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# Comparative Study on Investigative Journalism: Ireland

Ronan Fahy

The law regulating the disclosure, publication or possession of secret or confidential government information is contained in three main pieces of legislation: the Official Secrets Act 1963, the Freedom of Information Act 2014, and the Protected Disclosure Act 2014.

## Official Secrets Act 1963

The main legislation on secret or confidential government information is the Official Secrets Act 1963. The statute criminalises the communication of any ‘official information’,<sup>1</sup> which includes any ‘secret or confidential’ information held by a holder of public office.<sup>2</sup> The offence carries a possible punishment of six months’ imprisonment.<sup>3</sup> Second, the statute also makes it an offence to ‘obtain’ official information,<sup>4</sup> an offence which also carries a possible punishment of six months’ imprisonment. Third, the statute criminalises ‘retention’ of any official documents, or a document which contains official information.<sup>5</sup> Finally, the act also makes it an offence to publish or possess ‘any other matter whatsoever’ that might be ‘prejudicial to the safety or preservation of the state’.<sup>6</sup> This offence carries a possible punishment of two years’ imprisonment.<sup>7</sup>

## Freedom of Information Act 2014

In 1997, the first freedom of information law was enacted, the Freedom of Information Act 1997, which gave individuals a right of access to information held by certain public bodies,<sup>8</sup> subject to exceptions. While there is no right of access to information covered by the Official Secrets Act, the 1997 Act created a new defence for individuals prosecuted under the Official Secrets Act: a person who ‘reasonably believes’ they are ‘authorised by this Act to communicate official information to another person shall be deemed for the purposes of [the] Official Secrets Act, 1963, to be duly authorised to communicate that information’.<sup>9</sup> The Freedom of Information 2014 replaced the 1997 Act, and retained the defence.<sup>10</sup> Further, the 2014 Act extended access to information held by most public bodies, including law enforcement.<sup>11</sup>

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<sup>1</sup> Official Secrets Act 1963, section 4(1) (All legislation referenced below is available [here](#), most case law is available [here](#), and all websites were last accessed 31 July 2015).

<sup>2</sup> Official Secrets Act 1963, section 2(1).

<sup>3</sup> Official Secrets Act 1963, section 13(2).

<sup>4</sup> Official Secrets Act 1963, section 4(3).

<sup>5</sup> Official Secrets Act 1963, section 6(1).

<sup>6</sup> Official Secrets Act 1963, section 9(1)(v).

<sup>7</sup> Official Secrets Act 1963, section 13(3).

<sup>8</sup> Freedom of Information Act 1997, section 6 (replaced by the Freedom of Information Act 2014).

<sup>9</sup> Freedom of Information Act 1997, section 48 (replaced by the Freedom of Information Act 2014, section 51).

<sup>10</sup> Freedom of Information Act 2014, section 51.

<sup>11</sup> Freedom of Information Act 2014 (the 2014 Act also replaced the Freedom of Information (Amendment) Act 2003).

## Protected Disclosure Act 2014

In 2014, the first whistleblower protection law was enacted, the Protected Disclosure Act 2014, which protects employees, both private and government officials, from penalisation for disclosing information of ‘wrongdoing’.<sup>12</sup> The law provides protection to employees who disclose information externally, such as to the media, in certain circumstances.<sup>13</sup> Importantly, the law also protects individuals from criminal prosecution where they can show ‘the disclosure was, or was reasonably believed by the person to be, a protected disclosure’.<sup>14</sup>

## Garda Síochána Act 2005

The Garda Síochána Act 2005 makes it a criminal offence for law enforcement officials to disclose ‘any information obtained in the course of carrying out duties of that person’s office’ if the official knows the disclosure is ‘likely to have a harmful effect’. In May 2015, the first law enforcement official, a senior police officer, was arrested under the law, for disclosures to the media, and was later released without charged. The public prosecutor is currently deciding on whether to prosecute the officer. Further, in July 2015, *The Irish Times* newspaper reported that ‘journalists’ text messages and call-details have been accessed’ from the arrested officer’s phone.<sup>15</sup>

In a related 2012 case, *Walsh v. News Group Newspapers*, the High Court held that *The Sun* newspaper must disclose any leaked documents it received from law enforcement officials relating to certain sexual assault complaints made to the police. The Court held journalistic privilege did not attach to such disclosures. However, the Court did hold that if any document ‘could lead to the identification of [other] sources’, then the Court would ‘inspect any of these documents to ascertain whether or not journalistic privilege should apply in respect of them’.<sup>16</sup>

## Tribunal of Inquiry (Evidence) Acts 1979 - 2004

The Irish parliament has established a number of statutory tribunals of inquiry into corruption over the past few decades, and there have been many leaks to the press of confidential information from within these tribunals. The law regulating disclosure of such information is contained in the Tribunal of Inquiry (Evidence) Acts 1979 - 2004. Two notable judgments are: first, *Mahon v. Post Publications*, where a tribunal attempted to obtain an injunction banning the *Sunday Business Post* newspaper from publishing leaked information from the tribunal. However, both the High Court,<sup>17</sup> and the Supreme Court ruled that the injunction should not be granted.<sup>18</sup>

Second, in *Mahon Tribunal v. Keena*, a tribunal successfully obtained an order from the High Court to compel *The Irish Times* newspaper to answer questions about a leaked document it had received from an anonymous source.<sup>19</sup> However, the Supreme Court later set aside the

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<sup>12</sup> Protected Disclosures Act 2014.

<sup>13</sup> Protection Disclosures Act 2014, section 10.

<sup>14</sup> Protected Disclosure Act 2014, section 15.

<sup>15</sup> Conor Lally, ‘Journalists’ texts form part of Garda leak inquiry’ *The Irish Times* (25 July 2015).

<sup>16</sup> *Walsh v. News Group Newspapers* [2012] IEHC 353.

<sup>17</sup> *Mahon & Ors v. Post Publications Ltd.* [2005] IEHC 307.

<sup>18</sup> *Mahon v. Post Publications* [2007] IESC 15.

<sup>19</sup> *Judge Mahon v. Keena & Anor* [2007] IEHC 348.

order,<sup>20</sup> but ordered the newspaper to pay nearly 400,000 euro in costs to the tribunal (the newspaper decided to destroy the source's document before the court proceedings).<sup>21</sup> The European Court of Human Rights later held that this imposition of costs on the newspaper did not violate Article 10 of the European Convention of Human Rights.<sup>22</sup>

### **Confidential banking information**

There have been a number of banking scandals, and many leaks to the press of confidential banking information. The law regulating confidential banking information is found in case law, with the most important case being *National Irish Bank v. RTÉ*, where the Supreme Court overturned an injunction that had been granted by the High Court which had banned the public broadcaster RTÉ from publishing confidential banking information it had been leaked.<sup>23</sup> Further, in *McKillen v. Times Newspapers Limited* a businessman sought an injunction preventing *The Sunday Times* newspaper from publishing certain confidential banking information it had obtained. The High Court refused to grant the injunction in respect of certain information, but granted an injunction concerning other information.<sup>24</sup> Most recently, in *O'Brien v RTÉ*, the High Court granted an injunction banning the public broadcaster RTÉ from broadcasting a programme based on confidential banking documentation concerning a public figure.<sup>25</sup>

#### *The 'Anglo Tapes'*

In June 2013, the *Irish Independent* and *Sunday Independent* newspapers began publishing transcripts and recordings of telephone calls from a bank's internal telephone system, which had been leaked to the newspaper. And in the 2015 case, *DPP v. Independent News and Media*, a High Court judge found the *Irish Independent* newspaper in contempt of court for publishing leaked tape recordings of certain bank officials 'after an accused person had been charged and returned for trial'. The public prosecutor had claimed the material had interfered with the criminal process. The judge also ruled 'no details of her order could be published yet'.

### **Use of hidden cameras**

The law regulating the use of hidden camera by the press is mainly contained in case law, with the *Cogley v. RTÉ* case being the most significant. A private retirement home attempted to obtain an injunction preventing the broadcaster RTÉ from using footage it had obtained from inside the retirement home using hidden cameras. The High Court refused to grant the injunction.<sup>26</sup> Further, in 2013, the RTÉ broadcast an investigative programme on standards of childcare in Ireland, and used hidden camera footage of children 'subjected to emotional abuse' in a crèche.<sup>27</sup> Two crèche employees subsequently sued RTÉ for defamation, and sought access to earlier versions of the programme held by RTÉ. In 2014, the Supreme Court

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<sup>20</sup> *Mahon Tribunal v. Keena & Anor* [2009] IESC 64.

<sup>21</sup> *Mahon Tribunal v. Keena & Anor* [2009] IESC 78.

<sup>22</sup> *Keena and Kennedy v. Ireland* (App. No. 29804/10) 30 September 2014 (admissibility decision).

<sup>23</sup> *National Irish Bank Ltd. v. RTÉ* [1998] 2 IR 465.

<sup>24</sup> *McKillen & Anor v. Times Newspapers Limited & Ors* [2013] IEHC 150.

<sup>25</sup> *O'Brien v. RTÉ* [2015] IEHC 379 and *O'Brien v. RTÉ* [2015] IEHC 397 and

<sup>26</sup> *Cogley v. RTÉ* [2005] IEHC 180.

<sup>27</sup> Steven Carroll, 'RTÉ crèche documentary exposes "emotional abuse"' *The Irish Times* (29 May 2013).

held that RTÉ was required to hand over copies of the early versions of the programme to the plaintiffs.<sup>28</sup> The defamation proceedings are ongoing.

Moreover, the Broadcasting Act 2009 also contains provisions applicable to the use of hidden cameras, including a duty on broadcasters ‘in the means employed to make’ programmes, ‘the privacy of any individual is not unreasonably encroached upon’.<sup>29</sup> The Broadcasting Authority of Ireland’s code on fairness in news and current affairs, has detailed ruled on the use of hidden cameras, which should only be used ‘in exceptional circumstances’.<sup>30</sup> Notably, in 2012, the Authority found the public broadcaster RTÉ had breached various provisions of the Broadcasting Act 2009 over an investigative programme alleging an Irish priest had fathered a child with a teenage girl in the 1980s. One such breach was ‘secret filming’ of the priest, which the Authority found ‘unreasonably encroached’ upon the priest’s ‘privacy’.<sup>31</sup> RTÉ was fined €200,000 over various breaches of the Broadcast Act 2009 in the broadcasting and making of this investigative programme.

- 1b. *Please outline in detail the regulation regarding the boundaries of law enforcement: search of editorial offices, seizure of documents or (press) material (including the printed press), and surveillance of journalistic communication.*

### **Police search and seizure**

The law on search and seizure is contained in many statutes, depending on the suspected offence. The ‘most commonly used’<sup>32</sup> statute for issuing search warrants is the Criminal Justice Act (Miscellaneous Provisions) Act 1997,<sup>33</sup> which applies to gathering evidence in relation to ‘arrestable offences’ (offences carrying a punishment of five year’ imprisonment or more).<sup>34</sup> Only a district court judge may issue such a search warrant where there are ‘reasonable grounds’ for suspecting evidence may be found at a certain place.<sup>35</sup> The act has no specific provisions on the search of editorial offices, or on the seizure of journalistic material. Similarly, under the Official Secrets Act 1963, law enforcement officials must obtain a warrant from a district court judge to seize any documents which ‘might be prejudicial to the safety or preservation of the State’.<sup>36</sup> However, in certain circumstances, a police officer of ‘chief superintendent’ rank, may issue a search warrant.<sup>37</sup> Finally, under the Defamation Act 2009, where an individual is convicted of publishing blasphemous material, the court may issue a warrant allowing law enforcement officials to search any premises and seize blasphemous material.<sup>38</sup>

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<sup>28</sup> *Craddock v. RTÉ and Kavanagh v. RTÉ* [2014] IESC 32.

<sup>29</sup> Broadcasting Act 2009, section 39(1)(e).

<sup>30</sup> Broadcasting Authority of Ireland, *Code of Fairness, Objectivity & Impartiality in News and Current Affairs* (2013), Rules 12 and 13 (available [here](#)).

<sup>31</sup> Broadcasting Authority of Ireland, *Statement of Findings issued pursuant to Section 55(2) of the Broadcasting Act 2009*, 29 February 2012 (available [here](#)).

<sup>32</sup> Law Reform Commission, *Issues Paper on Search Warrants* (LRC IP 4-2015), para. 1.07 (available [here](#)).

<sup>33</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10 (as amended by the Criminal Justice Act 2006, section 6).

<sup>34</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10(6) (as amended by the Criminal Justice Act 2006, section 6).

<sup>35</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10(1) (as amended by the Criminal Justice Act 2006, section 6).

<sup>36</sup> Official Secrets Act 1963, section 16 (1).

<sup>37</sup> Official Secrets Act 1963, section 16 (2).

<sup>38</sup> Defamation Act 2009, section 37.

It does not appear that any statutes regulating search and seizure contain provisions relating to the searching of editorial offices, or the seizure of journalistic material. Notably, a number of such statutes have provisions relating to ‘legal professional privilege’, providing that legally privileged material generally may not be seized during a search.<sup>39</sup> Finally, in February 2015, it was reported by the National Union of Journalists that police secured a warrant to seize images of a protest from a photojournalist. The journalist had refused to voluntarily hand over the images.<sup>40</sup>

## Government wiretapping and surveillance

Government wiretapping of the press came to a head in 1987, when the High Court ruled in *Kennedy v. Ireland* that the wiretapping of two journalists had violated their constitutional right to privacy.<sup>41</sup> This led to the enactment of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The act provides that interception of telecommunication messages<sup>42</sup> by law enforcement or the military may only occur with prior-authorisation from the justice minister.<sup>43</sup> There are no specific provisions on journalistic communication.

The law on government surveillance is set out in the Criminal Justice (Surveillance) Act 2009, and provides that law enforcement, intelligence, military and tax agencies may usually only conduct surveillance<sup>44</sup> with prior-authorisation from a district court judge.<sup>45</sup> Notably, the Act provides that a judge ‘shall not issue authorisation’ if the surveillance ‘is likely to relate primarily to communications protected by privilege’. The Act does not define ‘privilege’, and arguably covers legal professional privilege, but it is not clear whether it covers journalistic privilege. Further, there are no specific provisions in the Act on journalists. Further, the Act also allows surveillance in ‘cases of urgency’, without the prior-authorisation of a judge, but instead with the prior authorisation of senior<sup>46</sup> law enforcement, military or tax agency official.<sup>47</sup>

Finally, in December 2014,<sup>48</sup> the government commenced operation of Part 3 of the Criminal Justice (Mutual Assistance) Act 2008, which regulates wiretapping requests from foreign governments. The act provides that where a request is made to the Irish government, the

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<sup>39</sup> See, for example, the Criminal Justice (Theft and Fraud Offences) Act 2001, section 48 (‘Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value’). See Law Reform Commission, *Search Warrants and Bench Warrants: Consultation Paper* (LRC CP 58-2009), para. 6.21 (available [here](#)).

<sup>40</sup> National Union of Journalists, ‘NUJ condemns Garda order against Photocall Ireland’ (17 February 2015) (available [here](#)).

<sup>41</sup> *Kennedy v. Ireland* [1987] IR 587.

<sup>42</sup> Interception is defined as including ‘listening or attempted listening to, or the recording or attempted recording, by any means, in the course of its transmission, of a telecommunications message’ (Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, section 1).

<sup>43</sup> Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, section 2.

<sup>44</sup> Surveillance is defined as ‘monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or monitoring or making a recording of places or things’ (Criminal Justice (Surveillance) Act 2009, section 1).

<sup>45</sup> Criminal Justice (Surveillance) Act 2009, section 5.

<sup>46</sup> See definition of ‘superior officer’ in the Criminal Justice (Surveillance) Act 2009, section 1.

<sup>47</sup> Criminal Justice (Surveillance) Act 2009, section 7.

<sup>48</sup> Criminal Justice (Mutual Assistance) Act 2008 (Commencement) Order 2014, S.I. No. 541/2014.

justice minister may give authorisation for interception of telecommunications messages, under certain circumstances.<sup>49</sup> There are no provisions on journalistic communication.

## Government access to communication data

The law on government access to communication data is set out in the Communications (Retention of Data) Act 2011, which replaced earlier legislation on communication data.<sup>50</sup> The act regulates government access to communication ‘traffic data’, ‘location data’, and ‘identity’ data,<sup>51</sup> but does not apply to the ‘content of communications’.<sup>52</sup> The law places an obligation on electronic communication providers to retain certain communication data for a defined period.<sup>53</sup> The act allows senior law enforcement, military, and tax agency officials,<sup>54</sup> to request an electronic communications provider to disclose data to the official for certain law enforcement or national security reasons.<sup>55</sup> There are no provisions in the law on journalistic communication data.

Notably, in 2010 an Irish civil rights organisation filed a claim against the government in the High Court,<sup>56</sup> seeking to have the previous law<sup>57</sup> on data retention declared unconstitutional, and challenging the legality of the EU’s data retention directive. The High Court referred the data-retention-directive question to the EU Court of Justice, and in its 2014 judgment, *Digital Rights Ireland Ltd v. Minister for Communications*, the Court held that the directive was invalid.<sup>58</sup> However, while question marks now hang over the current Communications (Retention of Data) Act 2011, the act is arguably still valid until there are further legal challenges.<sup>59</sup>

2. *Please describe the journalistic duty of care by reporting about on-going investigations, for instance criminal or political*

The law on press reporting of criminal proceedings and trials is contained in case law, and generally covered by the law known as contempt of court.<sup>60</sup> The Law Reform Commission, a statutory agency which examines law reform, recommended in 1994 that contempt of court law should be codified in legislation.<sup>61</sup> There have also been calls from the judiciary for the government to enact legislation.<sup>62</sup> This has not yet happened.

### “Sub judice” rule

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<sup>49</sup> Criminal Justice (Mutual Assistance) Act 2008, section 25.

<sup>50</sup> Criminal Justice (Terrorist Offences) Act 2005, Part 7.

<sup>51</sup> Communications (Retention of Data) Act 2011, section 1.

<sup>52</sup> Communications (Retention of Data) Act 2011, section 2.

<sup>53</sup> Communications (Retention of Data) Act 2011, section 3.

<sup>54</sup> Communications (Retention of Data) Act 2011, section 6 (as amended by the Competition and Consumer Protection Act 2014, section 89).

<sup>55</sup> Communications (Retention of Data) Act 2011, section 6.

<sup>56</sup> *Digital Rights Ireland Ltd v. Minister for Communications & Ors* [2010] IEHC 221.

<sup>57</sup> Criminal Justice (Terrorist Offences) Act 2005, Part 7 (repealed by the Communications (Retention of Data) Act 2011).

<sup>58</sup> *Digital Rights Ireland Ltd v. Minister for Communications* [2014] EUECJ C-293/12.

<sup>59</sup> Rob Corbet et al, ‘Data Retention Directive Declared Invalid by EU Court of Justice’, *Arthur Cox Group Briefing* (16 April 2014) (available [here](#))

<sup>60</sup> See generally Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) (available [here](#)).

<sup>61</sup> Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994), para. (available [here](#)).

<sup>62</sup> See, for example, *D.P.P v. Independent Newspapers Ireland Ltd. & Ors* [2003] IEHC 624 (‘I add my voice in support of the need for legislative intervention in hope rather than expectation’).

The “sub judice” rule basically means the point in criminal proceedings when the media cannot publish information that might be in contempt of court. The High Court has ruled in *DPP v. Independent Newspapers Ireland Limited*,<sup>63</sup> that proceedings for contempt of court may only be initiated when a ‘court has actually had seisin of the case in respect of which contempt is alleged’, or in other words, when a suspect is formally charged with an offence.<sup>64</sup>

#### *Suspect charged with an offence, and awaiting trial*

The most recent case on press reporting on criminal suspects who have been charged with an offence is the 2015 case of *DPP v. Independent News and Media*.<sup>65</sup> The High Court found the *Irish Independent* newspaper had committed the offence of contempt of court by publishing articles ‘after the accused had been charged’ and ‘gratuitously identified and associated the accused person with particular types of behaviour relevant to the charges to be considered by the jury’.<sup>66</sup> The Court acknowledged that there was ‘no evidence of intention’ to commit the offence by the newspaper, but ‘on the law as it stands there is no requirement to prove intent for this offence’. The Court also ruled that most of its judgment could ‘not be reported upon’ until a further order after the trial. The sanctions for contempt of court are fines or prison sentences, at the discretion of the courts, and the Court is yet to impose a sanction.

#### *Defendant convicted, and awaiting sentencing*

One of the main recent authorities on contempt of court by the media is *DPP. v. Independent Newspapers*,<sup>67</sup> where the High Court held that a newspaper had committed contempt of court by publishing articles following a defendant’s guilty plea, but before he had been sentenced. This was because ‘they were highly prejudicial to the [defendant] thus interfering in the administration of justice’.<sup>68</sup> The test was whether an article created a ‘real and serious risk that an accused does not have a fair trial’, and must be proven ‘beyond a reasonable doubt’.

### **Defamation Act 2009**

Under the Defamation Act 2009, the press enjoy an absolute privilege (i.e. a full defence to defamation proceedings) for a ‘fair and accurate report’ of court proceedings held in public, proceedings in parliament, and a number of other circumstances.<sup>69</sup> The act also provides a further defence of ‘qualified privilege’ to the press for publishing ‘fair and accurate reports’ of other proceedings, provided no malice is proven.<sup>70</sup>

3. *Which are the existing criteria, as for example guidelines for journalists in order to present the “objective truth”, such as: minimum level of facts of evidence, content requirements – expressly indication of “suspicion” without prejudice, requirements to apply for the legitimacy of text- or/and pictorial reporting) etc.?*

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<sup>63</sup> *D.P.P v. Independent Newspapers Ireland Ltd. & Ors* [2003] IEHC 624.

<sup>64</sup> *D.P.P. v. Independent Newspapers (Ireland) Ltd. & Ors* [2005] IEHC 128 (approving *D.P.P v. Independent Newspapers Ireland Ltd. & Ors* [2003] IEHC 624).

<sup>65</sup> *D.P.P. v. Independent News and Media Plc & Ors* [2015] IEHC 336. See also *Kelly v. O’Neill* [1999] IESC 81.

<sup>66</sup> *D.P.P. v. Independent News and Media Plc & Ors* [2015] IEHC 336.

<sup>67</sup> *D.P.P. v. Independent Newspapers (Ireland) Limited* [2005] IEHC 353.

<sup>68</sup> *D.P.P. v. Independent Newspapers (Ireland) Limited* [2005] IEHC 353.

<sup>69</sup> Defamation Act 2009, section 17.

<sup>70</sup> Defamation Act 2009, sections 18 and 19.

## **Defence of truth**

The Defamation Act 2009 sets out the defence of truth in defamation proceedings,<sup>71</sup> and provides that two or more allegations are made against an individual, ‘the defence of truth shall not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining allegations’.<sup>72</sup>

## **Defence of honest opinion**

Under the Defamation Act 2009, the press enjoy a defence of honest opinion, where the defendant believed the truth of the opinion, and was based on allegations of facts specified in an article, or facts that ‘might reasonably be expected to have been known’ by readers.<sup>73</sup> The act also sets out criteria for distinguishing between opinion and allegations of fact.<sup>74</sup>

## **Defence of fair and reasonable publication on a matter of public interest**

The Defamation Act 2009 also provides for a defence of ‘fair and reasonable publication’, where allegations are made on a subject of public interest. The act lays down a number of criteria for a court to consider when ruling on whether the defence applies to a defamatory publication.<sup>75</sup> Notably, if the defamation proceedings are being determined with a jury, the question of whether the defence of fair and reasonable publication applies is a question for the jury, not the judge.<sup>76</sup>

4. *Are there any legal/practical differences in how liability is asserted to different persons within the “editorial chain” of a journalistic product – journalist, editor, and publisher (as the legal person/company)? Please explain it.*

The Defamation Act 2009 provides that a person is not to be considered the ‘author, editor or publisher’ of a statement if they are only responsible the ‘printing, production, distribution or selling’ of printed material, or the ‘processing, copying, distribution, exhibition’ of film or sound recording, or through an electronic medium.<sup>77</sup> Moreover, the act provides that a person only has ‘one cause of action in respect of a multiple publication’, unless a court rules otherwise.<sup>78</sup>

## **B. Conclusion and perspectives**

*In this section we would like to hear your own assessment of the overall situation – as mainly characterised by the findings under A. above in view of the study’s interest in learning about the state of play in the (pluralistic and diverse) provision of investigative journalism. When allocating elements of your description to either section please bear in mind that, on the one*

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<sup>71</sup> Defamation Act 2009, sections 16.

<sup>72</sup> Defamation Act 2009, section 16(2).

<sup>73</sup> Defamation Act 2009, section 20.

<sup>74</sup> Defamation Act 2009, section 21.

<sup>75</sup> Defamation Act 2009, section 26.

<sup>76</sup> Defamation Act 2009, section 26 (4).

<sup>77</sup> Defamation Act 2009, section 27.

<sup>78</sup> Defamation Act 2009, section 11.

hand, your conclusion has sufficient grounding and textual framing and that, on the other hand, the assessment of perspectives is duly and understandably prepared for.

A number of notable current issues concerning press freedom would be the following:

### **Law enforcement officials leaking to the press**

In May 2015, the first law enforcement official, a senior police officer, was arrested under the law, for disclosures to the media, and was later released without charge. The public prosecutor is currently deciding on whether to prosecute the officer. Of particular concern, in July 2015, *The Irish Times* newspaper reported that ‘journalists’ text messages and call-details have been accessed’ from the arrested officer’s phone.<sup>79</sup>

### **Law enforcement officials and journalistic sources**

The *Guardian* newspaper has reported the concerns of a number of Irish journalists of being ‘questioned them about police contacts, threatened them with arrest and has been checking their mobile phone calls to suspected sources’.<sup>80</sup> The deputy editor of the *Evening Herald* newspaper described police attempts at discovering journalists’ sources as ‘Stasi-like’.<sup>81</sup>

Moreover, at a recent National Union of Journalists conference, delegates adopted a motion noting with concern at “the growing tendency of An Garda Síochána to seize images, including unpublished photographs taken by NUJ members in the course of their work”.<sup>82</sup>

### **Defamation**

While the government has decriminalised defamation, and enacted the Defamation Act 2009, public officials continue to successfully sue the press over publications concerning matters of public interest. Many newspapers settle cases before reaching trial. Some recent examples include the following:

(a) In 2015, the *Irish Examiner* newspaper settled a defamation action taken by two parliamentarians, paying €100,000 in damages, and publishing an apology.<sup>83</sup> The articles were an editorial and op-ed concerning the two elected public officials and on matters of public interest.

(b) In 2015, the *Irish Mail on Sunday* newspaper settled a defamation action taken by a government minister over an article on the minister entitled ‘Reilly link to developer of second clinic - he sold land for luxury homes’. The newspaper settled the High Court case, paying undisclosed damages, legal costs, and issuing an apology.<sup>84</sup>

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<sup>79</sup> Conor Lally, ‘Journalists’ texts form part of Garda leak inquiry’ *The Irish Times* (25 July 2015).

<sup>80</sup> Henry McDonald, “Irish journalists accuse police of ‘Stasi-like’ monitoring”, *The Guardian* (11 May 2012).

<sup>81</sup> Henry McDonald, “Irish journalists accuse police of ‘Stasi-like’ monitoring”, *The Guardian* (11 May 2012).

<sup>82</sup> National Union of Journalists, ‘Irish BDC condemns cuts and seizure of journalistic materials’, 10 October 2011 (available [here](#)). See also National Union of Journalists Biennial Delegate Conference, ‘Media Matters Serving the Public Interest’, Motion 3, 8 October 2011 (available [here](#)).

<sup>83</sup> Justine McCarthy, ‘Irish Examiner pays Sinn Fein due over libel’, *The Sunday Times* (17 May 2015).

<sup>84</sup> ‘Apology for James Reilly over “Irish Mail on Sunday” article’, *The Irish Times* (13 July 2015).

(c) In 2014, the *Evening Herald* newspaper was ordered to pay €1.25 million in damages to a public official over a number of articles published in 2004, which suggested the official might have had an extramarital affair with a government minister.<sup>85</sup> A jury had originally awarded €1.8 million in damages, which the Supreme Court reduced to €1.25 million.

(d) In 2014, a senator sued the *Daily Mail* newspaper for defamation over an article which claimed she personally gained from voluntary work in Africa, with the newspaper paying undisclosed damages and costs, and reading an apology.<sup>86</sup>

Further, the issues of damages and costs in defamation proceedings continues: in July 2015, Independent Newspapers filed an application with the European Court of Human Rights, seeking to have the Supreme Court's €1.25 million award against it declared disproportionate under Article 10 of the European Convention of Human Rights.<sup>87</sup> Moreover, the *Sunday World* newspaper filed an appeal with the Court of Appeal over a €900,000 damages award imposed by a jury on the newspaper over a defamatory article.<sup>88</sup>

### Contempt of court

Of note, the public prosecutor has made a recent statement that the media 'have a high degree of responsibility to ensure that not only do they not commit a contempt of court by publishing or broadcasting prejudicial material but also that such publicity is not the cause of a trial being postponed for a long period, or even indefinitely'.<sup>89</sup>

### Legal costs

The legal costs for the press of defending legal proceedings are a persistent problem. One recent example is *The Irish Times* newspaper defending itself against a government tribunal seeking to compel the newspaper to answer questions about a leaked document it had received from an anonymous source.<sup>90</sup> The Supreme Court ordered the newspaper to pay the tribunal's costs of €400,000, in addition to the newspaper's own costs.

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<sup>85</sup> *Leech v. Independent Newspapers (Ireland) Limited* [2014] IESC 79.

<sup>86</sup> "Senator Healy-Eames gets apology over 'Mail' article", *The Irish Times* (28 July 2014).

<sup>87</sup> Ruadhán Mac Cormaic, "Media group takes European action over Monica Leech case", *The Irish Times* (22 July 2015).

<sup>88</sup> Dearbhail McDonald, 'Newspaper asks court to overturn €900,000 libel award', *Irish Independent* (28 July 2015).

<sup>89</sup> Office of the Director of Public Prosecutions, *Annual Report 2012* (2013), p. 5 (available [here](#)).

<sup>90</sup> *Judge Mahon v. Keena & Anor* [2007] IEHC 348.