

Recent Developments in Defamation Law

Marie McGonagle,
Law Faculty, NUI, Galway.

T

he law of defamation in Ireland is still governed by common law and the Defamation Act 1961. At the time of writing, the promised new defamation bill to update Irish defamation laws and bring them into line with their European counterparts has not yet been introduced but is believed to be imminent.

Key developments in defamation law in the period under review (January–September 2005) stem primarily, therefore, not from legislation but from case law, particularly two decisions of the European Court of Human Rights. The first, chronologically, was *Steel and Morris v UK* (the so-called *McLibel* case).¹ Judgment was delivered in that case on February 15, 2005 and raised a number of issues, particularly legal aid, the burden of proof, the position of large corporations as plaintiffs in libel cases, and the level of damages. The court held unanimously that there had been a violation of Arts 6(1) and 10 of the Convention. The second, which is of particular interest in Ireland, as it was the first Irish defamation case to be heard in Strasbourg, was *Independent News and Media v Ireland* (the *de Rossa* case).² The European Court of Human Rights gave judgment on June 16, 2005, in which it found that it had not been demonstrated that there were ineffective or inadequate safeguards against a disproportionate award of damages, and therefore there was no violation of Art 10.

Meantime, at the national level, the Leas Cross Nursing Home case (*Cogley v RTE and Aherne and Ors v RTE*) is of considerable importance and should be of great interest to both lawyers and media.³

STEEL AND MORRIS v UK

Briefly, *Steel and Morris v UK*, the *McLibel* case, arose from a jury award against two environmental campaigners, who had distributed leaflets claiming that the food from fast-food giants, McDonald's, was unhealthy. The defendants were refused legal aid and defended themselves in the long-running trial and appeal.⁴ The European Court of Human Rights found in their favour in relation to the denial of legal aid. It noted that the two did not choose to commence proceedings but rather "acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention."⁵ It noted also the financial consequences for them and the length and complexity of the case against them, concluding that the denial of legal aid deprived them of the opportunity to present their case effectively and led to "an unacceptable inequality of arms with McDonald's".⁶ On that basis, the court found, there was a violation of Art 6.1 of the Convention.

In relation to Art 10 and freedom of expression, the central issue was whether the interference with their rights was necessary in a democratic society. Consistent with its own previous jurisprudence, the court observed that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be expected and tolerated.⁷ There was a strong public interest, the court said, "in enabling such groups and individuals outside the mainstream to contribute to the public debate".⁸ In relation to the burden of proof, the court recalled that in

¹ App No 68416/01.

² App No 55120/00.

³ High Court, Clarke, J, June 8, 2005.

⁴ The whole episode began with the distribution of the pamphlet in 1984, some six years before the *de Rossa* case (below). The court case was the longest-running case in English legal history, running for 313 days of testimony, preceded by 28 interlocutory applications. There were eight weeks of closing speeches and six months of deliberation, 40,000 pages of documentary evidence, and 130 oral witnesses. The legal battle had lasted some nine and a half years, with a trial period of two and a half years, and a 23 day appeal. Court judgments ran to 1,100 pages (see paras 18, 19, 30, 49, 63). Yet, for all that, it ended without causing the major upset to UK defamation laws that had been expected.

⁵ At para 63.

⁶ At para 72.

⁷ At para 90.

⁸ At para 89.

McVicar v UK,⁹ it had held that it was not in principle incompatible with Art 10 to place “the onus of proving to the civil standard the truth of defamatory statements” on the defendant.¹⁰ While the limits of acceptable criticism are wider in the case of large public companies and the businessmen and women who manage them, if a State decides to provide a remedy for them it is essential “in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for.”¹¹ Given the enormity and complexity of proving the truth in the circumstances of the case, the court did not consider that the correct balance had been struck between the need to protect the applicants’ rights to freedom of expression and McDonald’s rights and reputation.¹² A similar view was taken of the level of damages awarded by the English court. Given the modest resources of the two applicants and the fact that they were pursued by a large corporation which had not established any financial loss, the award of damages (£36,000 and £40,000, respectively) against Steel and Morris was disproportionate to the legitimate aim pursued.¹³

The case is authority, therefore, for the proposition that in complex cases, where the capacity of the litigants, especially defendants, is inadequate to enable them to present their case to the court with an equality of arms, legal aid should be available. The case is not authority for a general proposition that legal aid be available routinely in defamation cases. For instance, in a previous case, *McVicar v UK*,¹⁴ the court had held that a journalist involved in a fairly straightforward libel case was not automatically entitled to legal aid.

In the same context of a complex legal action, *Steel and Morris* is authority for assessing and balancing the requirement on the defendants to prove the truth of the allegations made. 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.¹⁵

INDEPENDENT NEWS AND MEDIA v IRELAND

The facts of *Independent News and Media v Ireland* (the *de Rossa* case) are well known. Briefly, the case concerned a jury award of IR£300,000 to politician Proinsias de Rossa arising from an article published in the *Sunday Independent*. An appeal to the Supreme Court in 1999 was unsuccessful.¹⁶ The case was taken to the European Court of Human Rights claiming that the exceptional damages award and the absence of adequate safeguards against disproportionate awards amounted to a violation of the applicant’s rights to freedom of expression under Art 10 of the European Convention on Human Rights.¹⁷ The parties did not dispute that the award of damages was an interference with the applicant’s freedom of expression, that it pursued the legitimate aim of protecting Mr de Rossa’s reputation, or that the interference was “prescribed by law”. It was also common ground that an award of damages following a finding of libel must be “necessary in a democratic society” so that it must bear a reasonable relationship of proportionality to the injury to reputation suffered.¹⁸ Where the parties diverged was on the question of proportionality.

Somewhat surprisingly, the court considered that the *Tolstoy Miloslavsky* judgment must be its point of departure in examining the case.¹⁹ What follows, therefore, is a very truncated and narrowly focused judgment dealing solely with the two issues of safeguards and amount of damages as they arose in the two cases. Largely absent from the judgment is the court’s usual recitation of its own previous jurisprudence underscoring the centrality of freedom of expression in a democratic society, the importance of political debate, and the role of the media in providing a forum for such debate.²⁰ Only in the dissenting judgment is there a clear acceptance that “the present case clearly involved a political debate on matters of general interest, an area in which restrictions on freedom of expression should be interpreted narrowly.”²¹ Instead, the majority confined themselves to reiterating their views on directions to the jury and the proportionality of damages in *Tolstoy Miloslavsky* and the distinctions that arose between the approach to those two issues in that case and in *Independent News and Media*.²²

⁹ App No 46311/99, judgment of May 7, 2002, (2002) 35 EHRR 22.

¹⁰ At para 93.

¹¹ At paras 94–95.

¹² At para 95.

¹³ At paras 96–97.

¹⁴ Above, n 9.

¹⁵ On this point, see Eoin O’Dell, “McLibel ruling has lessons for free expression”, *The Irish Times*, February 24, 2005.

¹⁶ [1999] 4 IR 432.

¹⁷ The arguments advanced by the parties are set out in detail in the court’s judgment at paras 89–108. For a short account of the case in Strasbourg and its implications for the media, see Michael Kealey, “European Court makes it a bad news day for media”, *The Irish Times*, June 18, 2005.

¹⁸ At paras 109–110.

¹⁹ *Tolstoy Miloslavsky v UK*, Series A, No 323, judgment of July 13, 1995. While the *Tolstoy* case was clearly going to be central to the analysis, it was very limiting to take it as the point of departure. Consider the contrast between this approach and that of the Court in *Steel and Morris* (above).

²⁰ Unlike the careful consideration of the status of the parties in *Steel and Morris* (above), the status of Mr de Rossa as a politician was not discussed, nor was the role of newspapers in contributing to open debate on a matter of public interest.

²¹ Dissenting opinion of Judge Cabral Barreto, para 2. Indeed, a non-media case, *Dawson and Dawson v Irish Brokers Association*, unreported, Supreme Court, February 27, 1997) is relied on without any reference to the fact that it did not involve either the media or a politician, or a matter of political debate. It must be acknowledged, however, that the fact that the finding of libel was not in issue, of itself narrowed to some extent the parameters of the case in Strasbourg. Notwithstanding that, the judgment is exceptionally narrow.

²² The court’s judgment includes paras 48–55 of the *Tolstoy* judgment.

Not only does the court take a very narrow approach, it asserts its own authority only to the extent of declaring that any uncertainty in the assessment of libel damages must be kept to a minimum²³ and that a general finding that an award of damages is “unusual” is sufficient to prompt its review of the adequacy and effectiveness of the domestic safeguards against disproportionate awards.²⁴ Its concern is whether, having regard to the entire proceedings, the protection against disproportionate awards sufficed, and not with the particular measures adopted to ensure that.²⁵ Otherwise, it considers only points of distinction between the present case and *Tolstoy*, concluding somewhat vaguely that the trial judge’s directions to the jury in *de Rossa* “can be considered to have given somewhat more specific guidance to the jury” than those in *Tolstoy*, and that the appellate review by the Supreme Court, with its requirement of proportionality, was also one of the main points of distinction between the two cases.²⁶

The dissenting judge, on the other hand, as well as emphasising the wider context of political debate, criticises the majority for attaching too much importance to the safeguards afforded by Irish law for reviewing domestic decisions and, instead, points to the importance not only of whether the:

“safeguards functioned properly but also whether, despite the margin of appreciation enjoyed by the domestic authorities, the final decision was consistent with the principles set forth in our case-law [i.e. the case-law of the European Court of Human Rights].”²⁷

Regardless of the outcome of the case, which was a disappointment for the media, particularly since this was the first defamation case they had taken to Strasbourg, the judgment of the court adds little or nothing to the existing Art 10 jurisprudence. At most it is a gloss on the *Tolstoy Miloslavsky* principles and does little to enhance the reputation of the court.

COGLEY v RTÉ, AHERNE AND ORS v RTÉ

At the national level, the Leas Cross Nursing Home case (*Cogley v RTÉ and Aherne and Ors v RTÉ*) is of particular interest to both lawyers and media for the insights it gives into the approach the courts should adopt in relation to the granting of interim and interlocutory orders to restrain publication. Judgment

was given in the High Court on June 8, 2005. Both of the proceedings related to the intention of RTÉ to broadcast a programme in the “Prime Time Investigates” series concerning the nursing home. The plaintiff in the first proceedings was director of nursing at the home, who based her claims on defamation; the plaintiffs in the second proceedings were the owners of the home, who based their claims on breach of privacy.²⁸ The proceedings were taken together since they both related to applications for injunctions to restrain RTÉ from broadcasting the same programme.

This was a case where the judge specifically referred at an early stage in his judgment to the European Convention on Human Rights and the need to consider its jurisprudence as well as the jurisprudence of the courts in this jurisdiction. That need arises as a result of the European Convention on Human Rights Act 2003. Under the European Court’s Art 10 jurisprudence, prior restraints which have the effect of restricting freedom of expression must be subjected to careful scrutiny. As a result, Clarke J held that “a court should be reluctant to grant interim orders which would have the effect of restraining in advance, publication in circumstances where the intended publisher has not had an opportunity to be heard.” If at all possible “the court should attempt to afford the defendant at least some opportunity to put before the court its case prior to making any form of restraint order”.²⁹ Where that is not possible, “the court should have regard to the question of whether the fact (if it be so) that there is not time to put the defendant on notice can, in any way, be attributed to a default or delay on the part of the plaintiff”. Such default or delay would be “a significant factor which would lean against the grant of an interim order”.³⁰ A less severe delay on the part of the plaintiff, which did not preclude the court from affording the defendant an opportunity to be heard but nonetheless placed him in a position where he might be prejudiced in the presentation of his case, would also be “a factor” to be taken into account by the court in appropriate cases.

The question of urgency was also considered. On the issue of delaying the broadcast for a short time, this might be necessary to ensure that proper scrutiny be exercised but the court “should not lightly interfere with an intended time of broadcast or publication without substantial reasons”.³¹ A longer delay amounts to “a significant interference in both the freedom of expression and, in cases where the issue arises, in the public interest in the timely dealing with the matters

²³ At para 114.

²⁴ At para 115, where it goes on to say that once a review is triggered it is immaterial how unusual the award is, the Convention provisions and jurisprudence will apply “equivalently”.

²⁵ At para 120. Absolute uniformity is not required among States which remain free to choose their own measures (the *Belgian Linguistic* case (judgment of February 9, 1967) and *Sunday Times v UK*, judgment of April 26, 1979, cited in support).

²⁶ The nature of the Supreme Court’s review was “more robust”, the court said, than that in *Tolstoy* (at para 128) and the requirement of proportionality distinguished it (at para 129). The majority was also dismissive of arguments based on the reluctance of appellate courts to interfere with jury awards, the heavy costs implications, the fact that the Supreme Court “could not substitute its own award”, and the cumbersome nature of the re-trial process (at paras 130–131).

²⁷ At para 2.

²⁸ They had not directly claimed defamation because they had not been able to view the programme until the morning of the hearing and therefore did not know the detail of the content. In those circumstances, the question of defamation was considered by the judge in their case also (p 6 of the typescript). The issue of privacy in the case is considered separately below.

²⁹ At p 3 of the typescript.

³⁰ At p 4 of the typescript.

³¹ At pp 4–5 of the typescript.

raised in the broadcast”.³² In that sense, the judge said, the grant of an interlocutory injunction would give rise to a significant detriment to the defendants by imposing an appreciable delay in the time at which the material could be broadcast.

On the matter of an injunction on the basis of defamation, Clarke J relied on the judgment of Kelly J in *Reynolds v Malocco and Others*³³ that a plaintiff must not only show that he or she “has raised a serious issue concerning the words complained of” but also that it must be shown “that there is no doubt that they are defamatory”.³⁴ It is for the defendant, therefore, to put forward some basis which is credible and potentially sustainable that the plaintiff might not succeed at trial. The central question, therefore, is “whether it is clear that the plaintiff will ultimately succeed at a trial”. Thus the likelihood of, and not a mere intention to plead, a defence, such as justification, qualified privilege or “a public interest defence”, would be relevant. The “availability and parameters” of a public interest defence, of course, “in this jurisdiction have yet to be clearly established”.³⁵

Having viewed the programme and applied the above tests to the three specific items complained of, Clarke J concluded that it was not clear that the plaintiff in the first proceedings would succeed. Her application for interlocutory relief was therefore refused.

THE TRESPASS AND PRIVACY ISSUES IN AHERNE AND ORS v RTÉ

The second of the Leas Cross nursing home cases (above) also raised issues of trespass and privacy. The main contention was that the film footage for the programme was obtained secretly in circumstances that amounted to breach of the plaintiffs’ right to privacy, and was unlawful as it was obtained by trespassing. The issue of the patients’ privacy was also raised.³⁶ The court noted that the right to privacy in the Irish Constitution is not absolute and must be balanced against other competing rights, particularly freedom of expression.

The court also distinguished between the information disclosed and the methods used to obtain it, bearing in mind also the interlocutory nature of the proceedings.³⁷ The main focus of the court was on the manner in which the information had been obtained. The court referred to a New Zealand case, *TV3 Network Services Ltd v Fahy*,³⁸ which took into account, *inter alia*, the context and circumstances in which the impugned methods were used, any special public interest considerations for broadcasting the programme, and the adequacy of damages at trial. In the *Aherne* circumstances, Clarke J found that there were issues of “very significant public importance”,³⁹ that inclusion of the surreptitious film could be described as “an understandable pre-emptive course of action”, that “legitimate public interest issues of a very high weight are raised by this programme”,⁴⁰ and if the accusations contained in the programme turned out to be correct, damages for breach of privacy would be small or even nominal.⁴¹

In relation to trespass, the special considerations for the granting of an injunction affecting freedom of expression did not apply. Instead, the ordinary principles applied. Considering the risk of future trespass and applying the balance of convenience test, the court decided that RTÉ should be restrained at this interlocutory stage from engaging in further trespass.

ISSUES RAISED IN OTHER DEFAMATION CASES

A normal run of non-celebrity defamation cases,⁴² most but not all involving libel and media defendants, reached conclusion during the period under review.⁴³ As usual most were settled by undisclosed amounts of damages and apologies read in court. In January, two nightclub bouncers settled their action against RTÉ: *O’Connor and McGeoghan v RTÉ*.⁴⁴ The plaintiffs had sued over a “Prime Time” programme in 2000, which had claimed that certain Dublin nightclubs had turned away some members of the public on a racist basis. The plaintiffs’ action had originally been taken in the High

³² At p 5 of the typescript.

³³ Unreported, High Court, Kelly J, December 11, 1998.

³⁴ Above, n 26, at pp 6–7 of the typescript.

³⁵ *Cogley*, per Clarke J, at p 9 of the typescript. In *Hunter and Callaghan v Duckworth & Co Ltd & Louis Blom-Cooper* (High Court, July 31, 2003), Ó Caoimh J accepted that the “reasonable publication” type defence which emerged from the House of Lords in *Reynolds v Sunday Times* [1999] 4 All ER 609; [1999] 3 WLR 1010 would be a persuasive precedent and of relevance in this jurisdiction. The reasonable publication defence is a public interest defence in the sense that it prioritises the flow of information to the public.

³⁶ However, there was evidence before the court that RTÉ intended to protect the privacy of the patients by using a technical process known as pixilation, and also by obtaining the consent of their families.

³⁷ On the approach at the interlocutory stage to issues both of defamation and privacy, see especially pp 20–22 of the typescript.

³⁸ [1999] 2 NZLR 129, which also involved secret filming.

³⁹ At pp 19–20 of the typescript.

⁴⁰ At p 24 of the typescript.

⁴¹ At p 25 of the typescript. However, the decision was not to be taken as supporting any general proposition that the ends of newsgathering justified the means (citing *TV3 Network Services Ltd v Fahy*).

⁴² It should be noted that many of these cases are reported only in the newspapers, and even then often only in the “shorts” section, which generally are not available in newspaper archives or on their websites.

⁴³ Slander cases continue to be much rarer than libel. An example of a slander case during the period under review is *Poole v McDonald’s, The Irish Times*, January 27, 2005. The plaintiff, a retired wholesaler who had a heart condition was awarded €14,000 for what the President of the Circuit Court described as “a very bad slander”. The plaintiff had fainted when wrongly accused in the defendant’s restaurant of having smashed windows on a previous “drunken” visit, and having been repeatedly told by the manager in front of customers that he was barred as a result. An example of a non-media libel case during the period is *Tolan v Lynham and Peacock, The Irish Times*, February 16, 2005. The plaintiff had applied for planning permission but it was alleged that a letter was sent to An Bord Pleanála on Mr Lynham’s letterhead seeking to have planning permission refused. Mr Lynham was a Fianna Fáil councillor. It was also alleged that the letter made defamatory statements about the plaintiff and his family. The proceedings were settled and an apology read out in court.

⁴⁴ *The Irish Times*, January 12, 2005.

Court, but remitted to the Circuit Court where unlimited damages can be awarded by agreement of the parties, no jury is present, and costs are lower. The time period between the broadcast complained of and the Circuit Court settlement had consequently been very long but counsel for the second plaintiff told the court that the time allowed for talks had been fruitful and the matter had been settled and could be struck out with no order for costs.

McLoone and Sweeney v Donegal Democrat was a case decided in Letterkenny Circuit Court after a three-day hearing.⁴⁵ The plaintiffs, Donegal county manager and Donegal county secretary, were awarded €38,000 and €30,000 respectively. They had sought damages and an injunction restraining the newspaper from publishing further defamatory articles relating to alleged planning corruption. There had been 28 articles and editorials published in the *Donegal Democrat* and *Donegal People's Press* between September 2002 and January 2003. The presiding judge expressed his surprise that the case was before him when a much higher award could have been sought in the High Court. In response, counsel for the plaintiffs said his clients did not want to go to court and had given the newspaper a chance to look into the matter; also they could have sued for each and every article but just wanted to have their names cleared. There have been numerous such cases down through the years where plaintiffs have expressed their wish in similar terms. Such cases point to the need for more immediate remedies, as acknowledged by the Law Reform Commission and other bodies.⁴⁶

In February 2005, in *Tynan v The Farmer's Journal*, a restaurateur sued in Portlaoise Circuit Court over an allegation published in the defendant newspaper in November 2001 that he had used "cheap imported beef". The newspaper had published a retraction the following week but the plaintiff was not happy with it.⁴⁷ He was awarded €3,500. Two things are noteworthy about this case. First of all, it took over three years for the case to come on for hearing at the Circuit Court — a long time at that court level where procedures are relatively straightforward and there is no jury involved. Second, the newspaper had not used

the form of wording for the retraction that had been provided by the plaintiff's solicitors. It is common enough practice for solicitors to request a particular wording. However, this particular case aside,⁴⁸ newspapers often complain that the form of wording requested by plaintiffs' solicitors is disproportionate in what it requires the paper to admit to and that, given the need to publish a clarification, retraction, or apology at the earliest possible opportunity, it could amount to an admission of liability and leave the paper without a defence should the case proceed to court.

A case taken by a former captain in the Irish army, *Clonan v Minister for Defence*,⁴⁹ was struck out while at hearing in the Circuit Court, following production by the defence of a tape of the plaintiff speaking to another army captain at a significant point in time. The action arose from a memo issued by the army's press officer commenting on a story that had been broken by the *Sunday World* in August 2001, publicising the plaintiff's findings in a PhD thesis of widespread bullying and sexual harassment of female soldiers in the army. The plaintiff claimed that the memo was libellous and had been leaked to at least one newspaper. The incident had taken place almost four years before the case came on for hearing at the Circuit Court. Four years is an unusually long period, particularly in the Circuit Court.⁵⁰ Such a period is not unusual in the High Court where actions take on average three years to come before judge and jury. Longer periods in the High Court can be more easily explained by reference to the greater complexity of the pleadings, attempts at settlement and the need to empanel a jury.

The issue of costs in the case of *Beverly Cooper Flynn v RTE* continued into 2005. It was reported that Ms Flynn, who lost her libel action against RTE and her subsequent appeal to the Supreme Court, had offered RTE a property valued at €500,000 and a monthly contribution from her Dáil salary to settle her legal bill. RTE was understood to have refused the offer and to be seeking full costs.⁵¹ Agreement was reached, however, on the issue of costs arising from the unsuccessful libel action, *Johnston v The Star* taken by Government press secretary, Mandy Johnston, in 2004.⁵²

⁴⁵ *The Irish Times*, January 25, 2005. On the third day of an expected four-day hearing, counsel for the newspapers announced they would be withdrawing their defence.

⁴⁶ LRC, *Report on the Civil Law of Defamation*, 38/1991.

⁴⁷ The paper's deputy editor accepted in the published retraction that he had reached the "totally wrong conclusion" in his interview with the plaintiff, and accepted that the plaintiff had never used imported beef and that to do so would be "alien to the ethos of the restaurant".

⁴⁸ The particular circumstances of the wording in this case are not revealed in the report. The comment above, therefore, is a general one, which relates to certain past cases in which various newspapers have been involved.

⁴⁹ *The Irish Times*, May 31, 2005.

⁵⁰ The period of limitation in libel cases is six years, so sometimes it can be a factor that the cases are not initiated for a time after publication. The time lapse in the High Court case of *Felloni v Sunday World*, *The Irish Times*, February 16, 2005, was two years and ten months. The case was settled. The newspaper had denied that the article published on April 28, 2002 was defamatory of Ms Felloni.

⁵¹ The High Court Taxing Master awarded RTE and its chief news correspondent, Charlie Bird, €1.5 million. *The Irish Times* June 21, 2005, June 25, 2005; *The Sunday Tribune*, June 26, 2005.

⁵² High Court, February 2004; *The Irish Times*, July 1, 2005.