

LAW SOCIETY SUBMISSION



ISSUES PAPER ON PRIVILEGE FOR REPORTS OF COURT PROCEEDINGS

LAW REFORM COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Contents

Issue 1: Overview of defamation law and meaning of "fair and accurate" reports of court proceedings	5
Issue 2: Who may claim the absolute privilege for a "fair and accurate" report?	6
Issue 3: A new qualified privilege for certain reports of court proceedings?	8
Issue 4: The need for leave to bring proceedings?	9

Context

The Law Society of Ireland welcomes the opportunity to make submissions on the Law Reform Commission's Issues Paper on Privilege for Reports of Court Proceedings under the Defamation Act 2009.

The following responses have been assembled by the Society's Litigation Committee in the main, and reflect practitioner perspectives on the policy proposals and implications contained with the Issues Paper.

This paper can be considered alongside the Society's contribution to the 2016 statutory review of the Defamation Act 2009, conducted by the Department of Justice & Equality in late 2016.

1. **Issue 1:**

Overview of defamation law and meaning of "fair and accurate" reports of court proceedings.

Do you consider that the current principles used to interpret what constitutes a "fair and accurate" report of proceedings under section 17 of the Defamation Act 2009, as applied in *Philpott v Irish Examiner Ltd*, are sufficiently clear and well understood?

- 1.1. The Society considers that the principles are sufficiently clear and well understood. Section 17 recognises the public interest in open justice, providing for absolute privilege for "a fair and accurate report of proceedings publicly heard before, or decision made publicly by, any court" in the State or in Northern Ireland. This commitment to open justice stems from Article 34.1 of the Irish Constitution which provides that:

"Justice shall be administered in courts established by lawand, save in such special and limited cases as may be prescribed by law, shall be administered in public".

- 1.2. This constitutional imperative has long been recognised and respected in the Irish courts which have noted that the media are the eyes and ears of the public when reporting on court proceedings. A similar view has also been taken by the European Court of Human Rights.
- 1.3. The principles set out in *Philpott* provide guidance and clarity to court reporters on the approach to be taken in reporting court proceedings. They represent a clear statement of the law. Therefore we would answer this question in the affirmative.

If the answer to above question is yes, do you consider that these principles, or some of them, should be incorporated into the 2009 Act?

- 1.4. We see no need for the *Philpott* principles to be enshrined in legislation. The principles have their origins in case law where the scope of the defence has been established. Indeed, the incorporation of the principles into the Act might lead them to be regarded as exclusive or exhaustive in an area in which the law may need to evolve and take account of particular circumstances which might arise.
- 1.5. Codifying these principles in statutory form raises the risk of eroding the flexibility required to deal with the variety of cases and circumstances coming before the Irish Courts. The pace of technological change in media reporting and media law means that the law needs to be able to adapt to new situations or circumstances. Accordingly, we see little reason to codify in legislation principles which have already been well established by the Courts.

2. **Issue 2:**

Who may claim the absolute privilege for a "fair and accurate" report?

- a. **Should the "fair and accurate" absolute privilege under section 17 remain applicable not only to professional journalists but also to "citizen journalists" such as social media users or bloggers?**
- b. **Should the "fair and accurate" absolute privilege be applied to a limited group of prescribed persons, along the lines of the categories allowed to report family law and child care proceedings, that is, bona fide members of the media, persons engaged by the Courts Service to prepare reports of court proceedings, and other persons engaged in legal research nominated by specified bodies such as a university or other statutory bodies?**
- c. **Should the working definition of bona fide member of the media issued by the Courts Service for the purposes of implementing the 2018 rules made under section 159 of the Data Protection Act 2018 provide a suitable model for the purposes of this project?**
- d. **Should the "fair and accurate" absolute privilege under section 17 of the 2009 Act be applied to all persons who subscribe to a specific set of standards that would be prescribed by a body, whether the Press Council or the Broadcasting Authority of Ireland or some other body, which would have responsibility for bona fide members of the media as well as "citizen journalists" such as social media users or bloggers?**

2.1. We will deal with these four questions together.

2.2. While we do have some concerns about treating journalists working for accredited publishers in the same way as any other person who writes and publishes a court report, we consider that restricting the availability of the absolute privilege defence to "bona fide members of the press", howsoever defined, might give rise to constitutional issues given the provisions of Article 40.6.1 of the Irish Constitution which provides:

"The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

i. The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

- 2.3. While the media play a vital role in our democracy by ensuring dissemination of important news to the public at large, all citizens are entitled to enjoy the right to freedom of expression and it is arguable that this includes the right to report and comment on court proceedings. Any restriction on this right would need to be justified as being necessary.
- 2.4. We believe that it is the content of the report – i.e. a fair and accurate report of court proceedings - rather than the reporter, which brings the privilege into being. This is the view taken by Advocate General Sharpston in an opinion delivered on 27 September 2018 in Buvids (ECJ Case C-345/17) in which he held that video recordings made by an individual who was not a journalist and which were uploaded to the internet, could fall within the 'journalistic purposes' exemption in the Data Protection Directive.
- 2.5. Again the pace of technological change means that any definition of a "bona fide member of the press" or "journalist" is arguably obsolete. Would it apply to a well-established private internet blog? The concept of a citizen journalist is relatively new and it is likely that the concepts of 'journalist' and 'journalism' will change radically in the years to come. The Press Council, an independent body promulgating and upholding important principles for publishers in its Code of Practice, is open for membership to internet publishers. We do not contend that membership of the Press Council should be treated as a pre-condition to avail of this defence but, in allowing this defence to all citizen journalists, membership and benefits of the Press Council should be encouraged to internet publishers generally.
- 2.6. Therefore our answers to these questions are:
 - a – Yes
 - b – No
 - c – No
 - d – No

3. **Issue 3:**

A new qualified privilege for certain reports of court proceedings?

4. **Should a new qualified privilege be enacted for a report of court proceedings which would apply in the absence of proof of malice, where such a report falls short of being "fair and accurate"? Please provide your reasons.**
5. **If your answer to Q3.1 is yes, please indicate what, if any, conditions (whether the regulatory oversight discussed in Issue 2 or any other conditions) might apply to such a qualified privilege.**

- 3.1. The Section 17-absolute privilege defence will not apply if a court report contains a "substantial inaccuracy". This provides a necessary protection for parties and witnesses in court proceedings as it places an onus on those publishing court reports to ensure that they are fair and accurate. To allow a defence of qualified privilege based on an "honest mistake" would significantly reduce the obligation on those reporting court proceedings to ensure that those reports are fair and accurate.
- 3.2. An inaccurate and negligently prepared report can seriously damage a party's reputation. If the change proposed by the Law Reform Commission was introduced, the party who was the subject of the inaccurate reporting would be left without a remedy unless they could discharge the high burden of proving that the reportage was not only incompetent but malicious (as that term is defined). We consider that any such change would be undesirable because:
 - 1) it could lead to a decline in journalistic standards;
 - 2) it could significantly increase the risk of increased dissemination of incorrect information to the public;
 - 3) perhaps most importantly, it could leave the individuals who are the subject of such inaccurate and unfair reporting without an effective remedy to protect their reputations.
- 3.3. We do not agree that such inaccurate and defamatory reports should be protected in circumstances in which such reports could have catastrophic implications for those defamed.
- 3.4. Where a mistake occurs, publishers can take prompt action to rectify the mistake and, by doing so, can significantly reduce their potential exposure. The proposed change would arguably reduce the incentive for publishers to take such action without delay to correct any such errors.
- 3.5. Therefore our answers to these questions are:
 - a – No
 - b – Not applicable

6. **Issue 4**

The need for leave to bring proceedings?

Do you consider that there should be a leave requirement for any proposed new qualified privilege, or do you consider that Section 8 of the Defamation Act 2009, which requires both parties to swear an affidavit verifying their allegations, provide sufficient protection against unfounded claims?

- 4.1. Given our response to issue 3, we do not consider that such a change would be needed. In any event, we believe that such a change would be inappropriate. The current requirement that both parties swear affidavits verifying their respective positions is a sufficient and balanced protection. The proposed change would significantly increase the burden on the Plaintiff.
- 4.2. We do not agree that any need for such a change emerges from the cases which have been before the Irish Courts since the Defamation Act was enacted almost a decade ago. Further, we believe that such a change would simply add an additional unnecessary layer of significant costs for all cases where this defence is invoked and prove to be of limited assistance in weeding out unfounded claims.

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