**O’Brien’s case should never have reached full trial**

**The Department of Justice needs to publish its review of the Defamation Act as soon as possible**

By **Eoin O’Dell**

Irish investigative journalism won a huge victory on Friday, when a jury found that Denis O’Brien had not been defamed by this newspaper. This shows that critical coverage, if true, is not defamatory.

Journalists must be independent. They should not act or write on behalf of any special interests, whether corporate, political or social. And they should be able to report fairly – even critically – on matters of public interest, without fear of such special interests. This is essential to a functioning democracy. The fact that this newspaper defended this action, and did so successfully, shows that such values are alive and well in Irish journalism today.

While the media will welcome the outcome of the case, the bigger point is that it should never even have reached this stage. Pending reforms by the Department of Justice should look at how such cases could be resolved much more speedily. And these reforms should be published as quickly as possible.

The Defamation Act 2009 contains many provisions designed to encourage earlier resolution of defamation cases. For example, it facilitated the creation of the Press Council. However, O’Brien memorably dismissed it as “toothless” in 2013, when he sued the Irish Daily Mail for defamation, and won €150,000, after a columnist falsely accused him of hypocrisy in relation to humanitarian works he financed in Haiti. No doubt that is why, in his action against this newspaper, he again declined to complain to the Press Council and issued court proceedings instead.

The Act also permits parties to defamation actions to seek an early ruling on whether the words complained of carry a defamatory meaning. In England, a similar provision now means that, in many cases, there is a trial of meaning as a preliminary issue, even before the service of the defence. This sensible case management can bring cases to a relatively speedy end and quite significantly reduce costs for all concerned.

The jury in O’Brien’s case found that this newspaper’s reports of his borrowing were not defamatory. This conclusion could have been reached in a preliminary trial on meaning, and saved everyone a great deal of time, stress and money. But cases taking advantage of this procedure are rare. The Department of Justice is currently carrying out a review of the 2009 Act. It should revisit this provision, and incorporate a version of the English practice.

Another innovation in the 2009 Act is the declaratory order. This allows a plaintiff who wants speedy vindication to seek a declaration in the Circuit Court that the statement in question is false and defamatory. No damages are available in this procedure. But this quick, non-damages, remedy has been sought in only a small handful of cases. The Department’s review should also revisit this procedure, to make it more attractive for plaintiffs.

The most important development in the 2009 Act is the defence of fair and reasonable publication on a matter of public interest. However, in O’Brien’s case against this newspaper, the jury did not reach this issue. There was no cause of action, because they held that the words complained of were not defamatory; so there was no need for them to go on to consider whether there would have been a defence.

Although this is a welcome outcome from the defendants’ point of view, it is a pity that we did not get to see the defence in action. In England, the Court of Appeal has robustly interpreted their equivalent in favour of defendants. But, in Ireland, the Court of Appeal has said that the scope and extent of the Irish provision need to be clarified. It is a very cumbersome defence, and should be simplified in the Department’s review of the Act.

In his action, O’Brien sought both compensatory and punitive damages. Awards in Irish defamation cases have tended to be very high. And this was a major concern in submissions by various media organisations to the Department’s review.

The high level of damages may in part explain why plaintiffs tend to avoid going to the Press Council or seeking the declaratory order, and proceed instead to a full trial before a jury in the High Court. For example, in 1999, in a defamation action against the Irish Mirror, O’Brien was awarded Ir£250,000, but Supreme Court set that award aside as disproportionately high. In the retrial in 2006, O’Brien was awarded then-record damages of €750,000, and the case subsequently settled.

In 2008, O’Brien lost the record for the highest defamation award when a High Court jury awarded Sligo traveller Martin McDonagh €900,000 against the Sunday World for false allegations of drug dealing and loan sharking. In 2017, the Supreme Court indicated that it would have substantially reduced that award to an amount as low as €75,000.

In 2010, McDonagh in turn lost the record for the highest defamation award when a High Court jury awarded businessman Donal Kinsella €10m damages against a company which had issued a press release falsely insinuating that he had made inappropriate sexual advances to a colleague on business trip. Almost overshadowed this week by the O’Brien case was the news that the Court of Appeal had cut this award down to €250,000.

The McDonagh and Kinsella appeals stand in stark contrast to the €1.872m damages awarded to communications consultant Monica Leech against Independent Newspapers in 2009. In 2014, the Supreme Court reduced this to €1.25m; in 2017, the European Court of Human Rights held that this award did not infringe the European Convention on Human Rights; and it remains the highest defamation award in Ireland.

All of these cases were decided on the law as it was before the 2009 Act. It now provides that the parties may make submissions to the court in relation to damages; and it requires the judge to give directions to the jury in relation to damages. The intention here is that a properly-directed jury should be less likely to base damages awards on American TV shows or international telephone numbers.

Since the jury found that O’Brien had not been defamed, they did not, in the end, need to consider the issue of damages. Had they done so, we could have learned whether the Act has abated Leech levels of damages and reinforced the McDonagh and Kinsella trend in favour of reducing damages awards in defamation cases.

Although the 2009 Act contains many provisions designed to encourage relatively quick resolution of defamation cases, a determined plaintiff can still reach the High Court. The only real dis-incentive is the prospect of being liable in costs. O’Brien could now face a legal bill of up to €1m. That would soften the cough of many plaintiffs, though not perhaps that of a billionaire businessman.

On the other hand, had this newspaper lost, costs of this level, and a potentially high damages award, would have imperilled its very existence. The jury’s finding that it did not defame O’Brien is therefore a powerful reaffirmation of Ireland’s proud traditions of responsible and independent journalism.

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