SUPPLEMENTAL SUBMISSION TO THE DEPARTMENT OF JUSTICE AND EQUALITY

REVIEW OF DEFAMATION ACT 2009

1. **Introduction**

1.1 Further to our submission of December 2016 in respect of the request from the then Minister for Justice and Equality for contributions to inform her Review of the Defamation Act 2009 ("the Act"), these supplemental submissions provide some additional perspectives, drawing upon issues canvassed at the Department's November 2019 Symposium, and upon our more recent experience of the operation of the Act since 2016. These supplemental submissions may usefully be read in conjunction with our December 2016 submission.

2. **Context of this submission**

2.1 McCann FitzGerald continues to provide legal advice to a wide range of clients relating to defamation and publication more generally. We have noticed a significant increase in international publishers seeking our advice prior to publication with a view to mitigating the risk of publishing into Ireland, as well as a greater volume of geo-blocking, particularly by US based clients. There has also been a significant increase in claims in respect of digital content, many of which have no factual connection to Ireland, raising issues of forum and, in some cases, jurisdiction. The effective operation of legislation in this field is thus important to us as a firm and to our clients, given the significant costs involved in managing and defending defamation claims. Our media practice is almost entirely a defence practice.

2.2 We believe, however, that it is essential that plaintiff perspectives are also fully appreciated in respect of any legislative changes that may be recommended. It is also important, given that such a high proportion of claims now affect defendants who do not fit within the traditional 'publisher' rubric, that the perspectives of others involved in generating and circulating digital content, are also captured. In this regard we note that Twitter, whom we represent, made submissions as part of the review in March 2020 and we respectfully adopt those submissions.

2.3 Digital media, which cover a spectrum of on-line content from digital versions of print, through digital publishers, to platforms facilitating sharing of on-line content, were not represented at the November Symposium as far as we are aware. We endeavour below to provide up-to-date feedback on the operation of the legislation from an on-line content perspective, but would emphasise the importance of ensuring that the specific perspectives of digital media are fully captured as part of the review.

3. **Imbalance between plaintiffs and defendants**

3.1 We have noted a greater incidence of claims being dismissed for want of prosecution on grounds of inordinate and inexcusable delay since our original submission, which is to be welcomed.

3.2 The absence of any demerit-based summary disposal procedure for defendants is, however, still problematic. The Court of Appeal has expressly stated that there is no triviality threshold for defamation claims under Irish law in *Gilchrist –v- Sunday Newspapers Limited [2017] IECA 190*, so that based on Section 6 of the Act it is not open to an Irish court to strike out a defamation claim on the basis that any benefit the plaintiff stands to obtain is so limited that on a cost benefit analysis the claim should not be permitted to proceed[1]. We note that the

[1] As occurs in England & Wales, see *Jameel (Yousef) v. Dow Jones & Co. Inc.* [2005] QB 946

primary basis for the Court of Appeal so finding is that to do otherwise would limit the constitutional right of access to the courts.

3.3 There was much discussion at the November Symposium about the perceived need for the introduction of a 'serious harm' threshold to mirror the approach now adopted under the England & Wales Defamation Act 2013. We consider, having reviewed the matter carefully, that any such provision would likely be found to offend against the constitutional right of access to the courts and on that basis we do not advocate the introduction of a serious harm threshold. Any such provision would almost inevitably be found to be unconstitutional.

3.4 We do, however, submit that it should be possible to legislate for a summary disposal mechanism for claims in which publication is limited, whereby a financial limit to jurisdiction would be imposed, such that access to justice would be maintained but there would be reasonable limits to the costs that may be incurred by defendants defending such claims and the damages payable to the plaintiff.

Undue weighting towards trial

3.5 The need for active case management of the Jury List remains pressing and we would strongly advocate for the extension of the case management Rules introduced in 2016 in respect of chancery and non-jury cases to the Jury List (albeit that these Rules are still not operational due to lack of court resources).

3.6 A review of recent jury cases which went to hearing shows that such cases commonly take several weeks, a situation complicated by the fact that Jury Terms are only allocated 2 or 3 weeks four times a year.

3.7 Given the prevalence of claims in which plaintiffs do not proceed with expedition, we again strongly advocate for an express statutory requirement that defamation plaintiffs must proceed with due expedition to deal with stagnant claims. We also submit that the Act should include an express statutory jurisdiction to dismiss claims where there has been no proceeding had within 2 years of issuing proceedings unless special circumstances exist. Any such change would not disadvantage plaintiffs who proceed with claims within a reasonable timeframe, but would significantly assist defendants who have no option but to budget for and manage the risks of claims that are not progressed.

Offer to make amends procedure requires reform

3.8 In our experience the offer to make amends procedure is rarely used as it provides little incentive, having regard to the lack of consistency around discounts available where a Section 22 offer is pleaded in the defence, and the fact that any damages fall to be assessed by a jury. See *Christie -v- TV3 Television Networks Limited* [2017] IECA 128; *Nolan v Sunday Newspapers Ltd (trading as Sunday World)* [2019] IECA 141; *Higgins –v- Irish Aviation Authority* [2018] IESC 29, [2019] IECA 54 and [2020) IECA 157. It may be noted that in *Higgins* Dunne J stated in conclusion:

> "*Undoubtedly, the Act of 2009 was intended to reform the law of defamation by, inter alia¸ the introduction of a new "offer of amends" procedure aimed at facilitating early and speedy resolution of defamation proceedings. Apart from the lack of clarity about the central issue which has led to these proceedings and appeals, it is not at all clear from the provisions of the Act of 2009 how it was envisaged that the new procedure was meant to work in practice to achieve its objective. It is surely desirable that where changes are proposed which may have very far reaching effects, that they should be carefully tailored to achieve their intended object and be clearly expressed. These proceedings, on an issue of statutory interpretation of one provision, which could have been resolved decisively one way or another by a single phrase,*

have been the subject of hearings in three Courts over a period of more than two years and cannot claim to have resolved all the issues raised by the limited statutory delineation of a novel procedure, having potentially far reaching impact on defamation proceedings. If this matter is to be the subject of further review or amendment it would be very desirable that consideration is given to setting out very clearly the mechanism envisaged and how it would function in a range of different circumstances."

3.9 In *Higgins* a discount of 10% was ultimately allowed by the High Court, on the basis *inter alia* that the defendant had originally put forward a defence of qualified privilege prior to the offer of amends being made. The High Court was also asked to determine whether the meaning of the term "court" in s. 23(1)(c) of the 2009 Act required the quantum of damages to be assessed by a jury rather than a judge sitting alone. The court held that Mr Higgins was entitled to have the quantum of damages assessed by a jury, with appropriate instruction from a judge, and rejected the IAA's argument that the language of s. 23 of the 2009 Act did not permit a jury trial.

3.10 That decision was appealed by the IAA to the Court of Appeal, which affirmed the decision of the High Court and specified that the right also applied where no proceedings had been instigated. The IAA subsequently appealed to the Supreme Court, where Ms Justice Dunne concluded that the phrase "the court" used in s. 23(1)(c), while not defined, meant a "jury" and noted that "*the assessment of damages in a High Court defamation action is and always has been quintessentially a matter for a jury*". The Supreme Court held that there was no basis for a difference of approach in a defamation action compromised by an admission of liability, leaving over damages for assessment by a jury, and a compromise of actual or potential proceedings by the acceptance of an "offer of amends".

3.11 The most recent development in the *Higgins* proceedings involved the Court of Appeal being asked to determine whether the damages award made by the jury in the High Court was disproportionate and whether it should increase the discount of 10%, as determined by the jury, to adequately reflect the offer of amends. Accordingly this was the first case in which the Court of Appeal had been required to consider whether or not an award made by a jury, following an offer of amends, was reasonable and proportionate. The court held that, on balance, it would be more appropriate to assess damages itself rather than remit it back to the High Court for re-trial. The Court of Appeal ultimately decided not to increase the level of discount, notwithstanding its decision to significantly reduce the level of damages awarded by the High Court.

3.12 We submit that Section 23 should be amended to provide expressly that "the court" for the purposes of the assessment of damages under Section 23(c) means a judge sitting in the High Court without a jury and that there should be express guidance by way of a practice direction as regards the measurement of the appropriate discount to be applied.

4. On-line publication

4.1 We noted in our original submission that a key aspect of the Act when introduced that was disappointing was the absence of express provision for on-line publication. Apps, websites and blogs are now main stream and on-line publication and the facilitation of on-line content constitute a key method of ensuring freedom of expression in our society, both locally and globally. Artificial intelligence is transforming how information is communicated and will continue to introduce new ways of communicating, with algorithms influencing and, at times, distorting news and the circulation of information.

4.2 We reiterate our original submissions in this regard and would strongly advocate for a procedure similar to the Notice of Complaint process deriving from section 5 of the UK Defamation Act 2013.

4.3 We note that Twitter has also made a supplemental submission in which it advocates for the introduction of a process under which a plaintiff could apply for a court determination that a published statement is capable of being defamatory which, if obtained, would be acted on by platforms and online services where appropriate. The suggested process would involve a plaintiff issuing defamation proceedings in relation to the statement, then applying for a preliminary order that the statement is likely defamatory and should be removed pending a full trial on the merits. We see the benefit of this approach.

5. **Honest opinion**

5.1 There have not been any examples of any defendant succeeding with a plea of honest opinion since our last submission, which stands.

6. **Fair and reasonable publication on a matter of public interest**

6.1 We reiterate our previous submission that the weighing of factors under s26 should expressly be reserved to the trial judge, given the complexity of the issues under consideration. This should not unreasonably trespass on the role of the jury.

6.2 We noted that the preponderance of views expressed at the November symposium was in favour of the abolition of juries for hearing defamation actions, albeit that the majority of those present were from a media defence background or academia. After careful consideration our view is that the option of a jury trial should be retained for defamation claims. This is subject to two caveats:

(a) Active case management is, in our view, an essential element in the effective running of jury trials, to reduce the scope for parties to raise and seek to have determined legal issues regarding the pleadings at the trial. Requiring such issues to be raised and determined at the interlocutory stage would significantly enhance the efficiency of jury trials;

(b) The uncertainty regarding damages would be significantly be addressed if parties were permitted to suggest a range of appropriate damages for consideration by the jury.[2]

6.3 The key risk in abolishing juries, as we see it, is that a 'respectability' threshold enters the frame, with digital media, tabloid journalism, 'entertainment' media and other non-traditional forms of content generation placed at an unconsious disadvantage. In many years of representing tabloid newspapers and other publishers and broadcasters, it has been our experience that often, even when successful on appeal, they may not get their costs. Juries are, simply put, a great leveller.

7. **Alternative dispute resolution**

7.1 We have not seen any meaningful uptake in mediation of defamation claims since our 2016 submission. Given the prevalence of mediation in other court lists, and the suitability of ADR for defamation, we would submit that consideration be given to establishing an ADR route under any revised legislation, a measure that would save costs and increase the possibility of claims resolving on a timely basis.

[2] Section 31(1) arguably does not permit parties to specify ranges or amounts but practices among counsel differ widely.

8. **Damages**

8.1 There has been a level of deflation in damages awards since our 2016 submission, with the appeal courts reducing damages in a number of cases.

8.2 It remains the case that although the threshold for defamation claims in the Circuit Court is €75,000, the vast majority of defamation claims still issue in the High Court where plaintiffs can avail of a jury trial.

8.3 The courts have expressly declined to place a cap on defamation damages but there is no reason why, with proper guidance, juries cannot assess damages at a more reasonable and consistent level. The focus should, we submit, therefore be on providing a clear and unambiguous structure for guidance for juries in respect of damages. The Act should set out clearly the nature of the guidance that can be provided, as confusion remains about what can and cannot be said to juries about damages.

9. **Conclusion**

9.1 We have sought to identify areas that require special focus to improve the balance between plaintiffs, who wish to vindicate their good names, and defendants facing claims for defamation. Legislation in this area should encourage early resolution of valid claims and reward defendants who seek to make amends where appropriate. It should also seek to bring about greater certainty for plaintiffs and defendants. The changes that we suggest in this submission would, in our submission, go a considerable distance towards this goal.

McCann FitzGerald

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