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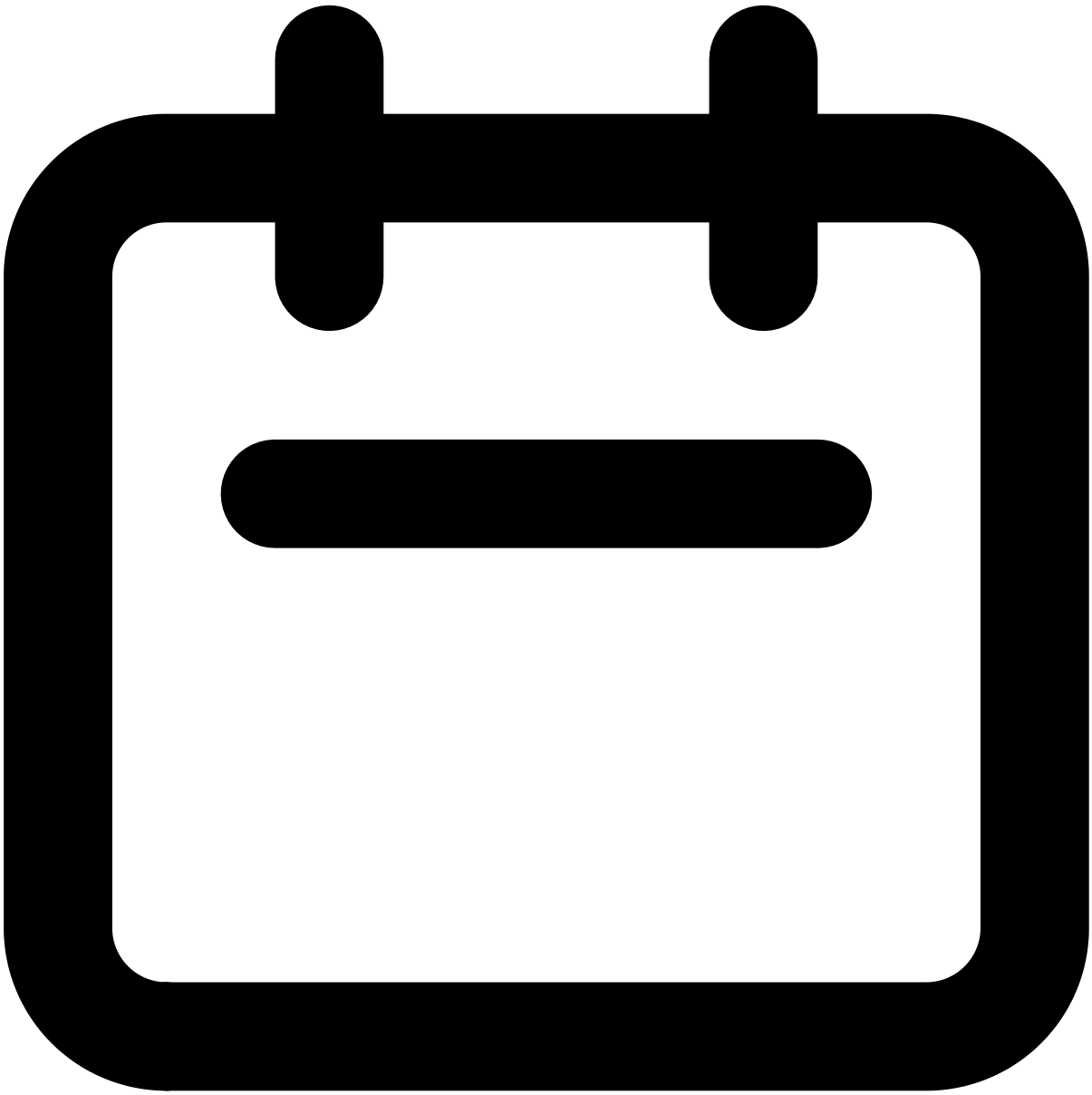
Independent Newspapers v. Ireland: €1.25 million defamation award against newspaper violated Article 10



June 19, 2017

The European Court's Fifth Section has unanimously held that a damages award made against an Irish newspaper for defamation violated the right to freedom of expression, under Article 10 of the European Convention. While the judgment in *Independent Newspapers v. Ireland* concerned Irish defamation law prior to reforms brought about in 2009, it is still significant for signalling to Irish courts that unpredictably high damages have a "chilling effect," and require the "most careful scrutiny" and "very strong justification."

The case arose in November 2004, when the *Evening Herald* published a number of articles concerning a consultant working for an Irish government ministry. While the articles had raised issues over the awarding of certain government contracts, the articles also referred to "rumours of an intimate relationship" between the married consultant and a government minister. The consultant sued for defamation, and a High Court jury found the articles were defamatory, having "alleged an extra-marital affair." The jury awarded 1,872,000 euro in damages to the consultant. However, in 2014, the Supreme Court allowed an appeal over the amount of damages, holding that it was "so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award." Instead, the Supreme Court substituted a sum of 1,250,000 euro in damages (here).

The newspaper's publisher made an application to the European Court, claiming the damages award was excessive, and "signified the absence of adequate and effective safeguards" in Irish defamation law, in violation of Article 10's guarantee of freedom of expression. Moreover, representative associations of national and regional newspapers (NewsBrands Ireland and Local Ireland) also made third-party submissions, arguing that Irish defamation law had a chilling effect on newspapers, leading to a "marked reluctance to publish stories of grave public interest for fear of very high awards of compensation."

The first issue raised by the applicant was that Irish law on defamation damages was not sufficiently clear, and violated Article 10's "prescribed by law" clause. The applicant pointed out that the High Court judge "was not permitted to offer any useful or meaningful guidance to the jury, such as relevant comparisons or even a range of figures." However, the Court rejected the argument, and applied the principle from the Court's 1995 judgment in *Tolstoy Miloslavsky v. the United Kingdom*, that "the absence of specific guidelines in the legal rules governing the assessment of damages must be seen as an inherent feature of the law of damages" in defamation, and did not violate Article 10.

The Court then moved on to consider whether the damages award satisfied the proportionality requirement under Article 10, and stated it would examine the "adequacy and efficacy" of the "domestic safeguards against disproportionate awards." The Court also noted that it was proceeding on the basis that it was an "established fact" the articles were defamatory. As a preliminary matter, the Court held that the "unusual size" of the awards, even by "domestic standards," at both High Court and Supreme Court level, was enough "to trigger" the Court's review. The Court then examined the High Court and Supreme Court awards in detail.

In relation the High Court, the Court noted that the judge had provided some guidance to the jury on how to assess damages, such as the "nature of the libel." However, the Court noted that in relation to the "quantum of damages," the judge said "he was not permitted to give any such guideline," or "any figure or range of figures." The Court held that the judge's directions "remained inevitably quite generic," and "caused him both frustration and regret." The Court concluded that the judge's direction was not "such as to reliably guide the jury towards an assessment of damages" that was proportionate.

The Court then turned to the Supreme Court's decision. It noted that the Supreme Court had found the jury award disproportionate, and it followed, that in setting aside the jury award, "the appellate safeguard was effective." However, the Court said that Article 10 analysis did not end there, and as the Supreme Court had substituted its own award of damages, the Court was required to examine "the process for arriving at that award." As the Supreme Court award was "higher than any award ever made by a jury or appellate court," the European Court held that "very strong justification would be required for such a heavy sanction." However, the Court would not "second guess the final award", but examine whether the "process followed" disclosed "relevant and sufficient reasons supporting the conclusion finally reached."

The Court noted that the Supreme Court's judgment "does not provide an explanation for the final award," and "did not explain," apart from reference to principles which had been put to the jury in the High Court, " how it arrived at the figure of EUR 1.25 million." The Court stated that while jury assessment of damages "may be inherently complex and uncertain", judicial control at appellate level "should, through the statement of reasons for the award, reduce uncertainty to the extent possible." The Court held that "clarification was lacking regarding why, in particular, the highest ever award was required in a case which the Supreme Court did not categorise as one of the gravest and most serious libels." Crucially, the Court held that given the "exceptional nature" of the damages award, this "pointed to a need for comprehensive reasons explaining the final award." This was particularly so given that the award "had the capacity to act as a benchmark for future defamation awards and out-of-court settlement." Thus, the Court found that the Supreme Court had failed to provide "very strong justification" for its award, and thus violated Article 10's guarantee of freedom of expression.

Comment

First, while the Court did find a violation of Article 10, it acknowledged that the case was "conducted under a legal regime that has since changed," with Ireland's Defamation Act 2009, including new provisions on assessment of damages (here). The Court noted the Supreme Court's holding that "it is now possible for the trial judge to give more detailed directions to a jury as to the assessment of damages," and the European Court said it "welcomes the Supreme Court's indication regarding the development of domestic practice towards the provision of more detailed guidance to the jury." Notably, the Irish government is currently reviewing the operation of the Defamation Act 2009 (here), and it is hoped *Independent Newspapers* and its principles will be incorporated into the review.

However, it is worth reiterating that not only was the jury direction deficient, it was the Supreme Court's lack of adequate reasoning for coming to the figure of 1,250,000 euro, which also violated Article 10. Irish judges not adequately explaining how defamation awards are calculated still arguably persists, even after the Defamation Act 2009. Only last month, the Irish Court of Appeal (here) set aside a 140,000 euro damages award made against a broadcaster by a High Court judge, and not a jury (here), and drastically cut the award to 36,000 euro. While this demonstrates "appellate review" working, Irish media are still being required to initiate costly appeals to ensure "proportionate" awards.

Finally, although the applicant did not explicitly argue that juries determining the amount of defamation damages violates Article 10, it is notable that the Court seemed to go out of its way to indicate its view on the role of juries. In its concluding remarks, the Court stressed that it is "mindful," of Ireland's "attachment to the institution of the jury in defamation cases", and held it was "entirely legitimate to involve citizens in different aspects of the administration of justice" (citing *Taxquet v. Belgium*). Moreover, the Court noted the role of juries had been "reaffirmed" in the 2009 Act, "following careful reflection and debate at domestic level." Thus, such language would suggest the continued use of juries in defamation proceedings, even in the calculation of damages, is still consistent with the European Convention.

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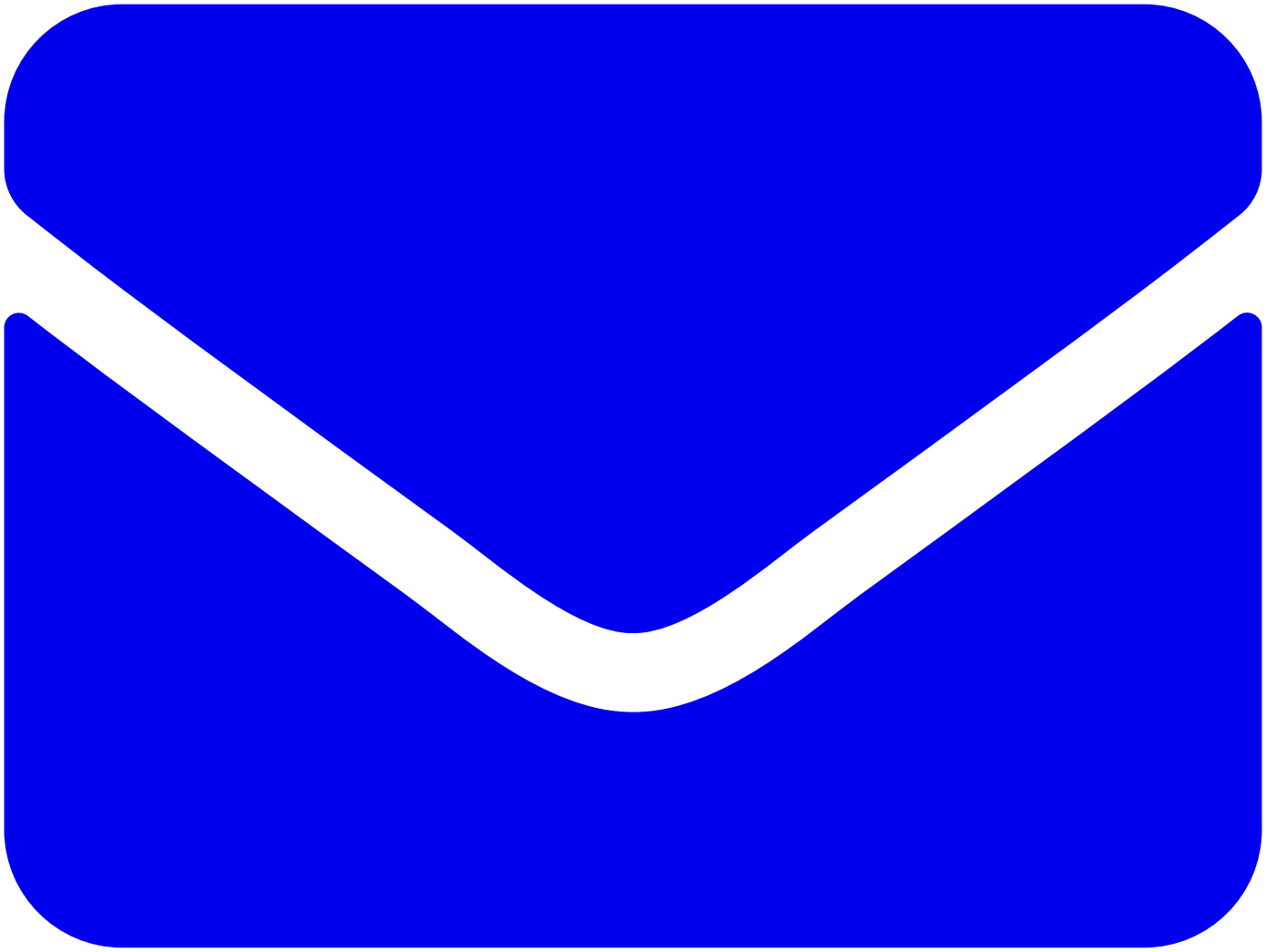

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BY Ronan Ó Fathaigh

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