PLEADING THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ARTICLE 10 CASE STUDIES

Michael Kealey, William Fry Solicitors, October 2003

Introduction

Much of the debate about the European Convention on the Human Rights Act 2003 relates to its likely impact in practice.

It is felt by some, including the Minister for Justice, that Ireland's existing constitutional protections and jurisprudence means that the Convention's practical effect will be limited. The Minister argued, however, at a conference in this venue a number of years ago, that the Convention's impact might be greatest in the area of freedom of expression. He accepted, albeit by implication, that the existing constitutional and common law protections of this right were not all they should be. I agree in part with the Minister. I agree with his views on likely changes to the protections afforded to freedom of expression but not on the wider repercussions of the Convention. Further, I would contend that the impact of the Convention has already been felt on the laws of defamation and privacy.

The impact of the Convention on freedom of expression has been, and will be, direct and indirect. Cases before the European Court will change and consolidate the law here, while Irish judges have (consciously or unconsciously) already developed the law to accord with Ireland's Convention obligations. I will give examples of both.

Constitutional and Convention provisions

The right to freedom of expression is expressly provided for in Article 40.6.1 (i) of the Irish Constitution of 1937; it is also recognised to be one of the personal unspecified rights of the citizen protected by Article 40.3.1.

In addition to the restrictions contained in the provisions of Article 40.6.1 (i), the Constitution contains other explicit and implicit restrictions on the right to freedom of expression. The

most significant of these is the constitutional right to one's good name, guaranteed in Article 40.3.

The right to privacy has been long recognised as an unenumerated right also guaranteed by Article 40.3 of the Constitution: see *Kennedy and Arnold v Ireland* [1988] ILRM 472. In appropriate cases, it also limits or balances the sometimes conflicting right of freedom of expression.

Article 10 of the European Convention on Human Rights enshrines both freedom of expression and the right to good name, while Article 8 covers the sometimes conflicting right to privacy.

The wording of the relevant Constitutional and Convention provisions is set out at the end of this paper.

Constitutional basis

It has perhaps been a failure of Irish legal practitioners and judges that the constitutional basis of the law of defamation, to which considerable lip service is paid, has not been to the fore in its development. The UK does not enjoy the fruits of a written constitution and was long regarded as having the most restrictive libel laws in western Europe. However, recent judicial reform there, prompted, at least in part, by the Convention, means that, for good or ill, the right to freedom of expression is better protected in the UK than on this side of the Irish sea. This divergence increases the likelihood of successful Convention challenges to existing Irish law and has lead to attempts by the Irish judiciary to try to close the apparent gap between constitutional and convention protection. While the decisions here are often characterised as a development of existing Irish constitutional and common law, the reality is that they often follow case law in the UK in which Article 10 arguments have been to the fore.

Two days ago (16 October 2003), the European Court heard a challenge to the procedures which the Irish courts have long adopted when charging juries in defamation cases. Unless long advocated reform is implemented, this will likely be the first of a number of such challenges.

Juries and damages in defamation cases

The only method by which the Irish courts can vindicate the good name of a person who has been defamed is by awarding damages. Neither the court, nor juries, can order a defendant to apologise, to offer a right to reply or, indeed, to admit that they were wrong. The majority of defamation cases are heard by juries in the High Court. The jury determines both liability and quantum. As matters stand, they decide the level of any award with only very limited guidance from the trial judge who cannot, for example, suggest financial parameters for any award or draw comparisons with personal injury damages. In effect the trial judge is limited to telling the jury to be fair to both sides in light of the evidence before them.

De Rossa v Independent Newspapers

In July 1997, a jury awarded the former Government Minister, Proinsias de Rossa, damages of IR£300,000 (€380,921) for a libel in an Eamon Dunphy article published in the *Sunday Independent* in December 1992. The jury had decided that the article falsely alleged that Mr de Rossa was involved in or tolerated serious paramilitary crime, was anti-Semitic and supported violent communist oppression. The newspaper appealed on quantum only, arguing that the award was excessive and disproportionate to any damage done to Mr de Rossa's reputation.

Importantly, the *Sunday Independent* sought to challenge the system under Irish constitutional and defamation law whereby juries determine the size of the award without any realistic guidance by the trial judge. They alleged that this procedure in practice leads to erratic and often excessive awards. In 1997, the Supreme Court had held in *Dawson v Irish Brokers Association* (Unreported, Supreme Court, 27 February 1997) that:

> *"Unjustifiably large awards, as well as the costs attendant on long trials, deal a blow to the freedom of expression entitlement that is enshrined in the Constitution".*

The newspaper sought to rely on U.K. and European case law on Article 10 of the Convention in support of its challenge to Irish defamation practice.

Its arguments were as follows. In 1993, the Supreme Court had upheld an award given to a barrister, Mr Donagh McDonagh, against the Sun newspaper for a very grave defamation. In *McDonagh v News Group* (Unreported, Supreme Court, 23 November 1993) the Supreme Court had determined, however, that the award of IR£90,000 (€114,276) was at *"the top of the permissible range"*. The newspaper argued that it was wholly illogical that a jury should determine the award in the *de Rossa* case without having the benefit of this information. Only if they were armed with knowledge of the Supreme Court's views as to an appropriate award for a serious libel could the jury properly determine the level of compensation to which Mr de Rossa was entitled. The appellants also went on to argue that the jury should also be told the level of awards in personal injury actions so as to make appropriate comparisons with damage to reputation. If such guidelines and procedures were not in place, the legal system did not adequately protect the defendant's right to freedom of expression. The newspaper was supported in this view by two decisions on Article 10 at U.K. and European level.

In *Rantzen v Mirror Group Newspapers* [1993] 4 ALL ER 975 the Court of Appeal in England held that:

> *"to grant an almost unlimited discretion to a jury failed to provide a satisfactory measurement of deciding what was necessary in a democratic society for the purposes of Article 10"*.

Thus, in the U.K., juries were given, where appropriate, both financial guidance and comparisons with personal injury awards.

The European Court of Human Rights endorsed this view in *Tolstoy Miloslavisky v U.K.* [1995] 20 EHRR 442. In that case the Court considered a defamation award of Sterling £1.5m. It stressed that these damages had been awarded by a jury which had received no specific guidelines relating to its assessment of damages. The court concluded that:

> *"Having regard to the size of the award in the appellant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a*

disproportionately large award, the court finds that there has been a violation of the applicant's rights under Article 10 of the Convention".

In the event, the Supreme Court in *De Rossa -v- Independent Newspapers* [1999] 4 IR 432 (by a 4 to 1 majority) felt that, given the serious nature of the libel of Mr de Rossa, the jury were *"justified in going to the top of the bracket"* and that the award was *"not disproportionate to the injury"* suffered by Mr de Rossa. In the majority decision, the Chief Justice stated that the law must reflect a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name. He held that the obligations arising from the provisions of the Constitution and the Convention were met by the existing law of the State which provides that the award must always be reasonable and fair and bear a due correspondence with the injuries suffered with the requirement that if it was disproportionately high, it would be set aside on appeal. On the issue of guidance to juries, accepted in the U.K. and endorsed at European level, the Chief Justice stated:

"While the aforesaid changes of practice where therein described as 'modest' they are not only important but fundamental and radically alter the general practice with regard to the instructions or guidance to be given to a jury as to the manner in which they should approach the assessment of damages in a defamation action. It had been the invariable practice in the past that neither counsel nor the judge could make any suggestion to the jury as to what would be an appropriate award".

While giving due consideration to the approach of the courts in England, he concluded that the giving of figures to a jury, even though by way of guidelines only, would constitute an unjustifiable invasion of the providence and domain of the jury, which would not be countenanced.

The dissenting judge, Mrs Justice Denham, would have reduced the award to Mr de Rossa to £150,000 (€190,500). She favoured giving guidelines to the jury and stated:

"In general, I favour the giving of guidelines to a jury on the level of damages. Information does not fetter discretion. If this is perceived as a more active approach by the judge I believe it is in the interests of justice. The legislature could legislate but in its absence more guidelines would, I believe, help juries in the administration of justice. Guidelines would assist in achieving consistent and comparable decisions, which would enhance public confidence in the administration of justice. There is a benefit to the administration of justice in such an approach. Whilst maintaining at all times the paramount position of the jury in determining the damages, specific information would aid decision making and the maintaining of an appropriate relationship to the awards of damages in other areas. Such information as is deemed appropriate could be given in more specific guidelines".

In a case the year following the *de Rossa* decision, the Supreme Court again upheld the practice of issuing jury instructions which leave the question of quantum at large; *O'Brien v MGN Limited* (Unreported, Supreme Court, 25 October 1999). The court did, however, overturn an award of IR£250,000 (€317,435) as excessive and ordered a retrial on the level of damages.

The decision of the majority of the Supreme Court in *de Rossa* has been criticised. Eoin Quill of the University of Limerick has said:

"The principles (upheld by the Supreme Court) are the traditional rules of defamation at common law and do not differ significantly from the principles applied by the European Courts in Tolstoy which were held to violate Article 10 of the Convention. The bare assertion of proportionality by Hamilton C.J. is surely inadequate if the substantive legal principles are largely the same as those which were held to lack such proportionality in Tolstoy. The constitutional gloss, by way of a backdrop in Irish law, is meaningless if there is no change in the substantive principles".

European Court

The *Sunday Independent* newspaper appealed the decision of the Supreme Court to the European Court of Human Rights (*Independent News & Media v Ireland*).

The State argued that the proceedings were inadmissible because Independent Newspapers had not challenged the legality of the procedure whereby juries are charged before the Irish courts. The court rejected this, on 19 June last, on the basis that the Supreme Court in *de Rossa* had expressly considered and rejected the submission that the applicable principles violated article 40.6.1.

In its substantive defence, the State relied on the latitude given Ireland by the *'margin of appreciation'*, stressed the difference in size of the award against Independent Newspapers and that made in *Tolstoy Miloslavsky* and argued that there were significant differences between the UK and Ireland both in the guidelines given to the jury and in the role of the appellant court.

Independent Newspapers argued that the circumstances of *de Rossa* could not realistically be separated from those in *Tolstoy Miloslavsky*. If the law in England at the time of that case was a breach of article 10, then so must the law in Ireland. On the role of the jury and the appellate court, they contended:

> *"It is destructive of the rights of the applicants under article 10 of the Convention to refuse to allow the original determining body (in this case a jury) to be informed of, still less to take account of, relevant matters, while at the same time to allow those matters to be taken into account by an appeal court, but only in determining whether an award is to be set aside by the very high standard that must be met before that result pertains. The court determined in Tolstoy Miloslavsky that a lack of adequate and effective safeguards against a disproportionately large award is a breach of rights under article 10. A system which not only permits but requires the determining body to be deprived of information relating to matters that are acknowledged to be relevant can never be*

thought to provide adequate and effective safeguards against disproportionately large awards.".

Third Party Intervention

Under Rule 61.3 of the Rules of the European Court, interested parties may, with the approval of the court, provide written observations in support of an alleged victim. A number of newspapers did this and their submissions were accepted by the court. The third parties do not participate in the oral hearing before the court, although the parties can comment upon the submissions.

Decision

While the State's arguments on the *"margin of appreciation"* and on the respective sizes of the awards in *de Rossa* and *Tolstoy Miloslavsky* are superficially attractive, it is difficult to see how the system of directing juries under Irish law differs in any significant respect from that in the United Kingdom which the court ruled was objectionable in *Tolstoy Miloslavsky*. I believe it is highly likely that the dissenting judgement of Ms. Justice Denham in the Supreme Court will commend itself to the European Court and that Irish law will be changed to accord with her views.

***Reynolds* incorporation**

There was an important Irish decision last July which shows the impact that article 10 has already had. In *Hunter & Callaghan v Duckworth & Company and Blom-Cooper*, the High Court recognised, for the first time, that some media reports are privileged, through its adoption of the decision of the House of Lords in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127.

The, as yet unreported, decision of Mr Justice O'Caoimh was delivered on 31 July 2003. Judge O'Caoimh was faced with a preliminary application in defamation proceedings brought

by two members of the Birmingham Six, Gerry Hunter and Hugh Callaghan, against Gerald Duckworth & Co Ltd and the well known English barrister, Sir Louis Blom-Cooper QC. Hunter and Callaghan had alleged that a booklet, written by Blom-Cooper and published by Duckworths, wrongly implied that the quashing of their convictions by the English Court of Appeal did not mean that they were entitled to be presumed innocent. The defendants argued, however, that the words complained of could not give rise to a cause of action because of the protections afforded to them by the Irish Constitution and Article 10 of the Convention.

Counsel for the Attorney General was an *amicus curiae* and recommended that the Court recognise, for the first time, the *Reynolds* principles and the tests formulated, in that decision by Lord Nicholls.

In his decision, Judge O'Caoimh recognised that the courts had to balance the often conflicting rights of freedom of expression and that of an individual to his good name. The need for an appropriate balance was imposed both by the Irish Constitution and the Convention.

To help achieve this balance, Judge O'Caoimh adopted into Irish law the *"flexible approach"* of the House of Lords in *Reynolds*. It was *"a persuasive authority, especially insofar as it considered the common law in the light of the provisions of the European Convention of Human Rights"*. The House of Lords had properly recognised that the role of the press was crucial in a democratic society and that, in certain instances, their duty to inform the public outweighed the rights of individuals about whom defamatory statements were made. This has been categorised in the UK as 'the right to be wrong'.

Each case would be decided on its own facts but, in deciding whether the press ought be protected, the House of Lords laid down ten criteria to be taken into consideration. These include the seriousness of the allegations. The more serious the charge, the more important that it be brought to public's attention, yet the more misinformed the public and the more harmed the individual if the allegation is not true. The Court will also look into what steps were taken to verify facts, the tone of the article and whether it contained the gist of the wronged person's side of the story. The urgency of the matter is an important factor for the Court, as news is often a perishable commodity.

The court would also look at the source of the information and its status. Clearly the closer the source to the subject matter the more the media can properly rely on it, even if the source is wrong.

The significance of the newly formulated defence is that, for the first time, the press can get things wrong, provided they have followed good practice. Previously, once a report was inaccurate, there was little the media could do to avoid financial penalty.

However, this does not give the press "carte blanche". Their actions will be closely scrutinised to see if they meet the law's stringent criteria for the defence. The decision is however a significant step forward. Indeed, the recommendation of the Legal Advisory Group on Defamation, appointed by the Minister for Justice, for a defence of 'reasonable care' mirrors, in statutory form, the ten fold test of the House of Lords in *Reynolds*.

There are ironies in how the defence of media qualified privilege came about. It took an Irish Taoiseach suing a UK newspaper before the House of Lords to produce a decision favouring the media. It has now taken a failed application by a leading English QC to change the law here.

Conclusion

Significant though they are in their own right, the cases of *Independent Newspapers v Ireland* and *Hunter & Callaghan v Duckworth & Company and Blom-Cooper* are likely to be only the first of a number of Article 10 changes to the Irish law of defamation. A number of other libel principles appear open to Convention challenge. These include the inability of defendants in defamation actions to make a lodgment without an admission of liability under Order 22 rule 1(3); this option is open to defendants in all other forms of civil action and the discrepancy is heightened by a decision which suggests this is allowed in the Circuit Court. The presumption of falsity sits uncomfortably with the provisions of Article 10, as does the failure of Irish libel law in theory to distinguish between media coverage of public representatives acting in a public capacity and of private individuals.

However, the Convention is by no means a media charter. There is little doubt (certainly if developments in the UK are considered) that the right to privacy enshrined in Article 8 will

increasingly become a counterweight to Article 10. While long recognised as an unenumerated constitutional right, there have been very few Irish decisions on the extent of the right to privacy and its occasional conflict with free expression. This may be due in part to a reticence by media defendants to allow cases on the point to run to trial, thereby giving the Irish courts the opportunity to clarify and perhaps extend the ambit of the constitutional and convention right. There has been less reticence in the UK and cases have been brought by plaintiffs ranging from a supermodel to a Premiership footballer - the latter to prevent a story about his *'playing away from home'* with a lap-dancer (to use the tabloid vernacular). It is beyond the scope of this paper to detail the impact of Article 8, save to say that its strength is shown by the fact that Michael Douglas and Catherine Zeta-Jones could succeed in what was, in effect, a privacy action when they were in the business of selling carefully controlled images of themselves.

Let the Convention games begin!

RELEVANT CONSITUTIONAL AND CONVENTION PROVISIONS

Article 40.6.1 (i) of the Constitution states:

> *'1. 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'.*

Article 40.3 reads:

> *'1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> *2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen'.*

Article 10 of the European Convention of Human Rights states:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

The right to privacy is expressly protected in Article 8, as follows:

'Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.