

DEFAMATION AND HARASSMENT VIA SOCIAL MEDIA

The legal issues
surrounding defamation
and harassment via
social media.

by
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DEFAMATION & HARASSMENT VIA SOCIAL MEDIA: AN OVERVIEW

- What are the basic principles covering defamation and harassment?
- What are the common themes with online behaviour?
- What are the specific issues when defamation and harassment occur via social media?
- Remedies for a victim of defamation via social media
- Remedies for a victim of harassment via social media
- Take-aways for potential plaintiffs

THE BASIC PRINCIPLES

"The internet is only a means of communication. It has not rewritten the legal rules of each nation through which it passes. It is not an amorphous extraterrestrial body with an entitlement to norms that run counter to the fundamental principles of human rights."

Charleton J, [EMI v Eircom](#) [2010] 3 IR 349

DEFAMATION

A civil cause of action, governed by the Defamation Act 2009. A plaintiff will need to establish:

- (a) a defamatory **meaning** to the statement, namely "a statement which tends to injure a person's reputation in the eyes of reasonable members of society."
- (b) **publication** to at least one person other than the plaintiff.
- (c) **identification** of the plaintiff in the statement.
- (d) **Statute of limitations:** proceedings will generally need to be instituted within 12 months of the material being published

HARASSMENT

- (a) Governed by s. 10 of the Non-Fatal Offences Against the Person Act 1997, and can only be tried by way of criminal proceedings. There is **no tort of harassment** in this jurisdiction.
- (b) to harass means to "seriously interfere with the other's peace or privacy or causes alarm, distress or harm to the other"

THE COMMON THEMES:

1. ANONYMITY

ANONYMITY

The easy availability of anonymity on the internet raises several important issues:

Where the defendant is anonymous:

- It creates a difficulty in identifying the person who is defaming or harassing the victim. *Maguire v Gill*, (Unreported, High Court, Sept/Oct 2006)
- For reasons of privacy, data protection and contract law, social media platforms of notoriously reticent in voluntarily revealing the identity of anonymous users.
- Court orders via an application for sole discovery – commonly referred to as a *Norwich Pharmacal* order – can be time-consuming and expensive.

Where the plaintiff seeks anonymity:

- The victim may wish to issue proceedings for harassment anonymously, so as not to draw attention to the very material they seek to have removed. The right to bring proceedings anonymously in this jurisdiction is severely curtailed, however, compared to other common law jurisdictions.

Constitutional imperative that justice be administered in public under art. 34.1 has consistently ruled out the availability of anonymity for plaintiffs other than in exceptions provided for by statute, although in *Gilchrist & Rogers v Sunday Newspapers [2017] IESC 17*, O'Donnell J suggested that a more nuanced approach may be taken in future.

Practical difficulties with request for anonymity to combat material published on the internet considered by Peart J in *McKeogh v Doe* (Unreported High Court, 16 May 2013)

THE COMMON THEMES:

2. LIABILITY OF INTERMEDIARIES

LIABILITY OF SOCIAL MEDIA PLATFORMS

Can they be held liable for defamatory/ harassing material which they facilitate?

REASONS FOR PROCEEDINGS AGAINST SOCIAL MEDIA PLATFORMS

1. To discover the identity of the person defaming/ harassing.
2. To compel the platform to block or take down the impugned material.
3. To impose liability for defamation/ harassment on the platform itself.

ATTRACTION OF SEEKING TO HOLD THEM RESPONSIBLE

1. It may be inordinately difficult to identify the author/creator of the content, while the platform is instantly identifiable.
2. The author/creator, even if identified, may be outside the jurisdiction of the court, while the platform is likely to be based in Ireland.
3. The author/creator is often impecunious, while the platform is a far more attractive mark for damages.

THE COMMON THEMES:

2. LIABILITY OF INTERMEDIARIES

ACTIONS AGAINST SOCIAL MEDIA PLATFORMS

1. Are they publishers? Common position is that they are not. Adopted in response to Donald Trump's threats in the US last week, and recently stated before Joint Oireachtas Committee on Justice in October 2019 – they are simply "facilitators" for others to publish material.

2. Position of intermediaries in the EU governed by **E-Commerce Directive (Directive 2000/31/EC)**.

Art 12-14 do not provide for total immunity for intermediaries, instead for varying degrees depending on whether they are mere conduits, cache, or host the content. Art 15 also provides for no general obligation to monitor information they transmit or store.

E Commerce Directive Art 14/ Art 18 EC Regulations 2003

1. An intermediary (social media platform) is not liable for information which it stores on its platform on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

Important questions are:

- **What is actual knowledge?** Considered re privacy in NI cases of [CG v Facebook](#) [2015] NIQB 11 and [J20 v Facebook](#) [2017] NICA 48
- What is considered to be acting "expeditiously" after being put on notice of the material?
- Can a platform be responsible for repeated behaviour? *October 2019 decision in* [C18/18 Eva Glawischnig-Piesczek v Facebook](#) *an important one.* Miriam O'Callaghan proceedings against Facebook in 2019 inter alia for malicious falsehood and defamation

See also defence of innocent publication under s. 27 of the Defamation Act 2009.

DEFAMATION VIA SOCIAL MEDIA: THE SPECIFIC ISSUES

MEANING

Should statements be made on social media be treated differently by the courts?

- when deciding on the natural and ordinary meaning of a statement, the nature of the 'hypothetical reader' (the audience) and the medium through which it is communicated will be factors to be considered.

Monroe v Hopkins [2017] EWHC 433

Stocker v Stocker [2019] UKSC 17- "the imperative is to ascertain how a typical reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression, and it is pre-eminently one in which the reader reads and passes on."

PUBLICATION

• **Who other than the author can be held liable for publishing the material?**

Is a retweet republishing of defamatory material? Touched on in the UK in *McAlpine v Bercow* [2013] EWHC 1342, but about to be considered head on in *Riley v Hoebroek* [2020] EWHC 1259

• Is a hyperlink to defamatory material considered publication of that material?

Defteros v Google [2020] VSC 219

• Company operating a Facebook page liable for user's comments? Yes, according to *Voller v Nationwide News & Ors* [2019] NSWSC 766

HARASSMENT VIA SOCIAL MEDIA: THE SPECIFIC ISSUES

Section 10 of the 1997 Act

- Act is 23 years old. While technology-neutral, it refers specifically to "use of the telephone".
- Requirement for "persistence" would seem to rule out once-off behaviour such as posting of private material on the internet, creation of a fake account etc.
- Requirement that communication be "with him or her" would not seem to cover situation where material about the victim is uploaded to the internet for anyone to view.

New forms of harassment facilitated by internet

- Cyber-bullying of children.
- Revenge Porn.
- Sextortion – not unlike revenge porn, but for financial gain rather than revenge.
- Online identity theft - 'fraping' or 'catfishing'.
- Trolling.
- Upskirting/ down-blousing.

Illustration of current difficulties

In 2014, a man was charged in with fraping under the s.2 of Criminal Damage Act 1991, not for unauthorised accessing of data, but for "damaging property." The Court accepted that it was more a case of harassment than damage, but held that reputational damage had taken place, and imposed a fine of 2000 euro.

REMEDIES FOR A VICTIM OF DEFAMATION VIA SOCIAL MEDIA

VICTIMS OF DEFAMATION

1. Damages – court may consider extent of initial publication, and difficulty in controlling its further dissemination. Court in [Cairns v Modi \[2012\] EWHC 756](#) awarded plaintiff £90,000 for a tweet seen only by 65 people, as it was "impossible to track the scandal, to know what quarters the poison may reach..."

Inconsistency, however, as to whether defamation on social media will attract greater damages than in traditional media:

- [AB v Facebook \[2013\] NIQB 14](#), plaintiff awarded £35,000 as libel on Facebook page was equated with "the main page of a leading newspaper or a popular television programme".
- in [Monir v Wood \[2018\] EWHC 3525](#), tweet which labelled the plaintiff a sex offender attracted £40,000, though the court admitted it would have been £250,000 had it appeared in a national newspaper.

Unreported cases in this jurisdiction – Monaghan Man awarded €75k in 2016 for comments on a Facebook page that he had been responsible for darts organisation going broke. Co Donegal couple awarded €32,500 in 2017 for comments on Facebook that man was having an affair.

2. Injunctions – usually the most pressing requirement is to have the material removed or blocked. First stage would be to seek voluntary taking down of the material by the platform.

Test for granting an injunction for defamation has usually be a strict one, requiring proof that the defendant "had no defence that was reasonably likely to succeed". Codified by s. 33 of the 2009 Act, which allows for the prohibition of publication of defamatory material.

In [Tansey v Gill \[2012\] 1 IR 380](#), Peart J in the High Court suggested a less strenuous test when someone has been defamed on the internet, but this appears to have been rejected by Barrett J recently in [Philpott v Irish Examiner \[2018\] 3 IR 565](#), who stressed the material **must** be defamatory.

In [Muwema v Facebook \[2016\] IEHC 519](#), Binchy J held that a plaintiff would almost never be able to obtain injunctive relief against a social media platform, as the latter would always have the defence of innocent publication available to them. I believe the trial judge to have fallen into error in this regard, and do not think that Muwema will be followed in this regard.

REMEDIES FOR A VICTIM OF HARASSMENT VIA SOCIAL MEDIA

VICTIMS OF HARASSMENT

1. Sentencing – s.10 of the 1997 Act provides for imprisonment up to 7 years on indictment. For online harassment, courts have tended not to impose anything like the maximum available sentences.

In May 2018, a man was given a 4 and a half year sentence, with the last 18 months suspended, for harassing TV presenter Sharon Ni Bheolain, though inclusion of possession of child pornography charge was a factor in the sentencing.

2. Injunctions – usually the most pressing requirement is to have the material removed. First stage would be to seek voluntary taking down by the platform. Injunctions are available in this jurisdiction – in December 2014, the High Court granted a perpetual injunction against a former member of the Church of Scientology from harassing two existing members.

Particular issue is the indexing of the material by search engines, as occurred in Sharon Ni Bheolain case (discussed above)

3. Alternative potential civil remedies

- Intentional infliction of emotional suffering – [Cronin v Kotal Ireland](#) (Unreported, Circuit Court, December 2005) - "a form of harassment ... done either with the intention of humiliating or embarrassing the butt of the harassment, or it must be done where there is a risk of such an adverse reaction..."
- Malicious falsehood – need to establish financial loss (also suitable for defamation)
- Breach of data protection rights
- Breach of constitutional rights – [Sullivan v Boylan](#) [2013] 1 IR 510
- Breach of copyright – s. 114 of the Copyright and Related Rights Acts 2000 covers photographs and films made for "private and domestic purposes" and has the right not to have them made available.

REMEDIES FOR A VICTIM OF HARASSMENT VIA SOCIAL MEDIA

VICTIMS OF HARASSMENT

4. Proposed legislation

- [Harassment, Harmful Communications and Related Offences Bill 2017](#).

- [Online Safety Bill 2019](#) – the BAI to be abolished and replaced by a Media Commission, which would include an Online Safety Commissioner. It would regulate harmful online content, but not material that was defamatory or breached data protection laws and could impose fines against, and demand blocking orders of, online platforms which did not comply with its code of practice.

Also of note:

Facebook "Oversight Committee"

SUMMARY

KEY POINTS

"It is indisputable that social networking sites can be a force for good in society, a truly positive and valuable mechanism. However, they are becoming increasingly misused as a medium through which to threaten, abuse, harass, intimidate and defame. ... Social networking sites belong to the "wild west" of modern broadcasting, publication and communication Recent and pending litigation ... confirms that an increasingly grave mischief confronts society."

AB v Facebook [2013] NIQB 14

1. The usual rules generally apply. Defamation and harassment occur "by any means", so that includes the internet.
2. Consider 2-step approach: a) take down of material; b) proceedings against the perpetrator.
2. Seek voluntary take down by social media platform of material as a first step.
3. If perpetrator is anonymous, seek disclosure of their identity from the platform.
4. Be aware of numerous ways that proceedings can be framed:
Defamation is often pleaded along with malicious falsehood, intentional infliction of emotional suffering, breach of privacy/ data protection rights.
Harassment can be framed as a civil action through torts of intentional infliction of emotional suffering, breach of privacy/ data protection rights, misuse of confidence, breach of copyright.
5. Before seeking damages from a social media platform, be familiar with the various means by which they are provided with immunity, and the novelty of any such claim in this jurisdiction.

Thank you for your time.