far as online publication is concerned.... I think much of our legislation is going to have difficulty in keeping up with technological advances.⁶⁸

I believe that there are several issues which must be rectified in order for the Act to offer sufficient protection for the citizens, corporations and Internet intermediaries of Ireland:

The burden of proof must be rebalanced. At present the defendant is 'guilty until proven innocent', so to speak. Marie McGonagle has argued that in certain situations, for example in *McDonald's Restaurants Limited v. Morris & Steel*⁶⁹, the presumption of falsity could violate the ECHR:

While not automatically in breach of the Convention, application of the presumption of falsity in defamation law, which automatically shifts the burden of proof onto the defendant in such complex circumstances could amount to a violation of the right to freedom of expression.⁷⁰

However, placing the burden of proof entirely on the plaintiff would be equally unjust. Following in the footsteps of UK and Australian law by shifting the burden

⁶⁸ Paula Mullooly, personal communication, 24th May 2010.

⁶⁹ *McDonald's Restaurants Limited v. Helen Marie Steel & David Morris* [1997] EWHC QB 366.

⁷⁰ Marie McGonagle, 1st September 2006, 'Recent Developments in Defamation Law', www.clarupress.ie, accessed: 30th May 2010.

from one party alone, and putting the responsibility on both the plaintiff and the defendant would prove far more democratic. I propose an amendment of the law, to retain the presumption of falsity in regards to an allegedly defamatory statement, but to place the onus of proving publication on the plaintiff. The plaintiff should also be required to prove that the defamatory statement referred to them.

Amending the defence of fair and reasonable publication. In order to rely on the defence of fair and reasonable publication a defendant is required to prove that they acted in good faith on a matter of public interest and that the extent of the publication did not exceed what was necessary. It is highly doubtful that a defendant would be able to utilize this “unworkably narrow”⁷¹ defence, particularly because of the lengthy list of considerations available for the court to take into account. The Legal Advisory Group on Defamation proposed in their report the introduction of the defence of responsible publication, the essential prerequisites of which would require the defendant to prove that the publication was made in the course of, or for the purpose of some form of public interest and that it was for the public benefit. Many argue that replacing the defence with something similar to the ‘responsible journalism’ defence would be beneficial. The defence of responsible journalism, already recognised in many culturally and technologically similar jurisdictions, is far more reasonable in its assessment of the sequence of events leading to publication. It also encourages journalists to maintain a standard of professionalism.

The responsible journalism defence has indeed meant greater scrutiny of journalistic standards and practices by the courts, and that has led media organizations to question whether their professional standards are ‘up to scratch.’ If media organizations want to use this defence, then they have to be prepared for their journalism to be put on trial ... The court will scrutinize the

⁷¹ O’Dell, ‘Defamation Act a welcome but imperfect reform for libel cases’.

reporter's conduct and also the editorial decisions made by editors who had a hand in the publication of the article.⁷²

This defence ensures that serious investigative journalism and democratic discussion is offered some form of protection, and that careless or malicious reporting and allegations are easily identifiable and dealt with in a satisfactory manner.

The introduction of the defence of innocent publication, similar to the defence introduced into UK law in 1996, as recommended in the Legal Advisory Group on Defamation's 2003 report. The terms 'author', 'editor' and 'publisher' should be clearly outlined and should take account of Internet intermediaries and online publications. It is also necessary to clarify what constitutes the intermediary provider being made 'aware' of the defamatory statement, whether it may be by way of email, telephone, fax or letter. The ISP should also be allowed to investigate whether removal of the information is necessary, so as not to breach Article 10 of the ECHR.

Another important provision would be:

Duty be placed on a broadcaster, when a potentially defamatory statement has been made, to seek, as soon as practicable, to minimise the impact of what has happened.⁷³

Instructions as to how the regulations of the European E-Commerce Directive (2003/31/EC) are incorporated into Irish Defamation law must be clearly acknowledged in the legislation. Many of the directions outlined in the Directive are ambiguous and need to be clarified in terms of interpretation. It should also extend protection to chatroom operators, search engines and other Internet intermediaries.

⁷² Kathy English, 17th November 2007, 'Defending responsible journalism', *www.thestar.com*, accessed 30th May 2010.

⁷³ Legal Advisory Group on Defamation, 'Report of the Legal Advisory Group on Defamation', 28.

The problem for search engines and other intermediaries is that the E-Commerce Directive does not go far enough. Under the Directive a limited immunity is given to three classes of intermediaries - caches, hosts, and mere conduits. This, however, leaves other internet [sic] intermediaries out in the cold. Search engines, providers of hyperlinks and content aggregators are analogous to hosts or mere conduits (they facilitate access to material but do not control it or have knowledge of its content) - but they do not enjoy comparable protection under the Directive.⁷⁴

Clarification in regards to online newspaper archives in respect of the single-publication rule. It has in recent years become commonplace for periodicals to upload material to the Internet following publication in hard-copy format. At present, the single-publication rule, as outlined in the 2009 Defamation Act, does not make reference to the re-publishing of a defamatory article online and whether or not this may form the basis for a second defamation action. I do not believe that archived material available online should constitute a secondary tort of defamation. I propose the introduction of a specific clause in relation to archived material, which instructs the archive operator to place a notice on the archived material once defamation proceedings have been taken in respect of its contents. This proposal has already been endorsed by the European Court of Human Rights in paragraph 47 of its judgement in *Times Newspapers Limited v. United Kingdom*.⁷⁵

The attachment of a notice to archive copies of material which it is known may be defamatory would 'normally remove any sting from the material'.... In the circumstances, the Court, like the Court of Appeal, does not consider that the requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, constitutes a disproportionate interference with the right to freedom of expression.⁷⁶

⁷⁴ McIntyre, 'Defamation, search engines and the E-Commerce Directive'.

⁷⁵ *Times Newspapers Limited v. United Kingdom* [2009] EMLR 14.

⁷⁶ European Court of Human Rights, 10th March 2009, 'CASE OF TIMES NEWSPAPERS LTD (NOS. 1 AND 2) v. THE UNITED KINGDOM (Applications 3002/03 and 23676/03)', *cmiskp.echr.coe.int*, accessed: 30th May 2010.

The law must be amended so that companies are obliged prove special damages in order to proceed with a defamation action. A corporate body should not be afforded the same protection as an individual. The Irish Human Rights Commission noted in their *Observations on the Defamation Bill 2006* report:

While it is clear that a body corporate has the right to sue for defamation, the same issues of the right to a good name and reputation do not apply as would be the case for an individual action. In this regard, the case may be made that restrictions on freedom of expression operating in favour of a body corporate should be more narrowly drawn than those protecting the reputation and privacy rights of individuals.⁷⁷

On the 20th February 2007, Senator David Norris also raised the issue in the Seanad:

If there is no financial hurt, one is left only with feelings. I contend, however, that corporate entities are not entitled to feelings. The ability to feel is a human attribute that does not attach to the collective in the same way. I again plead the interest of the ordinary person in this. If I were to say that Guinness or Mars bars are bad for us, should the corporate entities that manufacture those products be allowed to land on me? ... We should not be expected, however, to compensate a corporate identity for an injury to its supposed corporate feelings.⁷⁸

Then-Minister for Justice Michael McDowell agreed with the sentiments:

The good name of every citizen requires to be upheld by the Constitution but companies are not citizens. I will reconsider the matter between now and Report Stage. It may be better to recast the section to state that a body corporate can only bring a defamation action in respect of a statement made where it has incurred, or is likely to incur, financial loss or where the statement was made with malice.⁷⁹

Corporate bodies usually have far greater resources at their disposal with which to launch an aggressive action against any ordinary consumer for reasons which may have no overall effect on the company's financial income or reputation. Even consumer watchdog groups could be subject to defamation action.

⁷⁷ Human Rights Commission, 7th December 2006, 'Observations on the Defamation Bill 2006', www.ihrc.ie, accessed: 30th May 2010, 6.

⁷⁸ Parliamentary Debates, 'Seanad Debate Vol. 186 No. 4', debates.oireachtas.ie, accessed: 30th May 2010.

⁷⁹ Ibid.

Perhaps the most worrying aspect of the Act is the absence of legal aid for defamation cases. This is unacceptable from both a human rights perspective and a constitutional perspective. Article 40(3)(2) of the Constitution of Ireland reads:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Failing to provide legal aid for defamation without exception is an undeniable violation of the State's duty toward the citizens of Ireland. I propose, at the very least, the introduction of a scheme similar to the clause outlined in the UK's 1999 Access to Justice Act, which provides legal aid for defamation cases in exceptional circumstances. Such an amendment would also ensure compliance with the European Convention of Human Rights, as well as implementing the most basic amount of justice to the people of Ireland in this respect.

I do not believe that the 2009 Defamation Act affords sufficient protection to the citizens and Internet based corporations of Ireland. Equally, I do not believe that the Act is broad enough in content to make it applicable to the inevitable advances in communication and new media technologies. The result is an inexorable concern to multinationals assessing the potential to invest in the Irish economy. The incitement amongst Ireland's media law professionals and experts to initiate change is conclusive. A reform of the current Act is an absolute necessity if it is to comply with the ECHR and the Irish Constitution,

if it is to provide adequate protection for the public, and if it is to encourage direct foreign investment.

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APPENDIX – LEGISLATION

1999 Access to Justice Act (United Kingdom)

1992 Broadcasting Services Act (Cwlth) (Australia)

Brussels I Regulation (Council Reg (EC) 44/2001) (European Union)

1995 Civil Legal Aid Act (Ireland)

The Constitution of Ireland (Ireland)

The Constitution of the United States of America (United States of America)

1996 Communications Decency Act (United States of America)

1952 Defamation Act (United Kingdom)

1961 Defamation Act (Ireland)

1996 Defamation Act (United Kingdom)

2009 Defamation Act (Ireland)

Electronic Commerce Act 2000 (European Union)

2003 European Convention of Human Rights Act (European Union)

2003 European E-Commerce Directive (2003/31/EC) (European Union)

1974 Legal Services Corporation Act (United States of America)

2006 Uniform Defamation Law (Australia)

APPENDIX – CASE REFERENCES

Fiona Shevill v. Presse Alliance [1995] ECR I-415, Case 68/93.

Godfrey v. Demon Internet Ltd [1999] 4 All ER 342; [2001] QB 201 QBD.

Helen Marie Steel and David Morris v. United Kingdom [2005] EMLR 314 [2005] EMLR 314.

Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185 (9th Cir. 2001)(US).

McDonald's Restaurants Limited v. Helen Marie Steel & David Morris [1997] EWHC QB 366.

Mulvaney & Others v. Sporting Exchange Ltd (Trading as Betfair) & others [2009] IEHC 133.

Times Newspapers Limited v. United Kingdom [2009] EMLR 14.