Defences under the Defamation Act

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Introduction
In assessing recent developments in Irish defamation law, the starting point is inevitably the terms of the Defamation Act 2009. Equally it is probably fair to say that whereas it would be true some years ago that this was the most significant recent development in the area, there has been a certain amount of caselaw in the last eighteen months which has provided some clarification of the Act. Accordingly, the purpose and focus of this paper is three fold. First I will briefly refer to those elements of the Act and of the law generally which may be classified as miscellaneous and which have attracted some recent consideration by the courts. Secondly I will look at the new defences available under the legislation and finally I will consider the question of the remedies available thereunder.

In this regard one important introductory point should be made. The Act was originally (that is to say, prior to its enactment) heralded as generating some significant reform in the area of defamation law. In reality it did not do so in any sense that has significant practical impact. Rather it represented in large measure a codification or consolidation of existing developments. It is no less important for having done so – indeed as a point of reference for lawyers it will inevitably prove invaluable (albeit only for causes of action accruing after January 1, 2010).

1. Miscellaneous developments
As is well known, some of the most important changes that have been made under the 2009 Act come under the heading of procedural changes. Of these the following are particularly important (at least potentially)
Under s. 8 Parties must accompanying pleadings with a verifying affidavit averring to the truth of the contents of such pleadings.

Under s. 29 the Rules in respect of lodgements in defamation cases have been changed such that it is now possible for the first time for a lodgement to be made without any admission of liability.

Under s. 38, the Limitation period for defamation cases are reduced to one year.

In regard to this last point, it should be noted that one of the cosmetic changes made by the Act is that the old distinction between libel and slander is abolished. It will be remembered that previously, libel was a defamation in permanent form whereas slander was defamation in transient form and there were different rules (and different limitation periods depending on which tort was at issue). Under the 2009 Act, however, there is now a single tort of defamation governed by a single set of procedural rules albeit, as we shall see, that it is now possible for damages to be awarded in compensation for the kind of special harm that would often resonate in a slander action –namely damage impacting in financial terms.

In addition the Act codifies many of the essential elements of the tort of defamation as developed by the courts over the decades since the 1961 Defamation Act and makes certain minor and often cosmetic changes to the existing law. Thus the yardstick for testing whether something is defamatory is now the reasonable rather than the right thinking person. Moreover, the Act creates a single rather than multiple publication rule (such that where there is multiple publication of a defamation there is still only one cause of action, albeit that the breadth of publication is a factor to bear in mind when assessing quantum of damage)\(^1\). The Act further abolishes the crime of defamatory libel, but (controversially) it defines and thereby gives new life to the crime of blasphemy.

\(^1\) S. 11. Moreover under s. 9 where a statement has more than one defamatory imputation this will still only ground one cause of action.
In terms of the element of the tort, two particular aspects are worth noting, though primarily because they have attracted recent case law, namely the rules on **identification** and the new rule whereby a judge is permitted (under s.14 of the 2009 Act to give a **ruling on the meanings** which, in the plaintiff’s pleadings, are alleged to flow from the impugned statement.

### 1.1 Identification

Under the 2009 Act, the rule on identification is that which existed at common law – that is, a person is identified in a statement where this could reasonably be deemed to occur, with specific rules (under s.10) existing where there is a defamation of a class of persons. This issue arose in *Bradley v. Star Newspapers*² where a number of questions in relation to identification arose. It should be noted that the cause of action in this case accrued before the coming into being of the 2009 Act, but that, at least in part it retains its relevance as an aid to interpretation of the terms of the Act.

In essence in this case the plaintiffs sued in respect of allegations in an article which did not name them but instead referred to two criminals who went by the nicknames ‘the fatheads’. The jury in the High Court found that they were not reasonable identifiable in this publication. The key question on appeal to the Supreme Court was whether the trial judge should have admitted in evidence a second article published shortly after the first which actually named the plaintiffs (but which was not sued on by them) as an aid to interpretation of the first article.

On the rather unusual facts of the case, the Supreme Court held that the second article should have been admitted. Fennelly J reached this conclusion largely on the basis that the connection between the first and second article was so clear and so explicit that the latter could virtually be regarded as a republication of the former. Hardiman J in similar fashion pointed out that if it were not to be admitted, the jury would be denied access to information which the vast majority of reasonable readers of the material would have read. As

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² [2011] IESC 17
he put it (having accepted that the intention behind a publication was, in
general, irrelevant)

“This does not mean, however, that evidence that the same author
and publisher have published a subsequent article linking the
plaintiffs by name to the allegations previously made of two
unnamed brothers of the same age as the plaintiffs, who are also
brothers of the stated ages, is inadmissible and must be excluded
from consideration in an action based on the first article. To do so
would be highly unrealistic, in the sense that it would exclude from
the jury’s consideration material which every person of normal
intelligence would consider relevant to the question, who was the
first article published about? It is one thing to say that intention is
neither necessary nor sufficient to constitute a libel: it is quite
another to say that a specific article undoubtedly published in the
same newspaper by the same journalist was an employee of the
same defendant, must be excluded from consideration on the
question of identification”

Finally and by way of completeness, it should be noted that in this case the
Supreme Court endorsed the approach (which was clearly good law at the
time) that in terms of evidence of bad character being adduced in mitigation of
damage, evidence of specific misdeeds is not admissible whereas evidence of
general bad reputation is. It is submitted, however, that this distinction is and
has long been unfathomable (in that presumably in particular circumstances
the general bad reputation will be dependent on specific misdeeds). Thus it is
notable that under s. 31 of the Act any evidence can be adduced – albeit with
the leave of the court – of any matter that would have a bearing on the
reputation of the plaintiff.

1.2 Striking out Meanings
Under s. 14 of the Act it is provided that the Court (the judge sitting alone)
may, on application, and if it determines that the statement in respect of which
the action is brought is not capable of bearing the imputation pleaded by the
defendant (or that such meaning is not capable of being defamatory) dismiss the action insofar as it relates to that imputation. There have been two recent cases on this question both of which relate essentially to the question of whether it is a reasonable inference from a statement that one is being investigated in connection with a crime that one is either (a) suspected of involvement or (b) that one is in fact guilty. In Lewis v. Daily Telegraph the House of Lords had concluded that this was not a reasonable inference. Accordingly in Griffin v. Sunday Newspapers where a newspaper had referenced certain allegations about the plaintiff but had not claimed that they were true, Kearns P struck out the plaintiff’s plea that the words meant that he was guilty of that which was alleged.

A different approach was taken by Hedigan J in Travers v. Sunday Newspapers Limited. In this rather unusual case, the defendants had published an article in respect of a major bank raid and referring to the Plaintiff. The article was headed “€7.6m tiger raid was nothing to do with me” and, so the defendants argued, whereas the articulated noted that the plaintiff was under investigation for involvement in the raid, equally both the headline and the article as a whole was focused on the plaintiff’s adamant assertion that he was not involved. As such, the Defendant applied for the judge to strike out one meaning which the Plaintiff alleged was borne by the impugned words, namely that he was criminally responsible in respect of the raid.

In fact, Hedigan J refused to strike out the meaning. He referred to the precedents set in Quigley v. Creation Press and in Magee v. MGN Limited, both of which had stressed the primacy of the jury in determining the meaning of a particular statement and from these precedents he concluded that ‘It is well established that a judge should not withdraw a question of meaning from the jury unless satisfied that it would be “wholly unreasonable” to leave that

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3 This section naturally links with s. 34 considered below, whereby an entire claim can be struck out for disclosing no cause of action.
4 [1964] AC 234
5 [2011] IEHC 331
6 [2012] IEHC 185
7 [1971] IR 269
8 [2003] IEHC 87
question to the jury'. On this basis, (and because, so it would seem, there were elements in the publication which a reasonable reader might well take to be suggestive of the plaintiff’s guilt) Hedigan J allowed the impugned meaning to go forward for consideration by a jury. This is an interesting approach, in principal because it suggests that the test under s.14 (‘whether the statement in respect of the action is brought is reasonably capable of bearing the imputation pleaded by the plaintiff”) is in fact coloured by pre-2009 precedents such that the real test is whether it would be wholly unreasonable to allow the matter to proceed before the jury. It is submitted that in fact these are two distinct tests and it is, perhaps rather odd that Hedigan J did not consider whether the new legislation might have significantly altered the common law position such that a defendant should properly now have less to do in order to have a case struck out than would previously have been the case.

1.3 Jurisdictional issues and Internet Publication

Finally in terms of miscellaneous developments it is worth noting the decision of the ECJ in *eDate Advertising GmbH v. X; Martinez v. Societe MGN Limited*\(^9\). In this case the ECJ held that a broader answer could and should be given to the question of the appropriate jurisdiction in which a defamation action could be taken where what was at stake was internet publication as distinct from conventional publication.

The previous interpretation of Article 5 of the Brussels Regulations (as recognised both in European and Irish law) was that a defamation action could be taken either (a) in any state in the EU in which publication had occurred though damages would be limited to compensation for publication in that jurisdiction or (b) in the state in which the publisher was established in which case compensation could be awarded for the full extent of the publication throughout the entire EC territory.

In the instant joined cases, the ECJ noted the universal nature of internet publication and concluded that it meant that old rules based on the nature and

\(^9\) [2011] EUECJ C-161/10
extent of the distribution of publication were rendered redundant. As such the
court concluded that where there was any action in respect of internet
publication (which quite clearly means more than a defamation action), the
plaintiff could not alone sue in each member state in which publication
occurred for the publication in the state or sue in the state in which the
publisher was established for all community wide publication (the old rule) but
in addition could sue in the state in which the centre of his or her interests
were based for all publication in the community. Naturally this may greatly
open up the prospects for plaintiffs in terms of succeeding in obtaining
significant damages in libel actions in that, to some extent, it may provide
them with a potentially beneficial home advantage.

These then are what I will term recent miscellaneous developments in the
area of defamation law. We now turn to consider two more substantive areas
of the legislation worth considering for themselves namely the issue of
defences and the issues of reliefs under the legislation.

2. Defences under the Defamation Act

Part 3 enshrines in statutory form the various common law defences to
defamation, while also adding in a couple of new defences. Significantly,
under s. 15 of the Act it is essentially provided that save for the defence of
absolute privilege (s.18) and qualified privilege (s.17), the statutory statement
of the defences replaces all defences that could have previously been
pleaded in a defamation action. The rationale behind this step is obvious; it
would make little sense to permit a defendant to plead what would be, in
effect, the same defence twice - that is in both its statutory and common law
form. Thus the statutory defences operate as follows:

2.1 Justification/Truth

The common law defence of justification is abolished and replaced by the
more helpfully titled defence of truth with the new statutory defence retaining
its essential definition under the 1961 Defamation Act\textsuperscript{10}. Thus the defendant

\textsuperscript{10} S. 16
must prove that the impugned statement was true in all material respects. In addition, the old statutory rule is retained whereby if an allegation contains what might, simplistically be termed major and minor allegations and the defendant cannot prove the truth of the ‘minor’ allegations, [s]he can still avail of the defence if, by reason of the ‘major’ allegations being proved, the remaining words do not materially injure the plaintiff.\textsuperscript{11}

\textbf{2.2 Fair Comment/Honest Opinion}

The common law defence of fair comment is also abolished and replaced by the (again more happily titled) defence of ‘honest opinion’\textsuperscript{12}. Once again the new statutory defences combines elements of the old statutory defence under the 1961 Act but also encapsulates some of the gloss placed on the defence by judicial holdings. Thus in order for the defence to be available, the impugned statement must either be believed by the Defendant or, if the defendant is not the author, then [s]he must believe that the author believed it to be true\textsuperscript{13}. Secondly, it must be based on allegations of fact which the defendant can prove to be true\textsuperscript{14} and that are specified in the statement or referred to therein in circumstances where such facts were known or where they could reasonably have been expected to be known by the recipients (or else where such factual allegations were protected by the defences of either absolute or qualified privilege). Thirdly the opinion must relate to a matter of public interest. Finally, and obviously, the impugned statement must be an opinion rather than a fact and in distinguishing the two, the court must have regard to the extent to which the statement can be proved, the extent to which it was made in circumstances which would generate a reasonable belief that it was an opinion and the words used in the statement including whether they

\begin{footnotesize}
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\item\textsuperscript{11} S. 16(2)
\item\textsuperscript{12} S. 20
\item\textsuperscript{13} Where there are joint publishers and the honest opinion is only held by one, then the ‘innocent’ party will still be able to avail of the defence unless [s]he is vicariously liable for the actions of the second publisher. S. 20(4)
\item\textsuperscript{14} S. 20(3). The Defendant need not prove the truth of all of the factual allegations in the statement provided that he can show that his opinion was honestly held having regard to those facts that are provable. In the cases of allegations of fact to which privilege would apply, the defence of honest opinion will be available if the defendant can either prove the truth of such allegations, or can show that the opinion could not reasonably be understood as implying that the allegations were true and at the time of the publication of the opinion the defendant did not know or could not reasonably have been expected to know that the allegations were untrue.
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were subject to a qualification or disclaimer or accompanied by cautionary words.\textsuperscript{15}

2.3 Apology
The fact of making an apology is still not a defence proper, but can be used as evidence in mitigation of damages\textsuperscript{16}, provided that it was made as soon as practicable after the complaint of the plaintiff or the issuing of proceedings (whichever comes first) and provided that the apology was published (or offered to be published) in such manner as ensured that it was given the same degree of prominence as the earlier statement.\textsuperscript{17} Most significantly (and in what, I think is a radical departure for the law), such an apology does not constitute an admission of liability, nor is it relevant to the determination of liability, nor can it be used in any civil proceedings against the defendant.\textsuperscript{18}

2.4 Consent
The consent of the Plaintiff to the impugned publication is a defence in a defamation action.\textsuperscript{19}

2.5 Innocent Publication
Finally, the Act also codifies the common law defence of innocent dissemination or secondary publication. Under the Act, this defence is available to a defendant if
(a) he or she was not the author, editor or publisher of the statement to which the action relates,

(b) he or she took reasonable care in relation to its publication, And

\textsuperscript{15} S. 21
\textsuperscript{16} Significantly the defendant who intends to give evidence of an apology in mitigation must at the time of the filing or delivery of the defence notify the Plaintiff of his or her intention to give such evidence. S. 24 (2)
\textsuperscript{17} S. 24(1)
\textsuperscript{18} S. 24(4)
\textsuperscript{19} S. 25
(c) he or she did not know, and had no reason to believe, that what he or she
did caused or contributed to the publication of a statement that would give rise
to a cause of action in defamation.\(^{20}\)

In this respect, moreover, a defendant is deemed not to be the author, editor
or publisher of a statement if

\(a\) in relation to printed material containing the statement, he or she was
responsible for the printing, production, distribution or selling only of the
printed material,
\(b\) in relation to a film or sound recording containing the statement, he or she
was responsible for the processing, copying, distribution, exhibition or selling
only of the film or sound recording,
\(c\) in relation to any electronic medium on which the statement is recorded or
stored, he or she was responsible for the processing, copying, distribution or
selling only of the electronic medium or was responsible for the operation or
provision only of any equipment, system or service by means of which the
statement would be capable of being retrieved, copied, distributed or made
available.\(^{21}\)

And, in assessing whether reasonable care was taken as to publication or
whether the defendant had reason to believe that what he or she did caused
or contributed to the publication of a defamatory statement, the Court should
have regard to

\(a\) the extent of the person’s responsibility for the content of
the statement or the decision to publish it,
\(b\) the nature or circumstances of the publication, and
\(c\) the previous conduct or character of the person.

Two points perhaps arise in respect of the defence as it stands. First, it does
seem strange that the defence would cover a situation where a defendant

\(^{20}\) S. 27(1)
\(^{21}\) S. 27(2)
could show that [s]he was not the ‘publisher’ of a statement, in that of course publication is an indispensable element of the tort, and hence something that the plaintiff needs to prove rather than something that the defendant needs to disprove. Moreover, if the defendant is NOT the publisher of the material, then quite clearly he does not need to show any of the other factors listed in this section of the Act. It may be suggested that the statute has a particular view of what constitutes a ‘publisher’ in this context – presumably with something like a publishing firm in mind. Equally, this would potentially lead to a situation where the Act contains (without clarification), two operative definitions of a publisher, of which one will apply generally and one will apply purely in the context of the defence under s.27 of the Act.

Secondly, in terms of assessing whether the innocent disseminator did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation, it may again be asked whether in the case of, for example, a newspaper vendor, it is necessary for him to have read all material sold to check for defamatory content, or possibly to have read publications that habitually contain defamations. Alternatively, if a newspaper vendor is aware that a particular newspaper contains a controversial statement about someone and if he or she cannot be sure as to whether that statement is true or false, is [s]he then required to take all copies of the relevant edition off his shelves.

2.6 Privilege under statute and at common law
Under ss. 17 and s. 18 of the 2009 Act it would appear that both the defences of qualified and absolute privilege are protected both within and without the 2009 Act. Thus in both cases it is provided that it is a defence for the defendant to show that his or her statement would have been protected under the defence of absolute or qualified privilege immediately prior to commencement of the Act.

22 See generally Cox, Defamation Law (Firstlaw 2007) pp. 42-43
In so far as the defence of absolute privilege is concerned, this is uncontroversial, and hence s. 17, simply sets out a number of stated types of publication which will be absolutely privileged under the statute, while leaving open the possibility that there may be other types of absolutely privileged statements (and one can think instantly of, for example, comments made by the President in the course of her business) as required by, for instance, the constitution.

A more complicated issue arises in so far as the defence of qualified privilege is concerned and for two reasons. Thus what s. 18 does is twofold; first it essentially encapsulates the existing common law defence of qualified privilege in statutory form, with its traditional requirements that the publisher have a duty or interest (legal, moral or social) to impart the information reasonably to recipients who had (or whom the publisher reasonably believed had\textsuperscript{23}) a reciprocal duty or interest in receiving it\textsuperscript{24} and with its qualification that such privilege could be lost if the publisher was actuated by malice\textsuperscript{25}. Secondly, the Act does what had been done in the 1961 Act and in its first schedule create two categories of documents one which is privileged without explanation or contradiction and one which is privileged subject to explanation or contradiction.

The complication rests with the fact that, in so far as the common law was concerned, there is of course some uncertainty both as to whether the type of defence that is protected under Reynolds v. Times Newspapers\textsuperscript{26}(and its progeny) was available to Irish defendants before the coming into being of the 2009 Act, and also whether this defence was a ‘new’ defence for journalists, or simply an application of the defence of qualified privilege\textsuperscript{27}. If the latter, and if the approaches of O’Caoimh J in Hunter v. Duckworth and of Charleton J in

\footnotesize
\textsuperscript{23} Under s. 19(2) it is provided that the defence of qualified privilege shall not fail simply because the statement was published to someone without an interest in receiving it if it is proved that this happened because the publisher mistook him for an interested person.
\textsuperscript{24} S. 18
\textsuperscript{25} S. 19
\textsuperscript{26} [2001] 2 AC 127
\textsuperscript{27} See Generally Cox, Defamation Law pp 317ff
Leech v. Associated Newspaper\textsuperscript{28} are taken to represent the law (namely that some manifestation of Reynolds privilege was recognised as a defence in Irish law) then it would presumably be possible to argue that the Reynolds manifestation of qualified privilege continues to be available to defendants (indeed it may be that the impact of Reynolds is also pleadable as a simple application of normal qualified privilege rules). If this is the case then it would seem to be possible for a defendant simultaneously to plead the statutory defence under s. 26 (discussed shortly) and the common law defence of (Reynolds) qualified privilege. The reason why I think this is potentially important is because I think from a defendant’s perspective there may be more flexibility attaching to the common law rather than the statutory defence\textsuperscript{29}. Equally, to the extent that the legislative intention is relevant in the interpretation of the statute it might be argued that it would be an absurdity to suggest that the legislature would intend to leave open the possibility of a Reynolds line of jurisprudence developing post January 2010 while at the same time creating a new statutory defence which, at least superficially, seems to contain many elements of the so called Reynolds defence.

As I mentioned earlier, I think the two defences under the Act that are most worthy of attention are the defence of offer of amends and the defence of fair and reasonable publication on a matter of public importance. These two defences are now considered in turn.

\section*{2.7 s. 26 – The Defence of Fair and Reasonable Publication}

s. 26 of the Act creates a new defence of “fair and reasonable publication (on a matter of public interest)\textsuperscript{30}”. The statutory defence is similar, albeit not identical to the Reynolds defence, and to that extent, it is possible that the principles considered above and which have been developed in the post-Reynolds case law and possibly applied in Leech v. Independent Newspapers and Hunter v. Duckworth may become relevant as an aid to understanding the

\textsuperscript{28} [2007] IEHC 223
\textsuperscript{29} This is certainly the case since Jameel v. Wall Street Journal [2006] UKHL 44
new statutory defence. Equally, as we shall see, in reality the protection in s. 26 is considerably more circumscribed than that which derives from the *Reynolds* defence.

Under the section, the new defence will only apply where the defendant can prove that the statement in respect of which a defamation action was brought was published (a) in good faith and (b) in the course of, or for the purposes of discussion of a subject of public interest, the discussion of which was for the public benefit. Equally it is difficult to conceive of a situation where discussion of a matter of public interest could not be for the public benefit.

In addition, and in something of a throwback to the approach of the Court of Appeal in *Reynolds*, the defendant must show that, in all the circumstances of the case, both the manner and extent of publication of the statement did not exceed that which was reasonably sufficient and also that it was fair and reasonable to publish the statement\(^{31}\). In this respect, it is for the court to determine whether such publication was fair and reasonable, and in doing so, it is required to have regard to such matters as it considers relevant including any or all of the following,\(^{32}\)

(a) the extent to which the statement concerned refers to the performance by the person (presumably the plaintiff) of his or her public functions  
(b) the seriousness of any allegations made in the statement  
(c) the context and content (including the language used) of the statement  
(d) the extent to which the statement drew a distinction between suspicions, allegations and facts  
(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication  
(f) in the case of a statement published in a periodical by a person who at the time of publication was a member of the press Council. the extent to which the publisher of the periodical adhered to the code of standards of the Press Council to standards equivalent to those specified in that code of standards

\(^{31}\) s. 26(1)  
\(^{32}\) s. 26(2)
and abided by decisions of the Press Ombudsman and determinations of the Press Council

(g) In the case of a statement published in a periodical by a person who at the time of publication was not a member of the press Council, the extent to which the publisher of the periodical adhered standards equivalent to those mentioned in the previous paragraph

(h) the extent to which the plaintiff’s versions of events was represented in the publication concerned, and given the same or similar prominence as was given to the impugned statement

(i) if the plaintiff’s views were not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person and

(j) the attempts made and the means used by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

It is clear from the wording of s. 26(2) that these are guidelines for the court (which in a High Court action will mean the jury) and moreover, that the court is free to consider all or only some of them and indeed to bear in mind factors other than those contained in this list.

To a large extent, these considerations replicate the well known “ten principles” developed by Lord Nichols in Reynolds. Equally, and more generally, it is notable that these factors go to answer a different question than do the Reynolds principles. After all in Reynolds the ten principles are used to help a court to determine whether there is a public interest in publication, or, to put it a different way, whether the public duty/public interest

33 S. 26 makes specific provision for the requirement that the plaintiff’s version of events has been sought, and does so in a manner which is to the benefit of the plaintiff. Thus it is provided that the failure of the plaintiff to respond to an attempt to elicit his or her version of events shall not constitute or imply consent to the publication of the statement. s. 263(3)(a)

34 As McGonagle notes, “Unlike the permissive and illustrative nature of the factors listed in Reynolds, the factors in the Bill “shall” be taken into account. [The Court] may take additional matters into consideration - it must do so if it considers them relevant - and can exclude any of those in the list if, but only if, it considers that they are not ‘relevant’. Marie McGonagle, “Reforming Media Law in Ireland: Part 1: Defamation and Privacy.”(2006) 11 Communications Law 195
test has been satisfied. Under s. 26, however, the above factors go exclusively to the question of whether publication was fair and reasonable – nor is it precisely clear what these terms mean\(^{35}\).

Equally, the reality is that where these steps of responsible journalism have been followed (and especially where there has been a genuine effort to publish the Plaintiff’s side of the story), there will not likely be a defamation action arising out of the publication. In other words the defence may be of limited use in practice, irrespective of how significantly its arrival may have been heralded. Indeed to some extent, the reason why s. 26 may have attracted so much attention is precisely because it was this kind of reform (that is, reform aimed at improving the position of journalists at defamation law) which was expected when talk of the Bill originally began to surface.

### 2.8 The Offer of Amends Procedure

The old offer of amends procedure under Section 21 of the old Defamation Act 1961 had been enacted to provide some relief to a defendant publisher burdened unfairly under the rule that one could be liable for defamation to a plaintiff to whom one had not intended to refer\(^ {36}\). This defence had proved useless in both English and Irish defamation law.

Accordingly what is included in the 2009 Act is not an amendment of the old offer of amends procedure but rather its abolition and replacement with a new and completely different defence called “offer of amends”, This defence is not about protecting innocent publishers but exclusively about facilitating expeditious resolution of actions, hopefully without involving the courts at all, and (it is submitted) in all probability without involving a jury. Indeed to this extent it may be suggested that this represents (at least potentially) one of the most important reforms of defamation law proposed by the Bill.

\(^{35}\) It is notable that under the original Bill in 2006, the section contained a further requirement on the part of the Defendant that he show absence of malice. This was dropped when the Bill was finally enacted,

\(^{36}\) Hulton v. Jones [1910] AC 20
Under s. 22 of the 2009 Act, any person (and not merely an innocent publisher) who has published an allegedly defamatory statement may make an offer to make amends. The offer must be in writing, must state that it is an offer to make amends for the purposes of the section and must state whether it is in respect of the whole publication, or whether it is a “qualified offer” - that is an offer to cover only part of the statement or an offer to cover only a particular meaning that a statement may be alleged to carry.

Unlike s. 21 of the 1961 Act, there is no requirement that the offer under the 2009 Act be made “as soon as reasonably practicable”. Indeed the only time limit that is imposed, is that the offer not be made after the delivery of the defence. Moreover, the offer may be withdrawn at any time prior to being accepted, and another offer may subsequently be made, although it seems clear that this would be a new and independent offer, and hence a defendant who had made and then withdrawn an offer prior to the delivery of the defence, could not make a second offer subsequent to such delivery and try to claim that it was merely a revival of the original offer and therefore, in time for the purposes of the section. In similar vein, there are no time limits prescribed in which to accept the offer, hence normal contractual principles will apply and the offer remains extant until it is rejected.

An offer of amends under the 2009 Act can, should the offeror choose, merely represent an element of a settlement offer which may, if rejected, still possibly go to mitigation of damages. In other words, the offer need not be pleaded as

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37 s. 22(1)
38 s. 22(2)(a)
39 s. 22(2)(b)
40 Under the equivalent English rule it has been held that, before making an offer, the defendant is entitled to know the full impact of the alleged defamation on the plaintiff. If this were not the case, the defendant could decide not to defend the matter (and to make an offer) on the assumption that damages would be small, and then find that there was some aspect of the matter of which he was unaware that would generate much greater damages, and had s/he known of this aspect of the matter, s/he would not have made the offer but would have set about making a substantive defence. Abu v. Mirror Group Newspapers [2003] EMLR 493
41 s. 22(3).
42 s. 22(4)
43 It may be suggested that where there is a substantial delay in accepting such an offer and where, but for this delay, there would have been no need for the trial of the action to proceed, the plaintiff should be required to pay the costs of that trial. Roache v. News Group Newspapers [1998] EMLR 161
a specific defence (in which case there are no consequences for the plaintiff should he reject it). However, where it is pleaded as a defence (in which case the making of a rejected offer may provide the defendant with a complete defence to the action) no other defence can be raised in respect of the publication or that aspect of the publication to which the offer relates.

The content of an offer to make amends under the section is, at least in principle, set in stone and involves three elements, (and these three elements will apply whether or not the parties agree that any additional steps must be taken to settle the matter). Thus the defendant must offer

(a) to make a suitable correction and sufficient apology
(b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances
(c) to pay such sum in compensation or damages and such costs as may be agreed by the parties or determined to be payable.

Both the decision to make the offer and the decision whether or not to accept it involve significant tactical considerations, because the dominant feature of the statutory provision is that the offer of amends can be made and accepted as a matter of principle and without any certainty as to what precisely this will entail in fact.

All that is certain, after all, is that where an offer is made and accepted, a suitable correction and sufficient apology must be published in such manner as is reasonable and practicable in the circumstances, and some level of appropriate compensation must be paid. Unless there is an agreement between the parties as to what precisely is required, however, the pivotal

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44 s. 23(4)
45 Whereas under s. 23(5) a defendant who pleads offer of amends as a defence is not permitted to raise any other defence, equally if he only pleads it in respect of certain of the statements contained in a publication, he will naturally be able to plead other defences - truth, honest opinion, qualified privilege and so on - in respect of the rest of the statements contained therein
46 s. 23(5).
47 s. 22(5)
48 Naturally the defendant should be clear that the offer is in respect of all publications of the impugned statement for which the defendant would be liable Green v. Times Newspapers (Unreported, Queen's Bench, January 17, 2001)
questions of what is a sufficient and suitable apology and correction, what level of publication is reasonable and practicable in the circumstances, and what compensation must be paid remain unanswered, and will fall to be determined by the court.

From the defendant’s perspective then the procedure is a damage limitations exercise and, potentially, a means of preventing a jury from deciding on the appropriate quantum of damages in the case. Thus s/he can simply make an offer “to make appropriate amends for the purposes of the Act” and thereby present the claimant with the choice of accepting the offer (and hence having such issues as the level of damages that s/he will receive determined by a judge rather than a jury), or rejecting it (and, hence, running the risk that the entire claim will be met by a complete defence).

The manner in which the offer of amends takes effect in practice is laid down in s. 23 of the 2009 Act. Thus if the parties agree as to the precise measures that must be taken in fulfilment of the offer, then the party to whom the offer was made can apply to the court for an order directing the offeror to take such measures.49 On the other hand, where the offer is accepted, but there is no agreement as to what must be done in fulfilment thereof, the focus turns to the person making the offer, who may, with the leave of the court in which the action is being heard, make a correction and apology by means of a statement before the court, in such terms as may be approved by the court, and may give an undertaking as to the manner of their publication50. No matter how derisory or ineffective that correction or apology is, once the offer of amends is accepted, it cannot be set aside.

Equally, and whereas neither the court nor the claimant have any power in this context to demand that such apology or correction be framed in particular terms, (and thus it might appear that the defence gives excessive protection to the defendant), the factor that will almost inevitably ensure that the defendant takes steps to ensure the adequacy of the correction and apology

49 s. 23(1)(a)
50 s. 21(1)(b)
is the exclusive discretion that is given to the court to determine the level of damages that should be paid in fulfilment of the offer. In making this determination, the court is deemed to have the same powers as it would have in determining damages or costs in any defamation action. Thus just as the sufficiency or insufficiency of an apology or of other corrective steps taken can, in a routine defamation action, serve to mitigate or to aggravate damages, so also in this context, what a defendant does (either good or bad) under s. 23(1)(b) will help to determine what he must pay under s. 23(1)(c). Moreover, s. 23(1)(c) emphasises this fact in its provision that “in making a determination under this paragraph [the Court] shall take into account the adequacy of the measures already taken to ensure compliance with the term of the offer by the person who made the offer”.

The approach of the English courts in this respect has been to assess what the defamation would be worth in the normal course of events and then to discount it in percentage terms depending on the adequacy of the apology and correction and any other relevant background factors, including, so it

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51 s. 21(1)(c)
52 Hence in such circumstances it will benefit neither party to be overly aggressive or greedy Cleese v. Associated Newspapers [2003] EWHC 137. On the other hand, this apology can only go to aggravation or mitigation but cannot, for instance, be a ground for awarding punitive damages.
53 In Cleese v. Associated Newspapers [2003] EWHC 137 it was held that a judge should not be made aware of any “without prejudice” offers made in attempted settlement, but where sums had actually been paid in compensation, these should be disclosed to the judge.
54 In Cleese v. Associated Newspapers [2003] EWHC 137 it was further held that both parties had a duty to be constructive in trying to resolve the matter, and hence any delay that could be attributed to either party might aggravate or mitigate damages.
55 Nail v News Group Newspapers [2005] 1 All ER 1040 (effective and prompt publication of apology hence figure discounted by 50%), Campbell-James v. Guardian Newspapers [2005] EWHC (Civ) 893 (inadequate and delayed publication of apology and correction for a very grave libel, hence figure discounted by only 35%), Turner v. News Group Newspapers [2005] EWHC 892, [2006] EWCA Civ 540 (originally dismissive treatment of claimant and refusal to accept the falsity of the allegations hence discount of 40%), Angel v. Stainton [2006] EWHC 637, (grudging and non conciliatory attitude on the part of the defendant and a delay in making the offer hence reduction of 40%) Veliu v. Mazrekaj [2006] EWHC 1710 (serious delay in apologising for a particularly grievous libel hence reduction of one third). The courts in these cases stressed that there was no standard percentage discount that would apply in cases involving the offer of amends procedure.
56 Thus, for example, if a defendant in addition to pleading offer of amends also pleaded justification or fair comment in circumstances where such defences could not possibly apply, or had subjected the plaintiff to demeaning cross examination, this would reduce the percentage discount on the damages. Turner v. News Group Newspapers [2005] EMLR 25, Campbell-James v. Guardian Newspapers [2005] EWHC (Civ) 893, Angel v. Stainton [2006] EWHC 637, Veliu v. Mazrekaj [2006] EWHC 1710.
would appear, directly relevant information about the plaintiff’s past conduct. Presumably, however, if the apology in question was drafted in such contemptuous terms that the harm was aggravated, it would be up to a court actually to increase the notional figure for damages, again in percentage terms.

Naturally, therefore, the objective for the offeror is to make as limited an apology as will suffice to ensure that damages are mitigated to the degree sought.

In this sense then, the concept of offer of amends under the 2009 Act is merely a tactical tool for facilitating expeditious resolution of actions. Whether it will have this effect in practice, however, is uncertain. The issue of damages is a fraught one, and the experience of the English courts operating an equivalent section, is that battles over damages can be drawn out and require serious and sophisticated consideration by the relevant courts, involving for example, disclosure of documents, cross examination of witnesses and so on. Moreover it would appear that on the basis of recent judgements, considerable background evidence as to the character of the plaintiff will be admissible in mitigation where a judge is calculating the appropriate quantum of damages in such a case.

It has been suggested that in adducing evidence in support of a claim that damages should be significantly reduced, it will not be possible for the defendant to seek to prove that the statement in respect of which the offer is made is true, both because this would completely undermine the defence and also because this would offend against the rule in s. 23(5) that where an offer of amends is used as a defence, then no other defences (in this case, truth),

58 It would appear that under the procedure a judge could, in an appropriate case, award no damages. Alternatively it is possible that substantial damages might be awarded even where a grovelling apology was made, if this was warranted having regard to the serious nature of the defamation, Kiam v. Neill [1996] EMLR 4493.
can be pleaded. Equally it might be argued that what is prohibited under the terms of the section is *pleading* a defence and hence the defendant might successfully argue that whereas he is not pleading the defence of justification, (in that he is not seeking to avoid liability on the basis of truth), equally if he could prove that the statement was actually or substantially true, this should be admissible evidence in mitigation of damages\(^61\).

Finally, it would seem certain that where a defendant has made a qualified offer of amends, he should not be permitted (in giving evidence as to the appropriate level of damages to be awarded where an offer has been accepted but its terms not agreed) to adduce evidence that would go to prove the truth of the allegations in respect of which the offer has *not* been made (unless such evidence constitutes directly relevant background evidence that can be adduced in mitigation).

It is when an offer of amends made pursuant to the terms of the 2009 Act is *rejected* that it becomes a defence rather than merely a negotiations tool. Again this poses serious tactical questions for the claimant, in that an unaccepted offer of amends is a defence to a defamation action save where the plaintiff proves that at the time of the publication of the statement (or that aspect of the statement to which a qualified offer of amends applies\(^62\)) the defendant knew or ought reasonably to have known that

(a) the statement referred to the plaintiff or was likely to be understood as referring to him\(^63\) and
(b) that it was false and defamatory of the plaintiff\(^64\)

From the claimant’s perspective, the choice presented by an offer of amends is, therefore, a stark one. Is s/he to accept the offer and thereby forego the

\(^{61}\) See however, *Nail v. News Group Newspapers* [2005] 1 All ER 1040 for the view that where an offer is made and accepted, the defendant must be taken to have conceded that the statement in respect of which the offer was made bore the meaning complained of by the plaintiff.

\(^{62}\) S. 23(3)

\(^{63}\) S. 23(2)(a)

\(^{64}\) S. 23(2)(b)
potential windfall of a jury determination of quantum of damages (and indeed, where there is a qualified offer, to run the risk of not being vindicated in respect of certain of the allegations), or is s/he instead to reject the offer and run the risk that he will not be able to satisfy the burden under s. 23(2), and will thereby lose his claim in its entirety?

Finally, it should be noted that what is at issue here is a defence available to a defendant rather than one covering every aspect of a defamatory publication. In other words, where more than one person is liable for a publication, and where only one makes an offer, the plaintiff is at liberty to accept that offer, while continuing with his action against a concurrent wrongdoer. In such circumstances, it has been suggested that (in as much as one figure is to be awarded for the defamation as a whole for which all concurrent wrongdoers are jointly and severally liable) whereas the percentage discount on the level of damages to be awarded against the defendant who has made the offer of amends should not be affected by the fact that the co-defendant has not made such an offer, equally the overall quantum of damages would need to reflect the mitigating effect of the offer of amends that was made.

Moreover, if the behaviour of the party making the offer of amends actually aggravates the harm, then, (assuming that it is not possible for aggravated damages to apply where one but not all of the defendants is responsible for such aggravating behaviour), such aggravation, whereas it will not affect the overall quantum of damages, will reduce the percentage discount available to the party who has made the statutory offer of amends.\textsuperscript{65} Moreover, whereas in theory both defendants remain jointly and severally liable for the total quantum of damages, in reality the effect of the offer of amends procedure is that the liability of the party making the statutory offer of amends is capped at the percentage set by the court. Indeed, quite apart from the offer of amends procedure, this is the position which would appear to be reached by the terms of s. 14(6) of the Civil Liability Act of 1961.

\textsuperscript{65} Veliu v Mazrekaj [2006] EWHC 1710.
It remains to be seen how popular this defence will become, although there are already indications from English case law that the defence is far more popular than the older “offer of amends” procedure.

3. Remedies under the Legislation

In so far as the question of reliefs under the 2009 Act is concerned, once again the Act takes the approach essentially of consolidating what had gone before but also of expanding the number of potential remedies available to plaintiffs. For the purposes of this paper I will start by briefly referencing the treatment in the legislation of the traditional reliefs and then move to consider the new remedies under the Act. Indeed it is worth noting that most of the (admittedly rather limited) case law dealing with the legislation has focused on two of these new forms of relief.

To take first the traditional remedies:

3.1 Damages

The main change in s.31 of the 2009 Act in relation to damages is that there is provision for parties to make submissions to the court on the matter of damages and also for the judge to give directions to the jury. In assessing quantum a jury is to have regard to all the circumstances of the case as well as to specific listed factors. Furthermore, as noted earlier when looking at the case of Bradley, the Act appears to have changed the rules on when evidence of bad reputation can be admitted in mitigation of damage. Finally, and whereas defamation is actionable per se it is provided that a court (quite apart from punitive or aggravated damages) can make an award of damages referred to as ‘special damages’ to the plaintiff in respect of any financial loss he or she may have suffered arising out of the defamatory publication.

3.2 Injunctive Relief

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66 s.31(1)
67 s. 31(2)
68 s. 31(3) and (4)
Under s. 33 of the Act an order can be made prohibiting publication or further publication of a defamatory statement and, in line with the traditional reluctance of the courts to grant injunctive relief, it is further provided that this should only be granted where in the opinion of the court the statement is defamatory and the defendant has no defence which is likely to succeed.

### 3.3 Declaratory Relief

This is the aspect of the legislation which has attracted most attention from the courts thus far. Under s.28 a person who claims to have been defamed may apply to the Circuit Court for an order that the statement is false and defamatory of him or her. Very significantly if an application for a declaratory order is made, no other proceedings may be brought. On an application for declaratory order, damages are not available, however, where a court makes a declaratory order, it may in addition make a correction order under section 30, and grant, in effect an order under section 33. Policy wise then, it can be suggested that the purpose of s.28 was to provide a plaintiff whose primary concern was not to obtain money by way of compensation but rather the restoration of his or her good name with an expeditious (and relatively cheap) way of obtaining the relief sought. Indeed it may be conjectured that this is one of the reasons why the relief can only be sought in the Circuit Court. Alternatively, however, as was demonstrated by the decision of the Circuit Court in *Watters v. Independent Star* the order may be very useful for a Plaintiff who, whereas he technically has been defamed, nonetheless has such a poor existing reputation that it would be pointless for him to sue in respect of it.

Pivotaly, however, this is an ‘all or nothing’ shot in so far as the plaintiff is concerned in that where an application for a declaratory order is sought, no other proceedings can be brought. Under s. 28 there are various criteria to be met if the order is to be granted (for example an apology, correction or
retraction must have been sought and refused). Most importantly, however, the court must be satisfied that ‘the statement is defamatory of the applicant and the respondent has no defence to the application.

Of huge significance in this regard is the decision of Kearns P. in Lowry v. Smith - a case which also focused on the test to be met when bringing an application for summary disposal under s.34 (discussed below). Kearns J primarily focused on what an applicant would have to do to show that the respondent had no defence to the application and he concluded thus:-

“In summary therefore, it seems to this court that, where either party seeks relief under s.34, a high threshold requires to first be met. In the instant case, it can only mean that the plaintiff must satisfy the court that the defendant has no arguable case to suggest that his defence might be reasonably likely to succeed. While s.28 provides for relief where there is “no defence” and s.34 provides for relief where the defendant has “no defence which is likely to succeed”, I think in practical terms the test under both sections is a high one, though that under s.28 must necessarily be at the very highest, being that of no defence at all.”

This is enormously important. Remember that this conclusion (that the defendant must be shown to have no arguable case that his defence might be reasonable likely to succeed) was reached in respect of s.34 of the Act which (in that it can be activated where the defendant has no defence which is likely to succeed) appears to impose less of an obligation on the defendant applicant than s. 28 which can only be activated where there is no defence simpliciter. In other words it is certainly arguable that the test under s. 28 must be tighter yet than that under s. 34. Yet this being the case (and given that where a plaintiff fails under s. 28 he has no further cause of action available to him) there must surely now be a massive disincentive on a plaintiff to seek

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73 [2012] IEHC 22
74 Page 18.
relief under s. 28. As Eoin McCullough SC put it in an earlier Bar Council paper

“It follows therefore that, in order successfully to resist an application for a declaratory order under section 28, a defendant must merely show that he has an arguable case, and indeed it may be that he does not even have to meet the relatively low hurdle set by this test. If this is so, it greatly lessens the utility of section 28 for a plaintiff. Bearing in mind that the plaintiff has no remedy once he has brought and failed in a section 28 application, he would have to be very certain indeed of his ground before making the application”.

3.4 Summary Disposal
Under s. 34, as mentioned above, the court may grant summary relief to a plaintiff who can show that the statement in respect of which the action was brought is defamatory and that the defendant has no defence which is reasonably likely to succeed. We have considered above the potential impact on this of the decision in Lowry v. Smith, however it must be noted that at least in this context a plaintiff who fails in an application for summary disposal is not prevented from then simply pursuing his or her action in the normal fashion. Similarly, under s. 34(2) a court may, on the application of a defendant, dismiss the action if the impugned statement is not reasonably capable of being found to have a defamatory meaning. Strangely, however, there does not appear to be a similar ability under s. 28 for the court to strike out an action simply because there is a cast iron defence which must inevitably work and hence there is no realistic prospect of success75.

3.5 Correction Order
Finally under s. 30, the Court has power (where in a defamation action there is a finding that the statement was defamatory and that the defendant has no

75 Presumably such a jurisdiction continues to operate under Order 19 R 27 RSC
defence to the action), on application from the plaintiff to make an order requiring the defendant to publish a correction in a specified form, content, extent and manner and on a specific day or within a specific time frame. Such a relief can, it would seem, be ordered even where the Court will also make an award for damages or grant some other relief (including declaratory relief under s. 28). Rather bizarrely the statute says that an application for such relief may be made at such time during the trial of the action as the court directs, but given that there also needs to be a finding that the statement was defamatory and that there is no defence, it would surely follow that this can only occur either after a jury has reached its judgement should the matter proceed through a full trial or where there has been a decision to grant either declaratory relief or summary disposal of the action pursuant to ss 28 and 34 respectively.

Conclusion
As I suggested at the outset, I do not necessarily think that the 2009 Act is hugely revolutionary in terms of what it does; equally as a consolidation it is a useful point of reference (and indeed arguably the most ‘pro-defendant’ aspect of the whole Act lies in its requirement that all assertions in pleadings be supported by way of verifying affidavit). It may be, therefore, that whereas defences such as the new offer of amends procedure have much to attract them, the law of defamation will remain relatively unaffected by this legislation, no matter how protracted its gestation.

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