Irish defamation laws - an all island approach

Long awaited and overdue reviews of defamation laws in the Republic of Ireland and Northern Ireland are expected to gather pace in the coming months, creating an opportunity to better align the jurisdictions' approaches to reputational harm.

Allegations travel especially quickly across a small, shared, borderless island such as Ireland. As the saying goes, "*a lie can travel around the world while the truth is lacing up its boots*". The cultural, social, and commercial links between the Republic of Ireland and Northern Ireland make that journey considerably easier. Means of stopping it, however, differ and publishers operating on both sides of the border are increasingly being forced to grapple with the nuances between the two regimes.

Jurisdiction

The first question any party to a potential dispute needs to ask is "*is there a claim here?*" Unlike in other jurisdictions, the Republic of Ireland and Northern Ireland have not yet adopted any threshold to filter out trivial complaints. Prospective plaintiffs do not need to prove that their reputations have actually been harmed or that they have suffered any loss in order to proceed. The absence of any threshold often results in a significant disconnect between the reputational harm suffered by a plaintiff and the level of damages they're ultimately awarded. That disconnect favours defamation plaintiffs in both jurisdictions, but can have a chilling effect on a defendant's freedom of expression.

Under the Republic of Ireland's Defamation Act 2009 (the **ROI Act**) a plaintiff need only prove that an allegation was published which tended to injure their reputation "*in the eyes of reasonable members of society*". A near identical assessment is used in Northern Ireland, and there is relatively little difference between the available defences across the jurisdictions. Both may change after the reviews have been completed. There have been various calls for Northern Ireland to adopt the same "*serious harm*" threshold as is currently applied in England and Wales. The European Commission, amongst others, has criticised the frequent use of defamation claims in the Republic of Ireland.

Defamation claims often have a cross-border element and "*libel tourism*" will certainly be up for debate in both reviews. Nonetheless, neither the Republic of Ireland nor Northern Ireland is likely to adopt a strict requirement whereby a plaintiff must prove that the court in question is the most appropriate place to bring the claim before advancing proceedings against a non-domiciled defendant (although the courts may continue to decline to hear claims without proof of publication or some other meaningful connection).

Considerations

Anonymity and prior-restraint

Anonymised proceedings and pre-publication injunctions are rare in defamation claims in Northern Ireland, although the courts have allowed certain plaintiffs to alphabetise their names (particularly in privacy and harassment claims where there is a genuine threat of real harm). That practice is even less common in the Republic of Ireland and the High Court has previously expressed the view that it would be counter-intuitive to anonymise proceedings aimed at vindicating a person's right to a good name[1].

Applications for Norwich Pharmacal Orders are, however, becoming increasingly common in the Republic of Ireland and proposals to legislate for them had been included in early drafts of its new online harassment act. The review of the ROI Act may resurrect this suggestion, but any order granted is likely to be limited to the information necessary to identify the wrongdoer. The courts in both jurisdictions have to date been reluctant to extend this relief to the disclosure of any documentation. Neither is likely to change that approach, but recommendations on how and when to grant a Norwich Pharmacal Order may be expected in the Republic of Ireland.

Jury trials

Plaintiffs have a right to opt for a jury trial in both jurisdictions, although juries are a more common sight in the Republic of Ireland than in Northern Ireland, and both reviews are expected to suggest reforms in this area. In practice, jury trials in Northern Ireland have been few and far between over the last decade with parties often electing to proceed to hearing by judge alone. This goes some way to explain the more moderate damages the Northern Irish courts have awarded over recent years.

In the Republic of Ireland though, there are loud calls (including from us) to remove juries from defamation cases entirely and to overhaul its unpredictable damages regime. That position may gain more support in light of the considerable caps on damages suggested and agreed in the Republic of Ireland's new personal injury guidelines. However, defamation claims have always compared unfavourably to those awards, and a compromise position to further limit a jury's role in determining the amount of damages may prove less controversial.

Limitation periods

On paper, the ROI Act and the Defamation Act 1996 (which remains in force in Northern Ireland) both apply a one-year limitation period to defamation claims (although the ROI limit can be extended to two years in exceptional circumstances). The Republic of Ireland though applies the single publication rule, meaning the cause of action will run from the date that the allegation was first broadcast, printed, posted or otherwise published.

Conversely, the multiple publication rule in Northern Ireland means that a new and separate cause of action will accrue every time the publication is downloaded or accessed within the jurisdiction. In practical terms, that means an allegation published on a website accessible on both sides of the border could be the subject of a claim in the Republic within one year of the date of publication, but the person defamed could take action in Northern Ireland if it was viewed ten years later.

Northern Ireland's multiple publication rule will almost certainly be a focus of the upcoming review. Abolishing it in favour of the single publication rule would harmonise Northern Ireland's approach with that of the Republic of Ireland, as well as the rest of the United Kingdom.

Funding

Although options for financing defamation proceedings differ slightly, both jurisdictions take similarly conservative approaches by comparison to other common law jurisdictions. Those positions are unlikely to change following either review.

The biggest hurdles for plaintiffs in the Republic of Ireland is its total prohibition on third party funding (although this remains on the agenda for judicial reform) and relatively limited access to after-the-event insurance. Conditional fee

[1] Mc Keogh v John Doe 1 & Ors [2012] IEHC 95

agreements are also subject to restrictions, and charging a contingency fee or claiming fees as a percentage of the amount recovered are prohibited (and likely to remain so if the recommendations of a recent civil justice review group are followed). While conditional fee agreements are not permitted at all in Northern Ireland, third party litigation funding and after-the-event insurance is available on a limited basis.

Procedure

Neither jurisdiction has a dedicated list for media claims, as is the case in other jurisdictions. That is also unlikely to be impacted by the pending reviews. Urgent applications in the Republic of Ireland and Northern Ireland will generally be assigned according to the court's availability to hear them, while trials will be assigned by availability and the mode of hearing. In practice, however, almost all defamation claims in the Republic of Ireland are dealt with in (and occupy most of) the High Court's jury list.

Unlike other lists, the Republic of Ireland's jury list does not have any defined case management procedures and, as a result, cases can take considerably longer to resolve. In Northern Ireland, the courts have adopted a defamation pre-action protocol which sets standards for the content of correspondence, timetables for the exchange of information and the requirement that parties should act reasonably to keep the costs proportionate.

Damages and costs

The Republic of Ireland and Northern Ireland share a reputation for being plaintiff friendly and the upcoming reviews will likely receive plenty of submissions on the 'chilling effect' of existing defamation laws in both jurisdictions.

The Republic of Ireland is notorious for its extremely high and unpredictable defamation awards, which reached heights of €10m[2], €1.87m[3], €900,000[4] and €750,000[5] (albeit, all reduced on appeal) under the old legislation. The ROI Act was intended to consign those enormous awards to the past by, amongst other things, introducing the 'offer of amends' procedure and allowing judges to give guidance to juries. To date, neither seems to have had the intended effect, as evidenced by a recent award of €387,000 being reduced on appeal to €76,500.

Northern Ireland hasn't seen the same level of awards, with the largest damages awarded by a jury trial being £450,000 in 1992 when Barney Eastwood succeeded in his libel claim against Barry McGuigan. The most recent jury award for damages that we are aware of was in 2012 for £80,000[6], with judicial damages over recent years tending to be more modest again (£48,750 in *Elliot v Flanagan*[7] and £50,000 in *Coulter v Sunday Newspapers*[8], although the latter award was overturned on appeal). However, greater consistency would go some way to mitigating the risk of Northern Ireland's defamation laws being used to deter free speech.

Reducing the costs of bringing and defending a defamation claim in both jurisdictions would go a great deal further, and the upcoming reviews may well make recommendations to do so. However, costs reform is a broader issue across both jurisdictions and meaningful changes will require comprehensive action. The costs of a defamation claim will not be reduced in isolation.

Conclusion

Reform of the defamation laws in both jurisdictions has been long awaited. The Republic of Ireland's review was due to be completed by January 2015 and Northern Ireland's laws have been expected to change since the implementation of the Defamation Act 2013 in England and Wales. It is hoped that the pressure to modernise both regimes continues to build, and that each review gives due consideration to the reputational and commercial links on both sides of the border. Closer alignment will mean greater predictability for publishers and their subjects. In turn, that predictability will better facilitate freedom of expression and offer greater efficacy when the need to defend one's good name arises.

However, and although hopes are high, the limited progress to date and the potential for further pandemic-related delay may mean that reform, in whatever shape it comes, won't be on the horizon anytime soon.

[2] Kinsella v Kenmare Resources plc & Carvill 2007/5677P

[3] Leech v Independent Newspapers (Ireland) Limited [2015] 2 IR 214

[4] McDonagh v Sunday Newspapers Limited [2015] IECA 225

[5] O'Brien v Mirror Group Newspapers Limited [2001] 1 IR 1

[6] Gormley v Sinn Fein, unreported, NIQB, 14 December 2012

[7] [2016] NIQB 8

[8] [2016] NIQB 70

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