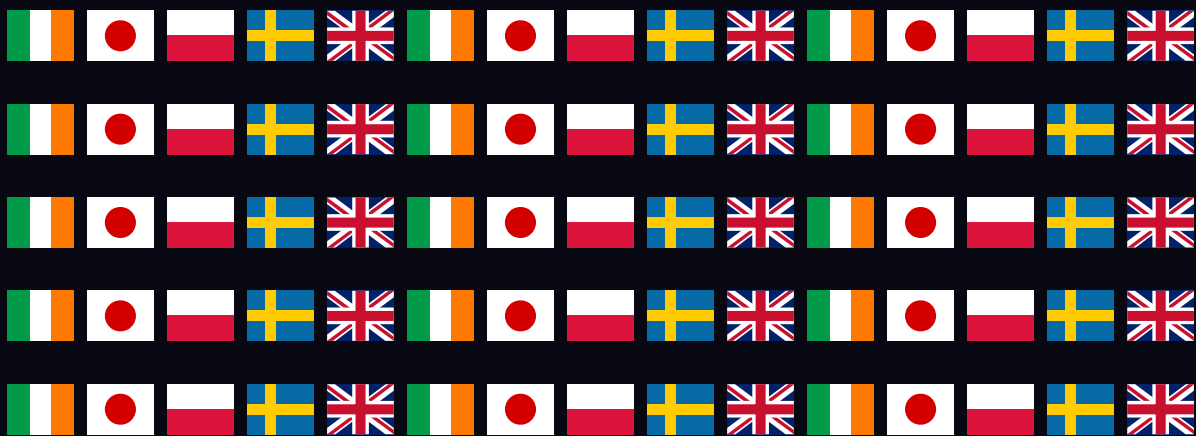


# DEFAMATION & REPUTATION MANAGEMENT

## Ireland



# Defamation & Reputation Management

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Quick reference guide enabling side-by-side comparison of local insights, including into claims; remedies; key laws and legal tests; the role of data protection law; harassment; online defamation and other adverse online content; anonymity and privacy in litigation; freedom of expression and the rights of the press; multi-agency reputation management; and trends and developments.

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## DEFAMATION CLAIMS

### Key laws

What key legislation and case law serve as the basis for defamation claims in your jurisdiction?

The Defamation Act 2009 (the 2009 Act) is the key legislation for defamation claims in Ireland.

Key case law includes:

- *Higgins v The Irish Aviation Authority* [2022] IESC 13, where the Supreme Court addressed the issue of quantum of damages in defamation cases.
- *Kinsella v Kenmare Resources plc & Anor* [2019] IECA 54, where the Court of Appeal gave detailed consideration to damages in defamation cases. It reduced an award of €9 million (compensatory damages) and €1 million (aggravated damages) and substituted an award of €250,000.
- *Lidl Ireland GmbH v Irish Farmers Association, Cullinan and Rushe* [2021] IEHC 381, which concerned the court's jurisdiction under section 33 of the 2009 Act.
- *McDonagh v Sunday Newspapers Ltd* [2017] IESC 59, which demonstrates the Supreme Court's readiness to intervene should it find that a jury award is disproportionate.
- *Leech v Independent Newspapers* [2014] IESC 79, where a jury award of damages of €1.8 million was substituted by the Supreme Court for an award of €1.25 million, as the former amount was deemed excessive.

*Law stated - 21 April 2023*

### Legal tests

What is the test to determine whether words published are defamatory? Must the claimant show actual harm or loss?

Section 2 of the 2009 Act defines 'defamatory statement' as 'a statement that tends to injure a person's reputation in the eyes of reasonable members of society'.

A claimant is not required to show actual harm or loss.

*Law stated - 21 April 2023*

### Libel and slander

Does your jurisdiction distinguish between libel and slander?

No. The torts of libel and slander are collectively described as the 'tort of defamation'.

*Law stated - 21 April 2023*

### Standing

Who can sue in defamation and must the claimant be named in the publication in order to bring a claim? Are there any key differences between litigation involving individual and corporate claimants?

Natural persons and bodies corporate can sue in defamation.

It is not necessary for the claimant to be named in the publication to bring a claim.

There are no key differences between litigation involving individual and corporate claimants. A corporate claimant can bring a defamation action. It does not have to show any past or prospective financial loss to succeed.

*Law stated - 21 April 2023*

## Defences

### What key defences are available to a claim in defamation?

The key defences available to a claim in defamation are:

- truth;
- absolute privilege;
- qualified privilege;
- honest opinion;
- consent to publish;
- fair and reasonable publication on a matter of public interest; and
- innocent publication.

*Law stated - 21 April 2023*

## Jurisdiction

### How do the courts approach questions of jurisdiction, for example in relation to online content that may be accessed by readers and viewers in multiple jurisdictions?

Where cases involve parties domiciled in member states of the European Union, jurisdiction is determined by reference to the Brussels I (Recast) Regulation (Regulation No. 1215/2012) (Brussels Recast). The general rule is that a person domiciled in a member state of the European Union shall be sued in the courts of that member state. However, there are rules of special jurisdiction that can displace the general rule. Under article 7(2), in matters relating to tort, a person can be sued in the place where the harmful event occurred.

Where Brussels Recast and the Lugano Convention (which governs jurisdictional matters regarding the recognition and enforcement of judgments in civil and commercial matters in the EU, Norway, Switzerland and Iceland) do not apply, jurisdiction under Irish law is determined by the common law doctrine of forum non conveniens, whereby a court may refuse jurisdiction on the basis that there is another more suitable and competent jurisdiction. In doing so, the court will consider whether the parties have significantly closer connections with that other jurisdiction.

Under Irish defamation law, the 2009 Act requires proof of publication of the defamatory statement, so the plaintiff must prove more than accessibility; in other words, the plaintiff must prove that the statement was accessed. Under the Brussels Recast, as interpreted by the Court of Justice of the European Union (CJEU), it appears that proof of accessibility is sufficient, see for example Case C-509/09 Martinez [2011] ECR I-10269, and Grovit v Jensen [2020] IEHC 501.

In Ryanair v Fleming [2016] 2 IR 254, [2016] IECA, the Court of Appeal held that to establish jurisdiction, the plaintiff must establish publication, accessibility and access in Ireland in relation to the online post in question. This case did not concern the Brussels Recast and therefore the question of jurisdiction was determined under the common law doctrine of forum non conveniens.

The issue of accessibility was recently considered by the Irish High Court on an application to contest the Irish court's

jurisdiction under article 7(2) of the Brussels Recast, in *Anthony Jay Robbins v BuzzFeed UK Ltd* [2021] IEHC 433. In that application, the Court found that where online publication in Ireland was established, and confirmed by the defendant, it followed that jurisdiction under article 7(2) was established. On that basis, the Court rejected the argument that proof that the online content was accessed or downloaded in Ireland was also required for the purposes of article 7(2). The Court found that the Irish courts had jurisdiction to hear a claim by a US-domiciled plaintiff in respect of alleged defamatory material published by UK-domiciled defendants via a US online news site.

*Law stated - 21 April 2023*

## **Burden of proof**

Who bears the burden of proof in defamation claims in your jurisdiction?

The claimant bears the burden of proof in defamation claims.

*Law stated - 21 April 2023*

## **Limitation period**

What limitation period applies to claims in defamation?

A claim in defamation cannot be brought after the expiration of one year from the date on which the cause of action accrued. On application, the court may extend the one-year limitation period to a period not exceeding two years in certain circumstances.

*Law stated - 21 April 2023*

## **Evidence**

What rules and procedures govern the collection, submission and admissibility of evidence in defamation trials? Is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The normal rules and procedures governing the collection, submission and admissibility of evidence apply in defamation trials, including the normal rules of discovery and disclosure.

Expert witness testimony is allowed.

A common evidential issue that claimants should be aware of is an exception to the rule of hearsay, which permits an out-of-court statement to be admitted as evidence where its making is a fact in issue in a case. This allows a claimant to rely on the existence of a document to prove that an allegedly defamatory statement, contained in the document, was published, without relying on the truth of the document itself.

*Law stated - 21 April 2023*

## **Trial format and time frames**

Are defamation cases decided by a judge or jury? How long does a case typically take to reach trial and a verdict or judgment?

Defamation cases in Ireland can be initiated before the Circuit Court or the High Court. Where the case proceeds in the



Circuit Court, the case is decided by a judge sitting alone. In the High Court, there is a right to trial by jury, and, subject to any objections from the other party or parties, the claimant may elect trial by a judge instead.

The length of time a case typically takes to reach judgment can vary from 12 to 36 months.

*Law stated - 21 April 2023*

### **Case management and anti-SLAPP laws**

What types of application or case management procedure are available to enable an early determination or dismissal of a claim? Does your jurisdiction have anti-SLAPP (strategic lawsuits against public participation) legislation?

There are no case management procedures available in a defamation action and there is no anti-SLAPP legislation. However, several applications are available to enable an early determination or dismissal of a claim:

- Where the court is satisfied that the statement was defamatory and the defendant has no defence to the action, a plaintiff may apply during the trial for a correction order directing the defendant to publish a correction of the defamatory statement.
- The court may grant summary relief where it is satisfied that the statement is defamatory and the defendant has no defence to the action that is reasonably likely to succeed.
- The court may dismiss an action where it is satisfied that the statement is not reasonably capable of bearing the imputation pleaded by the plaintiff, or that any imputation pleaded is not reasonably capable of bearing a defamatory meaning.
- A defendant may make an offer to make amends before the delivery of their defence. This is a statutory defence to a defamation claim whereby a defendant offers:
  - to make a suitable correction of the statement and a sufficient apology;
  - to publish that correction and apology in such manner as is reasonable and practicable; and
  - to pay the claimant compensation or damages (if any) and such costs as agreed by them or determined by the court.
- A defendant may also make a lodgment in settlement of an action by paying a sum of money into court when filing his or her defence to the action, without any admission of liability.

*Law stated - 21 April 2023*

### **Other causes of action**

Does your jurisdiction recognise other causes of action that are separate from but related to defamation, such as malicious falsehood? If so, what are the main differences between these and defamation claims?

The tort of malicious falsehood is provided for in section 42 of the Defamation Act 2009. It includes slander of title, slander of goods and other false statements that have been maliciously published and refer to a claimant or their property, office, profession, calling, trade or business. Unlike defamation, a claimant is not required to show damage to reputation to prove malicious falsehood.

*Law stated - 21 April 2023*

## Criminal defamation

Does your jurisdiction recognise any criminal offences for defamation? If so, what are the elements of these offences and how are they punished?

No.

*Law stated - 21 April 2023*

## DEFAMATION REMEDIES

### Damages

How are damages and compensation calculated in defamation cases? What key principles underpin damages awards?

As observed by the Irish Court of Appeal, an award of damages in a defamation action is intended to serve a different function from an award of damages in other types of litigation. Its primary function is to vindicate the plaintiff's reputation, but it is also intended to compensate for any injury sustained as a result of the defamation.

Section 31 of the 2009 Act deals with damages in defamation cases. It allows parties to a defamation action to make submissions to the court in relation to an award for damages. In the High Court, the judge must give directions to the jury in relation to damages.

An award for damages may include nominal, general, special, aggravated and punitive damages.

In making an award for general damages, regard must be had to all the circumstances of the case. Without prejudice to that general position, the court must have regard to the factors listed in the 2009 Act, including the extent to which the defamatory statement was circulated, the making of any offer of an apology, corrections or retractions, and the means of publication, including the enduring nature of those means.

The Supreme Court decision in *Higgins v The Irish Aviation Authority* [2022] IESC 13 held that defamation cases can be grouped into four categories or ranges for general damages:

- moderate defamation: awards of €0 to €50,000;
- medium defamation: awards of €50,000 to €125,000;
- serious defamation: awards of €125,000 to €199,000; and
- top-of-scale defamation: awards over €200,000 but rarely over €300,000.

*Law stated - 21 April 2023*

### Injunctions

Are pre-publication, interim or final injunctions available? What procedures apply?

Under section 33 of the Defamation Act 2009, the High Court or the Circuit Court may make an order prohibiting the publication or further publication of the defamatory statement.

In the High Court, an interim injunction is usually sought by way of an originating motion ex parte grounded on an affidavit sworn by or on behalf of the applicant. Applications for interlocutory orders under section 33 are brought by way of a motion on notice to the opposing party and grounded upon an affidavit sworn by the moving party.

*Law stated - 21 April 2023*

## Other remedies

### What other remedies are available at trial?

A court may grant a correction order directing the defendant to publish a correction of the defamatory statement. Two tests must be satisfied before a court will grant a correction order: (1) the statement was defamatory; and (2) the defendant has no defence to the action.

Upon application by a plaintiff, the court may grant summary relief to the plaintiff where it is satisfied that the statement is defamatory and the defendant has no defence to the action that is reasonably likely to succeed (section 34(1)).

At any time after a defamation action is brought, up to the trial of the action, the court may dismiss an action where it is satisfied that (1) the statement in question is not reasonably capable of bearing the imputation pleaded by the plaintiff; or (2) that any imputation pleaded is not reasonably capable of bearing a defamatory meaning.

*Law stated - 21 April 2023*

## Settlement

### What might typically be agreed if the parties decide to settle a case? Are settlements subject to any procedural requirements?

Typically, in a settlement the parties will agree terms including payment of an agreed sum of damages, an apology, publication of a correction, an undertaking not to repeat the defamatory material, a take-down of information and an agreement on legal costs.

A defendant may, on notice to the plaintiff, pay a sum of money (a lodgment) into court in satisfaction of a defamation action when filing their defence. The plaintiff is allowed 14 days (or more, if agreed between the parties) to accept the whole sum. Once payment is made to the plaintiff, the proceedings are stayed. A lodgment can be made without acceptance or denial of responsibility for making a defamatory statement.

An offer to make amends allows a defendant an opportunity to accept responsibility for a defamatory statement. The offer must be made before the delivery of the defence. An offer to make amends is an offer to:

- make a suitable correction of the statement and a sufficient apology;
- publish that correction and apology in such manner as is reasonable and practicable; and
- pay the plaintiff compensation or damages (if any) and such costs as agreed by them or determined by the court.

Where a plaintiff is under 18 years of age and a settlement is agreed between the parties to a defamation action, the settlement offer must be ruled and approved by the court.

*Law stated - 21 April 2023*

## PROTECTING PRIVACY AND CONFIDENTIALITY

### Key laws and legal tests

Other than applicable data protection legislation, is there a separate law of privacy in your jurisdiction that regulates the publication of private or confidential information? If yes, what is the test to determine whether an individual's privacy has been infringed?

In Ireland, the right to privacy is captured as an unspecified right under article 40.3 of the Constitution. The right to privacy is not absolute and will be determined on the facts of each case, balanced against other constitutional rights and the requirements of public interest.

Article 8 of the European Convention on Human Rights (ECHR), transposed into Irish law by the ECHR Act 2003, protects an individual's right to respect for their private and family life, home and correspondence.

*Law stated - 21 April 2023*

### **Private information**

Are any types of information automatically considered to be private?

Certain information is regarded as inherently private, such as medical information and information in respect of personal relationships and sexual orientation. Moreover, a distinction has been made by the courts in Ireland in respect of information that is in itself private, and information that has been obtained by means that constitute a breach of privacy ( *Cogley v RTÉ [2005] IEHC 180* ) ( *Cogley* ).

*Law stated - 21 April 2023*

### **Privacy rights**

Do the attributes of the claimant affect their privacy rights? For example, do public figures have a lower right to privacy?

In *Cogley* , Clarke J stated that 'the weight to be attached to the undoubted right of parties to privacy can vary significantly from case to case'. The extent to which a person's right to private life is protected and the zone of privacy that will be afforded to a person's actions will depend on the circumstances of the case. This is consistent with the approach taken by the ECHR, under which public figures are considered to have a lower right to privacy than those who live their lives entirely in private.

*Law stated - 21 April 2023*

### **Injunctions**

What steps can an individual take to prevent the publication of private information? If applicable, what is the test for a privacy injunction and can it be obtained from the courts on an urgent basis?

An application for an interim injunction preventing publication may be brought. However, Irish case law suggests that in defamation actions the courts are reluctant to justify prior restraint 'save in unusual circumstances and after careful scrutiny' (Clarke J in *Cogley* ). Where the information sought to be published is of a private nature and there is no legitimate public interest in its disclosure, then the usual criteria governing the grant of interlocutory injunctions should apply.

In short, a court hearing an application for an interlocutory injunction will consider whether there is a fair issue to be tried and, if so, the balance of convenience, which includes consideration of the adequacy of damages.

*Law stated - 21 April 2023*

## Other remedies

### What other remedies are available for breach of privacy?

Damages are an available remedy to those who successfully take an action against another party, a private individual or the state for a breach of privacy.

A Norwich Pharmacal order may be appropriate to compel the respondent to disclose information or documents showing, for example, the source of anonymous defamatory material, to the applicant.

*Law stated - 21 April 2023*

## Protecting company information

### Privacy is generally regarded as a right of the individual. Do companies have separate means of preventing the disclosure or misuse of confidential or commercially sensitive information?

Yes. First, there is a duty of confidentiality that may be implied in contract, tort, equity and on a constitutional basis, both between corporate entities and between corporate entities and natural persons ( *Slattery v Friends First Life Assurance Co* [2013] IEHC 136, Clark, *Contract Law in Ireland* (9th ed 2022), Chapter 19 – Damages, section 19. Breach of Confidence).

Commercially sensitive information is protected from disclosure by the European Union (Protection of Trade Secrets) Regulations 2018, under which a trade secret is defined as:

- a secret in the sense that it is not generally known among, or readily accessible to, persons within the circles that normally deal with the information in question;
- having commercial value because it is secret; and
- having been subject to reasonable steps, under the circumstances, by the person lawfully in control of the information, to keep it secret.

It is unlawful for a person to acquire a trade secret without the permission of the trade secret holder. However, a person can lawfully acquire such information, such as by their own independent discovery or creation or otherwise in conformity with honest commercial practices.

Furthermore, confidentiality agreements and non-disclosure agreements may be entered into between commercial entities and between commercial entities and natural persons to protect commercially sensitive information from disclosure. These contracts are legally binding, and breach of these agreements is actionable under contract law.

The Irish legislature has also imposed confidentiality requirements for specific commercial sectors under the following acts:

- the Central Bank Act 1942 (as amended);
- the Credit Reporting Act 2013 (as amended);
- the Companies Act 2014 (as amended); and
- the European Union (Markets in Financial Instruments) Regulations 2017.

*Law stated - 21 April 2023*

## DATA PROTECTION LAW

### Causes of action

Can data protection legislation be relied on for separate causes of action outside of other more recognised legal avenues for protecting reputation and privacy?

In Ireland, the national law giving effect to the GDPR is the Data Protection Act 2018. Processing data in any manner other than that provided for under the GDPR and Data Protection Act 2018, or failing to comply with a data subject's rights as provided for in the GDPR and Data Protection Act 2018, may constitute a cause of action.

Remedies, liabilities and penalties are provided for under Chapter 8 of the GDPR, such as the right to compensation for damage suffered due to an infringement of a data subject's rights pursuant to article 82. Furthermore, section 117 of the Data Protection Act 2018 provides a data subject with a right to bring an action against a data controller or processor where they believe their rights under a relevant enactment have been infringed. This may include claims relating to a data subject's right of access, right to rectification, right to erasure and right to compensation for material or non-material damage arising from such infringements. These claims are often included as a separate cause of action by plaintiffs in defamation actions.

*Law stated - 21 April 2023*

### Right to be forgotten

Does your jurisdiction have the 'right to be forgotten' or similar? If so, how has this been applied by the courts?

The right to be forgotten is provided for under article 17 of the GDPR. The data subject has a right to have their information removed by the data controller without undue delay where one of six prescribed grounds under article 17 applies, these grounds being:

- the personal data is no longer necessary in relation to the purposes for which it was collected or otherwise processed;
- the data subject withdraws the consent on which the processing is based;
- the data subject objects to the processing pursuant to article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to article 21(2);
- the personal data has been unlawfully processed;
- the personal data must be erased for compliance with a legal obligation under the EU or member state law to which the controller is subject; and
- the personal data has been collected in relation to the offer of information society services referred to in article 8(1).

Under section 33 of the Data Protection Act 2018, there is a standalone right to be forgotten for children, meaning any person under the age of 18 in Ireland pursuant to section 29 of the Data Protection Act 2018.

The right to be forgotten has not yet been litigated to any great extent in Ireland. However, a recent case, *X v Google Ireland Limited* [2023] IEHC 56, heard before the High Court, considered an applicant's right to be forgotten and right to be delisted. Google brought an application to have Mr X's action against Google struck out and made several assertions in the affidavit of the solicitor as to prerequisites for the right to be delisted and the right to be forgotten. Solicitors for Google alleged that for the rights sought by the plaintiff to be invoked, the plaintiff must provide URLs to

the information the plaintiff would like removed, and insisted that the complaint be made via the Online Tool before Google actions the request. Justice Barrett found that both prerequisites had no legal basis and were not a bar to delisting or invoking one's article 17 right under the GDPR.

*Law stated - 21 April 2023*

## Journalistic protections

Do journalists have specific protections against claims brought pursuant to data protection law?

Journalists have specific protection pursuant to section 43 of the Data Protection Act 2018. This section concerns data processing and the importance of freedom of expression and information in a democratic society. The Data Protection Commission has commented that, in cases concerning information published by the media, it must be considered whether general public interest could be deemed to apply. If so, the general requirements of data protection may be set aside.

*Law stated - 21 April 2023*

## HARASSMENT

### Regulation

How is harassment regulated? Is it always a criminal matter or does a private right of action exist?

Section 10 of the Non-Fatal Offences Against the Person Act 1997 makes harassment a criminal offence. Harassment for the purposes of section 10 means harassment by any means, including telephone, where the person persistently follows, watches, pesters, besets or communicates with or about another. While section 10 specifically references the telephone, the offence is committed where a person harasses another within the meaning of section 10 'by any means'. It would therefore follow that online harassment falls within the scope of the section.

Harassment under section 10 is a criminal offence punishable summarily or on indictment. Although rarely invoked, there is a common law right for private individuals to initiate criminal prosecutions as a 'common informer'. That right is limited to the prosecution of summary offences: indictable offences must be prosecuted by the Director of Public Prosecutions.

Under the Harassment, Harmful Communications and Related Offences Act 2020, it is an offence to record, publish, distribute or threaten to do so intimate images of a person without their consent. It is also an offence to distribute, publish or send threatening or grossly offensive communications.

*Law stated - 21 April 2023*

## Published material

Can the publication of information about a person constitute harassment? Can journalists and media organisations be sued for harassment?

Section 10(1) defines harassment as occurring where a person 'without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with or about him or her'.

Under section 10(2), a person harasses another where:

- by his or her acts intentionally or recklessly seriously interferes with the other's peace and privacy or causes alarm, distress, or harm to the other; and
- his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress, or harm to the other.

The section defines harassment as including persistently 'communicating with or about' another. The publication of information about a person, where that is persistent, can constitute harassment.

Harassment is a criminal offence. It would not be possible for journalists or media organisations to be sued civilly for harassment. While it is possible for a private individual to initiate a criminal prosecution for harassment as a common informer, in general, whether a prosecution for the criminal offence of harassment is pursued is a matter for the Police and the Director of Public Prosecutions.

*Law stated - 21 April 2023*

### **Claims by companies**

Can companies bring an action for harassment of their staff as a result of (for example) aggressive correspondence or online postings?

There is no right of action under civil law for harassment. A private person may initiate and prosecute a criminal prosecution for the summary offence of harassment, as a common informer.

*Law stated - 21 April 2023*

## **ONLINE DEFAMATION AND OTHER ADVERSE ONLINE CONTENT**

### **Key laws and regulations**

Are there any specific laws or regulations that govern online content?

The Online Safety and Media Regulation Act 2022 transposes the Audiovisual Media Services Directive into Irish law. It establishes a framework for the regulation of content available on relevant online services and harmful online content available on designated online services. It imposes obligations on providers of broadcasting services and audiovisual on-demand media services and provides for the establishment of a media commission, Coimisiún na Meán, which regulates broadcasters and online media.

*Law stated - 21 April 2023*

### **Liability for user-generated content and search results**

Do companies that host user-generated content or search engines have special protections against being sued for the actions of their users or the results they generate?

Under Regulation 16 of the European Communities (Directive 2000/31/EC) Regulations 2003 (e-Commerce Regulations), intermediary service providers are not liable for information transmitted by them in a communication network where they act as mere conduits for consumers to access content through their internet service.

Such companies may be able to avail of the defence of innocent publication under section 27 of the Defamation Act 2009.



## Social media versus traditional media

How might a court approach a social media case differently from one involving traditional media?

There are several potential issues that a court may be faced with in dealing with cases of social media defamation, including:

- an anonymous defendant, which may result in an application for a Norwich Pharmacal order (NPO);
- the liability of the social media platform. This will also include considerations under the E-Commerce Regulations;
- a defence of innocent publication;
- consideration of the meaning of 'publication' and whether someone other than the author can be said to have published the material; and
- consideration of the jurisdiction issues arising from the location in which online material was accessed by a party.

Law stated - 21 April 2023

## Identifying anonymous posters

Where an individual posts content anonymously, are there any available legal procedures to obtain their identity?

An NPO is generally used to discover the identity of a wrongdoer from a third party. It is an exception to the rule that discovery can only be sought when proceedings are closed. Proceedings are instituted against the third party for the purpose of obtaining an order identifying the unknown wrongdoer. An NPO typically directs the third party to disclose information to the applicant about the wrongdoer's identity. Presently under Irish law, NPOs can only be granted by the High Court.

Law stated - 21 April 2023

## ANONYMITY AND PRIVACY IN LITIGATION

### Bringing claims anonymously

Can litigation in defamation or privacy be brought on an anonymous basis? If so, in what circumstances?

Under the Constitution, there is a requirement that justice be administered in public (article 34.1). This has been interpreted as meaning that plaintiffs cannot be anonymous unless specifically provided for under statute, for example, under section 27 of the Civil Law Miscellaneous Provisions Act 2008 (anonymity in civil proceedings in relation to a medical condition of a relevant person).

Law stated - 21 April 2023

## Public hearings and judgments

Are hearings in these types of case open to the public? Even if not, does the court provide a public judgment?

Hearings are held in public unless they fall within one of the exceptions under section 45 of the Courts (Supplemental Provisions) Act 1961, which allows proceedings to be held in camera in certain cases.

*Law stated - 21 April 2023*

## **FREEDOM OF EXPRESSION AND THE RIGHTS OF THE PRESS**

### **Right to freedom of expression**

Is freedom of expression considered a fundamental right in your jurisdiction and does it have any kind of priority over other related rights, such as any applicable right to privacy or protection of reputation?

There is a fundamental right to freedom of expression under article 40.6.1 of the Constitution. This right is not absolute and is subject to public order and morality. Freedom of expression may be limited in light of another's right to privacy or the protection of that person's reputation.

Freedom of expression is also protected under article 10 of the European Convention on Human Rights (ECHR), which has been given effect in Irish law under the ECHR Act 2003. It is also protected under article 11 of the EU Charter of Fundamental Rights and Freedoms.

Under Schedule 2 of the Defamation Act 2009 (the 2009 Act), a principal objective of the Press Council of Ireland is to ensure the protection of the freedom of expression of the press.

*Law stated - 21 April 2023*

### **Pre-publication notification of allegations**

Are journalists required as a matter of law to put allegations to the subject of a story before publication?

There is no legal requirement to do this, however, false allegations made against another party could be subject to action under the 2009 Act. Furthermore, Principle 1 of the Press Council of Ireland Code of Practice for Newspapers and Magazines requires journalists to strive at all times for truth and accuracy in reporting. Considerations made by the Press Council in reviewing a publication will include the publication's investigation and inquiry of the information prior to publication.

*Law stated - 21 April 2023*

### **Confidentiality of journalistic sources**

Are there specific laws protecting the confidentiality of sources?

Evidentiary privilege or journalistic privilege can protect a journalist against disclosing their sources. The privilege has its roots in article 40.6.1 of the Constitution (freedom of expression) and is also provided for under the ECHR. The privilege is not an absolute one and can be displaced by other competing rights, such as the right to a good name.

The protection of journalist sources was recently considered by the Court of Appeal in *Corcoran v The Commissioner of An Garda Síochána* [2022] IECA 98. The court summarised the principles on journalistic privilege emerging from provisions of the Constitution, article 10 of the ECHR, the ECHR Act 2003 and case law as follows:

- Journalistic privilege should first be considered under the protections in article 40.6.1.i of the Constitution, which

the court considers to be largely the same as those under the ECHR and which are to be attributed a high value.

- The court should interpret laws in a manner compatible with the ECHR and judicial notice must be taken of the ECHR and the judgments of the European Court of Human Rights.
- Although the right to protect sources is not absolute, the constitutional protection of article 40 would be meaningless if journalists' sources were not protected. The case for overriding journalistic privilege must be convincingly established. A judge must therefore balance the competing rights and apply special or careful scrutiny in their examination. The onus of proof is on the party seeking to interfere with the right, and the court may only order disclosure of sources if there is an overriding requirement in the public interest or pressing social need.
- The interference must be prescribed by law, for the furtherance of a legitimate interest, necessary in a democratic society and proportionate.
- An order to search a journalist's home is seen as a more drastic measure than an order to divulge a source.
- Not every person who provides information is a source entitled to protection. An order to surrender journalistic material that may identify a source is an interference with journalists' rights, even if the source is not a source attracting journalistic privilege under the ECHR. When the review by the judge is made ex parte, the full picture must be put before the court.
- The court must be able to prevent unnecessary access to sources, and the judge should be able to make a limited disclosure order to protect them.
- Unless urgent, the review should take place before the seizure. A review that takes place after the seizure is not compatible with the right to confidentiality. An ex post facto review cannot retrospectively authorise a search that is invalid for breach of these requirements.
- If urgent, it is permissible to seize, but not access, the material prior to the review of the court.

*Law stated - 21 April 2023*

## Press regulator

Does your jurisdiction have a separate press regulator? If so, what kind of role do they play?

The Office of the Press Ombudsman deals with complaints from members of the public and seeks to resolve them by conciliation or mediation and, where this is not possible, the Press Ombudsman will make a decision on the complaint based on its Code of Practice.

The Press Council of Ireland is tasked with oversight of the professional principles embodied in its Code of Practice and upholding the freedom of the press. Its Code of Practice is dedicated to the development and strengthening of best professional practice in journalism and defending the right to a free press. The Press Council decides appeals from decisions of the Press Ombudsman and complaints referred to it directly by the Press Ombudsman. It is independent of both government and media.

*Law stated - 21 April 2023*

## REPUTATION MANAGEMENT

### Collaboration and cooperation

How do media and reputation lawyers tend to work with other advisers, such as public relations and communications experts or investigators?

This will be determined on a case-by-case basis. Under the Law Society of Ireland's Solicitors Guide to Professional Conduct (4th edition), although not having force of law, the rules of professional conduct for solicitors are set out. In

short, solicitors must serve the interests of justice, avoid conflicts of interest, and ensure they uphold the professional duty of confidentiality to their client.

Solicitors often engage with public relations and communications experts and investigators when assisting clients in navigating critical reputation management issues, such as adverse media coverage.

*Law stated - 21 April 2023*

## UPDATE AND TRENDS

### Key trends and developments

What are the most noteworthy recent trends and developments in defamation law and reputation management in your jurisdiction? What developments are expected in the coming year?

The reformation of Irish defamation laws is a priority for the Irish government in 2023. The General Scheme of the Defamation (Amendment) Bill was published in March 2023. The publication of the General Scheme is an important step in the reform process. It seeks to reduce the risk of unpredictable awards in the High Court, reduce legal costs, address online defamation, and promote the use of ADR in defamation. The proposed amendments include:

- the abolition of juries in High Court defamation actions;
- obliging solicitors to advise their clients of the role of the Press Council before initiating legal proceedings;
- the introduction of measures targeting SLAPP proceedings and forum shopping;
- the introduction of a requirement to prove serious harm before suing for transient retail defamation;
- the introduction of a requirement for bodies corporate to prove serious financial loss before suing for defamation;
- the automatic dismissal of cases for want of prosecution where the plaintiff has taken no step within two years of initiating the proceedings;
- extension of the list of factors the court shall have regard to when assessing damages;
- extension of the 'innocent publication' defence to website operators for statements posted by a person over whom the operator has no effective control;
- extension of the jurisdiction to grant Norwich Pharmacal orders to the Circuit Court; and
- the introduction of a notice of complaints procedure, whereby a person who believes that a defamatory statement about them has been published online may submit a notice to the intermediary service provider.



The government intends to publish the Bill by the end of 2023. The Bill will then progress through the Irish legislature before being signed into law.

The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 was published on 27 October 2022. It aims to criminalise any intentional or reckless communication or behaviour likely to incite violence or hatred against a person or persons because they are associated with a protected characteristic. It covers hate speech in an online context and will complement provisions under the Online Safety and Media Regulation Act 2022.

At a European level, Regulation (EU) 2022/2065 (the EU Digital Services Act (DSA)) came into force in EU law in November 2022. The DSA aims to provide greater online safety, protecting the fundamental rights enshrined in the Charter of Human Rights. The DSA applies to certain online intermediary service providers in the EU, and updates the responsibilities and liabilities of digital services provided in the EU, in respect of illegal content and online harm, among others.

*Law stated - 21 April 2023*

## Jurisdictions

	<b>Ireland</b>	William Fry
	<b>Japan</b>	TMI Associates
	<b>Poland</b>	.
	<b>Sweden</b>	Advokatfirman Delphi
	<b>United Kingdom - England &amp; Wales</b>	Farrer & Co LLP