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Chapter 52

REPUBLIC OF IRELAND TO RUSSIAN FEDERATION

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1. REPUBLIC OF IRELAND

Defamation

52.1 Defamation law in Ireland¹ continued until very recently to be based on the traditional torts of libel and slander familiar to English lawyers, carried over into Irish law in 1922² and modified by the Defamation Act 1961 (similar in content to the Defamation Act 1952 in England and Wales), developments in the common law, and (to a limited extent) the impact of the Irish Constitution and the European Convention on Human Rights. The 1961 Act did little more than add detail on a selected number of topics and, while repealing (in Ireland) certain nineteenth century UK statutes, left much of the common law untouched. In many – but not all – regards, the law in Ireland remained similar to that of England and Wales, with post-1922 developments often paralleled through judicial development in the Irish courts despite the separate legal systems. However, the Defamation Act 2009 ('the 2009 Act'),³ the culmination of a series of studies and reports,⁴ represented a significant revision to the scheme of defamation law in Ireland and is therefore the subject of particular attention in this section. The Act came into force on 1 January 2010.⁵

¹ Irish defamation law has been the subject of a number of important publications, including N Cox, *Defamation Law* (2007) First Law, and is covered in detail in monographs on media law, eg M McGonagle, *Media Law* (2003) Sweet & Maxwell. A Davidson, *Defamed!* (2008) Gill & Macmillan reviews infamous trials in an informal fashion. The cearta.ie blog maintained by Dr Eoin O'Dell of Trinity College Dublin is a useful resource for reports on recent cases: <http://www.cearta.ie/category/defamation>.

² At independence, the law of the United Kingdom in force in the territory that became the Irish Free State was carried over into the new jurisdiction (subject to the 1922 Constitution and then its 1937 successor).

³ No 31 of 2009. For discussion, see M McGonagle, 'Reforming Media Law In Ireland – Part 1' (2006) 11 Comms L 195; E Nagle, 'Keeping its own counsel: the Irish Press Council, self-regulation and media freedom' (2009) 20 Ent L Rev 93; TJ O'Dowd, 'Ireland's New Defamation Act' (2009) 1 J of Media L 173.

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⁴ Law Reform Commission, 'Report on the Civil Law of Defamation' LRC 38-1991; Department of Justice, 'Report of the Legal Advisory Group on Defamation' (2003) <http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>; see also E O'Dell, 'Defamation Reform in England and Ireland After *McLibel*' (2005) 121 LQR 395; W Binchy, 'Some Unanswered Question in Irish Defamation Law' in *Human Rights, the Citizen and the State: South African and Irish Approaches* (2001) Sweet & Maxwell.

⁵ Defamation Act 2009 (Commencement) Order 2009 (SI 2009/517).

Definition

52.2 Defamation is a matter of civil law in Ireland. Libel and slander remained separate torts until 2009, with the overwhelming majority of proceedings being in respect of the former.¹ The 2009 Act merged the two torts by describing them collectively as the 'tort of defamation'. The common law definition was that defamation consisted of '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.'² Section 2 of the 2009 Act provided a briefer definition, with a defamatory statement being defined solely as 'a statement that tends to injure a person's reputation in the eyes of reasonable members of society'. However, it is anticipated that this is unlikely to make significant changes to the law as previously applied. Note should be taken of significant cases relating to the concept of a defamatory statement with reference to specific political and social aspects of Irish life.³

¹ Section 15 of the 1961 Act defined broadcasting as publication in permanent form and therefore put beyond doubt that such statements were covered by libel rather than slander.

² B McMahon and W Binchy, *Irish Law of Torts* (3rd edn, 2000) Butterworths, p 882.

³ For example, the Supreme Court dividing in 1973 on whether an allegation that a senior civil servant was a 'felon setter' in the context of co-operation with the government of the UK: *Berry v Irish Times* [1973] IR 368, and the High Court finding as late as 1998 (albeit in an application for an interlocutory injunction) that an allegation of homosexuality remained defamatory: *Reynolds v Malocco* [1999] 1 ILRM 289.

Procedure

52.3 Proceedings should now be commenced within one year of publication, as opposed to the previous position where a six-year limitation period applied to libel and a three-year period to slander.¹ The new one-year period can be extended to two years in exceptional cases. Actions are normally heard before a judge and jury in the High Court. A previous rule that payment into court was only possible with an admission of liability was abolished by the 2009 Act.² Civil legal aid is not available.³ Actions for defamation can be commenced in the geographically appropriate District Court (where the claim does not exceed a cap of just over EUR 6,000) or Circuit Court (where the claim does not exceed a cap of EUR 50,000), but are usually brought in the High Court (where there are no limits as to geography or claim). If an award in the High Court is less than the Circuit Court threshold, this will have an impact on the award of costs. Corporate entities and other non-human legal persons can pursue claims⁴ and, while there always appeared to be no need to demonstrate financial loss, the 2009 Act put this beyond doubt. Claims did not

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previously survive the death of the plaintiff, but the 2009 Act removed this restriction. Verdicts can be appealed to the Supreme Court, the court of final appeal within Ireland.

¹ Statute of Limitations Act 1957, s 11.

² Rules of the Superior Courts, Order 22.

³ Civil Legal Aid Act 1995, s 28(9).

⁴ See generally A O'Neill, *The Constitutional Rights Of Companies* (2007) Sweet & Maxwell, ch 10.

Defences

52.4 The range of common law defences familiar to practitioners in England and Wales is available in Ireland, including fair comment, justification (with the burden of proof continuing to rest with the defendant), consent and innocent publication. The 2009 Act clarified the common law definition of fair comment and renamed the defence honest opinion; justification is also now known as the defence of truth. A very limited defence of unintentional defamation was available under the 1961 Act (s 21); this was significantly expanded by offer of amends provisions in the 2009 Act.

Absolute privilege is guaranteed by the Constitution in relation to statements made in Parliament.¹ Statutory qualified privilege is set out in Sch 1 to the 2009 Act (divided into statements subject and not subject to explanation or contradiction) and common law qualified privilege (based on duty/interest principles) is also available (though s 18 of the 2009 Act put this on a statutory footing). However, it is, at the time of writing, unclear whether principles akin to those established in *Reynolds v Times Newspapers*² form part of the law of Ireland. It was strongly suggested in *Hunter v Duckworth & Co*³ that *Reynolds* could be relied upon in order to give full protection to constitutional and Convention rights (with the related approaches adopted in Australia⁴ and New Zealand⁵ also being reviewed). The clearest (and most recent) word on the subject is that of Charleton J in the High Court in a ruling during *Leech v Independent Newspapers*,⁶ accepting in principle that such a defence was available and could go to the jury, where sufficient evidence had been brought before the court. The 2009 Act created a statutory responsible journalism-style defence, known as the 'defence of fair and reasonable publication' which resembles, but is not identical to, the decision of the House of Lords in *Reynolds*. However, s 26 would appear to be narrower than *Reynolds* as currently applied in England (particularly after *Jameel v Wall Street Journal*)⁷ and therefore its adequacy for the purposes of the European Convention on Human Rights may be subject to challenge.

¹ Article 15.12.

² [2001] 2 AC 127.

³ [2003] IEHC 81.

⁴ *Lange v Australian Broadcasting Corporation* (1997) 182 CLR 104.

⁵ *Lange v Atkinson* [1998] 3 NZLR 424.

⁶ [2007] IEHC 223.

⁷ [2006] UKHL 44.

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Remedies

52.5 There is no statutory cap on damages. The leading case on the subject is *de Rossa v Independent Newspapers* (upholding damages of £300,000, then the highest ever awarded):¹ guidelines are not given to juries on the appropriate level of damages in defamation cases and the *Rantzen v Mirror Group Newspapers*² approach is not followed.³ However, the quantum of damages can be appealed to the Supreme Court and the issue of the proportionality of damages awarded by the Irish courts has reached the European Court of Human Rights.⁴ Prior to the 2009 Act the Supreme Court could, in jury cases, do no more than return the case to the High Court for a new trial by jury, with the fresh jury not being made aware of the original finding or of the Supreme Court's criticism.⁵ Under the 2009 Act the substitution of an alternative amount by the Supreme Court is, however, permissible.

Injunctions are available in appropriate cases but are granted sparingly.⁶ The 2009 Act also introduced a number of new remedies, such as a declaratory order (s 28).

¹ At the time of writing, the highest award of damages was EUR 900,000: 'Record EUR 900,000 award in drugs libel case' (*Irish Times*, 2 February 2008).

² [1994] QB 670.

³ *De Rossa v Independent Newspapers* [1999] 4 IR 432.

⁴ *Independent Newspapers v Ireland* (2006) 42 EHRR 1024. This application related to the *de Rossa* case; no violation of the Convention was found, with the ability to appeal the level of damages to the Supreme Court being recognised by the court as an important element of the protection of freedom of expression.

⁵ *Crofter v Genport* [2005] IESC 20. See also *O'Brien v MGN* [2001] 1 IR 1 where, the Supreme Court, having found damages of £250,000 to be too high, the second jury awarded more than double that amount ('O'Brien happy to have been "vindicated"', *Irish Times*, 11 November 2006).

⁶ *Reynolds v Malocco*; *Cogley v RTE* [2005] 2 ILRM 529.

Press Council

52.6 A non-statutory Press Council and Press Ombudsman¹ have existed since 2007, and a voluntary Code of Practice has been published. Under consideration for quite some time, and established by a Press Industry Steering Committee, the Council applied for recognition pursuant to s 44 and Sch 2 of the 2009 Act. Such recognition was granted in April 2010 by way of statutory instrument² and publishers can therefore refer to their participation in the Council and compliance with the Code and Council/Ombudsman decisions as a part of the s 26 defence (see para 52.4 above). The Council monitors a Code of Practice to which publications subscribe.³

¹ See <http://www.presscouncil.ie>.

² SI 2010/163.

³ At the time of writing over 200 organisations participate in the Council: <http://www.pressombudsman.ie/member-publications/national-newspapers.168.html>.

Fundamental rights

52.7 Freedom of expression is protected by Article 40.6.1(i) of the Irish Constitution. This is, however, a comparatively weak guarantee¹ and has been of limited effect both generally² and in the context of defamation.³ Indeed, any

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consideration of the constitutional aspects of defamation law must also address Article 40.3.2, which expressly requires the state to protect from unjust attack and vindicate (in the case of injustice done) the good name of every citizen⁴ and it has been argued by academic commentators that Irish libel law is inconsistent with desirable standards of freedom of expression.⁵ A step towards remedying this perceived deficit was attempted in *Hunter v Duckworth*,⁶ where O Caoimh J declared that 'in certain cases, in the context of the democratic nature of the State, primacy may have to be given to freedom of expression'. However, the Supreme Court did not provide further clarity in a subsequent appeal and the case itself was settled in 2010. Irish courts are required to apply the Constitution (and can declare any statute or rule of law repugnant to the Constitution), and must interpret the common law in accordance with the European Convention on Human Rights insofar as is possible and subject to the Constitution.⁷

¹ The state guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the state shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the state. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

² See generally E O'Dell (ed), *Freedom of Expression* (forthcoming) Ashgate.

³ G Hogan and G Whyte, *Kelly: The Irish Constitution* (2004) Butterworths, pp 1748–1750.

⁴ The relationship between the two Articles and the law of libel was considered by the Supreme Court in *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436.

⁵ For example, E O'Dell, 'Does Defamation Value Free Expression' (1990) 12 DULJ 50.

⁶ [2003] IEHC 81.

⁷ European Convention on Human Rights Act 2003, s 2.

New media

52.8 Irish libel law was slow to respond to the challenges posed by new technology; for example, no equivalent of the exemption under s 1(3) of the English Defamation Act 1996 was enacted. However, EU law on electronic commerce¹ has been transposed into Irish law² and is of relevance to cases of online defamation.³ Section 27 of the 2009 Act reinforced and clarified this development, albeit in general terms and without specific reference to communication systems.

Historically, Irish law did not recognise a 'single publication' rule. However, s 11 of the 2009 Act provided that, in general, only one action may be brought in respect of multiple publications; although the court may allow further actions to be brought if this is required in the 'interests of justice'.

¹ Articles 12–14 of Directive 2000/31.

² SI 2003/68.

³ *Mulvaney v The Sporting Exchange t/a Betfair* [2009] IEHC 133 confirmed the application of these provisions – particularly Article 14 of the Directive – to a 'chatroom' situation.

Criminal libel

52.9 Although prosecutions were extremely rare, criminal libel remained an offence in Ireland until the passage of the 2009 Act. The Defamation Bill as

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introduced would have replaced the common law offences of criminal libel, seditious libel and obscene libel with a new statutory offence of the publication of a gravely harmful statement. However, the new offence was removed from the Bill in the upper house (Seanad) and the previous offences were therefore abolished without replacement

Privacy

52.10 The law of privacy is not well developed in Ireland.¹ However, there is a procedure open to those who would allege a breach of privacy, namely an action based on the violation of constitutional rights. Article 40 of the Irish Constitution has been held to incorporate a right to privacy² and Irish law recognises both that (a) where no existing cause of action is sufficient to vindicate the rights of the individual, it is possible to bring an action for breach of constitutional rights and to recover damages, and (b) certain breaches of constitutional rights are actionable against non-state actors.³ A cause of action thus exists, in effect, in privacy in relation to violations both by the state and by non-state actors.

The Supreme Court has held that actions for breach of constitutional rights should generally be treated as if they were brought in tort, and therefore the general principles of Irish tort law would appear to be applicable to limitation periods, calculation of damages and so forth in the context of a claim in privacy.⁴

Although the first successful action of this kind in relation to breach of privacy was brought as long ago as 1987,⁵ it remains a comparatively rare cause of action and very limited jurisprudence has developed. It would appear that two forms of infringement – intrusion (ie obtaining information) and disclosure (ie disseminating information)⁶ – are actionable. Damages have been awarded against both the state⁷ and private actors⁸ in relation to intrusion. In *Herrity v Associated Newspapers*⁹ where a newspaper published extracts from illegally recorded telephone conversations, Dunne J expressly confirmed that there was a right of action for breach of privacy, based on the Constitution rather than the European Convention on Human Rights, which was enforceable against non-state actors in relation both to obtaining and disseminating private information.¹⁰ However, further consideration of the subject by the Supreme Court is probably required before this approach can be assessed more thoroughly; for example, it is at present unclear whether liability is based on negligence.¹¹

As far as the statutory position is concerned, a Privacy Bill was introduced in 2006 which would have created a new tort of privacy.¹² However, this was the subject of severe criticism, particularly from the media, and has not, at the time of writing, even been debated in Parliament. No announcement has been made as to its future.

¹ See generally E Carolan and H Delany, *The right to privacy: a doctrinal and comparative analysis* (2008) Thomson Round Hall; D Kelleher, *Privacy and Data Protection Law in Ireland* (2006) Tottel; C Millen, *The Right to Privacy and its Natural Law Foundations in the Constitutions of the United States and Ireland* (1999) Blackhall.

² *McGee v Attorney General* [1974] IR 284 (where a ban on the importation of contraception brought by a married couple was challenged); see generally G Hogan and G Whyte, *Kelly: The Irish Constitution* (2004) Butterworths, pp 1346–1355.

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- ³ See inter alia *Byrne v Ireland* [1972] IR 241, 279, *Meskeil v CIE* [1973] IR 121, 132; *Conway v INTO* [1991] 2 IR 305, *W v Ireland (No 2)* [1997] 2 IR 141; see generally C O'Conneide, 'Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?' in D Oliver and J Fedtke (eds), *Human Rights And The Private Sphere* (2007) Routledge; G Hogan and G Whyte, *Kelly: The Irish Constitution* (2004) Butterworths, pp 1297, 1302.
- ⁴ *McDonnell v Ireland* [1988] 1 IR 134; discussed and criticized in G Hogan and G Whyte, *Kelly: The Irish Constitution* (2004) Butterworths, pp 799, 1314.
- ⁵ *Kennedy v Ireland* [1987] IR 587 – the claim related to the state's recording of telephone calls.
- ⁶ *Cogley v RTE* [2005] 2 ILRM 529.
- ⁷ *Gray v Minister for Justice, Equality & Law Reform* [2007] IEHC 52.
- ⁸ 'Landladies ordered to pay students €115,000 in damages' *Irish Times*, 11 November 2007.
- ⁹ [2008] IEHC 249.
- ¹⁰ EUR 90,000 was awarded in damages (EUR 60,000 in ordinary and aggravated damages and EUR 30,000 in punitive damages).
- ¹¹ *Simmott v Carlow Nationalist* (unreported, 31 July 2008): 'Court increases payout to GAA player over photo', *Irish Times*.
- ¹² This was preceded by a report issued by the Department of Justice, Equality & Law Reform, 'Report of the Working Group on Privacy' (2006).

2. ROMANIA

General

52.11 Private life, dignity, honour and reputation are fundamental rights guaranteed by the Romanian constitution.

Defamation in Romania is primarily a matter for the criminal law and the Criminal Code provides for two principal offences, namely (i) insult; and (ii) slander. Insult arises under Article 205 of the Criminal Code and is defined as 'Damage to the honour and reputation of a person caused by words, gestures or otherwise, or by exposure to mockery'. The offence is committed when 'a flaw, sickness or disability is attributed to a person which, even if true, should not be expressed'. Slander is defined by Article 206 of the Criminal Code as 'The public statement or imputation, by any means, of a specific fact regarding a person, which, if true, would expose that person to criminal, administrative or disciplinary sanction or to public contempt'. In the case of slander, an objective test is applied to determine whether the statement or imputation exposes its subject to the requisite sanction or contempt. By contrast, a subjective test applies in the case of insult.¹

The Constitutional Court of Romania has stated that 'The legal object of the offences of insult and slander, as provided for at Art. 205 and, respectively, Art. 206 Criminal Code, is the individual's dignity, reputation and honour . . . If such deeds were not discouraged through the means of criminal law, they would trigger a de facto reaction of the offended parties and lead to permanent conflicts that could render social life impossible altogether.' The Constitutional Court has thereby deemed that, by punishing insult and slander, the Criminal Code satisfies the constitutional requirement that 'man's dignity' be recognised as one of Romania's 'supreme values'.²

A civil claim for damages arising out of defamation may be brought pursuant to Articles 998 and 999 of the Civil Code.³ The Civil Code also expressly requires that respect be shown for private life and the dignity of the human being and, in this context, forbids the use of an individual's image or of a