

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2.

PRIVILEGE FROM DEFAMATION FOR REPORTS OF COURT PROCEEDINGS

While in the main the subject matter of this consultation is largely irrelevant to ISME and its members, we feel obliged to respond, and comment on the lamentable vindication of the constitutional right to free expression that flows from the current interpretation of the Defamation Act 2009.

The Law Reform Commission will be aware of ISME's high degree of activity and lobbying on the cost of insurance issue in recent years. What is of a great deal of concern to us and to our membership is the emergence of defamation as a new form of action against business owners in the hospitality trade, particularly in retail and convenience. A number of cases have been reported where suspected shoplifters have been reasonably challenged at the door of a premises, and have successfully sued for defamation. Awards in these cases have been in the region of €20,000.

So successful has this ruse been in recent months that we are now being informed by members of shoppers deliberately acting suspiciously, or pretending to steal stock while actually leaving it on the store shelf, with a view to being challenged by a store owner in front of a conveniently located 'witness.' This type of legalised extortion is extremely difficult for retailers to defend against, especially where the store is being manned by a single individual.

It is patently absurd that damage to a person's reputation to the value of a five figure sum is being occasioned to someone who is merely challenged at a shop door. Yet that has now become almost routine, and our members can name certain solicitor's practices who specialise in this type of action.

When Hollywood stars are flying into Dublin to vindicate their good name before an Irish court, we should be mature enough to recognise that we have a major problem. And so to the LRC's current consultation.

The Reporters Without Borders 2018 report on Ireland¹ is worth quoting in full:

Unhealthy concentration

The highly concentrated nature of media ownership in Ireland continues to pose a major threat to press freedom, and contributed to Ireland's two-place fall in the 2018 World Press Freedom Index. Independent News and Media (INM) controls much of the daily and Sunday newspaper market, while broadcasting is dominated by the semi-state company RTE. The 1937 constitution guarantees media freedom, but defamation suits are common. The high damages awarded by Irish courts in defamation cases have prompted calls for a review of Ireland's defamation legislation. The general scheme of the Communications (Retention of Data) Bill, published in October 2017, has been criticized for failing to provide specific protections for journalists. In November 2017, the Standards in Public Office Commission tried to force a journalist to provide confidential information related to his investigations into alleged planning irregularities. Interviewing police sources has been virtually impossible since the Garda Siochana Act of 2005, which bans police officers from talking to journalists without prior authorization. Officers contravening the ban risk dismissal, a fine, or up to seven years in prison.

It is noteworthy that Ireland's place in this index has fallen two places since last year, placing Ireland in 16th place globally. Even the concept of parliamentary privilege has come under attack in recent years. While the absolute protections for the Dáil enshrined in Article 15 were ultimately upheld by the Supreme Court, it is our clear position in ISME that the vindication of the right to a good name enumerated in Article 40.3.2 has been elevated to a level of superiority over the 'right of the citizens to express freely their convictions and opinions...' and their 'rightful liberty of expression...' as set out in Article 40.6.1.i, which was never the intention of the framers of the 1937 Constitution. In short, we believe that the manner in which the Defamation Act 2009 is currently enforced in our courts amounts to a breach of the constitutional rights of citizens, business owners, and journalists.

¹ <https://rsf.org/en/ireland>

If we are to continue with our current biased and asymmetric enforcement of the Defamation Act in Ireland, then at least the LRC should consider recommending the introduction of anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation, which is in place in many common-law jurisdictions, or a requirement to demonstrate actual damage, as has recently been introduced in the UK.

In summary, ISME believe that it goes without saying that journalists and 'citizen journalists' should enjoy absolute privilege for fair and accurate reporting of proceedings in court, once they are not in breach of any reporting restrictions set out by the trial judge. Restricting such privilege to a prescribed group of persons would be impracticable.

The consultation on Issue 3 re qualified privilege would be largely moot if Ireland did not suffer such an onerous damages regime. In our view the problem is the absurd and absolutist interpretation of the 'good name' under the Defamation Act, to the total detriment of the Article 40 rights of the reporter. While it may be that the ECHR² solves this problem for us, it would be better, ISME believes, if we came up the solution to our own problems locally.

We therefore ask that the LRC recommends the vindication of the rights of journalists in court reporting before moving on to the more substantive issue of reform of our inherently unjust (and possibly unconstitutional) defamation laws.

² <https://www.rdj.ie/insights/europe-encourages-shift-to-lower-damages-in-irish-defamation-cases>