

## **THE DEFAMATION ACT 2009**

The above Act was enacted in July 2009 and all sections of the Act came in to operation on 1 January 2010.

The Act represents a major revision and revamping of previous legislation governing this area. It abolishes the separate and distinct torts of libel and slander and creates a new tort of defamation. The following is a brief review of the major provisions of the Act.

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### **The new tort of Defamation**

**Section 6** defines defamation as the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first mentioned person). A defamatory statement is defined as a statement that tends to injure a person's reputation in the eyes of reasonable members of society.

**Section 6(4)** states that there shall be no publication if the defamatory statement is published to the person to whom it relates (the Plaintiff) and to a person other than the Plaintiff where it was not intended that the statement would be published to the second mentioned person or where it was not reasonably foreseeable that publication of the statement to the Plaintiff would result in its being published to the second-mentioned person.

Proof of special damage is no longer required and the tort of defamation is actionable without the Plaintiff having to prove financial loss was suffered by him or her as a result of the injury to his or her reputation.

**Section 12** now provides that bodies corporate may bring a defamation action whether or not it has, or is likely to, incur financial loss as a result of the publication.

**Section 13** changes the right of the Supreme Court on appeal to substitute its own figure for damages for the High Court award, including a jury award.

### **Defences**

The Act abolishes all prior common law defences. It redefines them and makes them statutory. These include the defences of truth, absolute privilege, qualified privilege, honest opinion and consent.

**Qualified Privilege** - The defence of Qualified Privilege is set out in **Section 18** and refers to a statement which was published to a person who either (a) had a duty to receive the information contained in the statement or (b) the Defendant believed on reasonable grounds that the person had a duty or interest in receiving the information and the Defendant had a duty to communicate or interest in communicating the information.

This is similar to the traditional duty/interest test which previously existed at common law for determining whether an occasion of qualified privilege arose. The defence of qualified privilege will fail if the plaintiff proves that the defendant acted with malice.

**Honest Opinion** - A further defence of Honest Opinion is outlined in **Section 20**. It applies if (i) the defendant believed that the opinion was true; (ii) the opinion was based on allegations of fact; and (iii) the opinion related to a matter of public interest. The defence will fail unless the defendant proves the allegations of fact are true, or where he cannot prove they are true, that the opinion is honestly held in respect of those allegations of fact which have proven to be true. The mere fact that the defendant believed the allegations to be true is insufficient.

**Consent** - The defence of Consent is provided for in **Section 25** and applies where a Plaintiff consented to publication of a statement. This may have relevance for customers of financial institutions who have consented to general terms and conditions which may include a consent to publication of certain matters regarding their accounts.

**Section 22** provides that a Defendant may make an offer of amends which can take the form of a correction, an apology and an offer of compensation or damages and costs and new procedures are set out for applying to the High Court to rule on such matters. This may be done before proceedings are even issued. Previously, only an innocent or unintentional publisher of defamatory content could offer to make amends, however the new Act allows the publisher of an alleged defamatory statement to make amends. The offer must be in writing, state that it is an offer to make amends, and state whether it is in respect of the whole statement, or whether it is a qualified offer in respect of part only of the statement or a particular defamatory meaning only. The offer must be made prior to the delivery of the defence in the action.

The offer of an apology will be a mitigating factor in defending such proceedings and such apology will not constitute an admission of liability. The Act also abolishes the need for a Defendant to admit liability in an action for damages for defamation when making a lodgement into Court.

The remedies available under the Act are damages, a Declaratory Order, a Correction Order or an Order prohibiting the publication of a defamatory statement

### **Statute of Limitations**

The Statute of Limitations has now been amended and a defamation action shall not be brought after the expiration of one year or “such longer period as the Court may direct not exceeding two years” from the date on which the cause of action accrued. The extension to a two year period will require a Plaintiff to prove that “the interests of justice require the extension of time and that the prejudice the Plaintiff would suffer would significantly outweigh the prejudice the Defendant would suffer if the time is extended”.

A defamation action shall survive the death of the Plaintiff but only in respect of special damages. Another significant development is that the jurisdiction of the Circuit Court has been increased to €50,000.00 for proceedings brought under the terms of the Act.

As can be seen above, the implementation of the provisions of the Act will depend on the interpretation by the Courts of certain sections and this will be monitored closely over the coming months. If you have any queries in this area please feel free to contact Fachtna O'Driscoll on 021 4278131 or [fachtna.odriscoll@fodlaw.ie](mailto:fachtna.odriscoll@fodlaw.ie) or Larry Power on 021 4278131 or [larry.power@fodlaw.ie](mailto:larry.power@fodlaw.ie).