

Oireachtas Joint Committee on Justice
Draft Scheme for a Defamation (Amendment) Bill
Opening Statement
by
The Hon. Mr Justice Bernard Barton (retd),

Introduction

Cathaoirleach and Members of the Joint Committee I welcome the opportunity afforded to appear in person to discuss the proposals contained in the General Scheme for a Defamation (Amendment) Bill.

Of these and given the very serious consequences for the administration of justice which will ensue if it is enacted, I am particularly concerned with the proposal to abolish the right to trial by jury in High Court Defamation proceedings set out at head 3.

Expertise

Quite apart from the knowledge and experience gained over nearly 40 years of practice as a Barrister and Senior Counsel with a special interest in the law of Torts, as the judge with responsibility for the management of the Civil Juries Division of the High Court from 2017 to 2021, I had the privilege of presiding over some of the most legally significant high public profile defamation actions of the last decade. It is from this well that the expertise I possess is drawn and informs the contribution offered for your consideration.

The Proposal

The proposal to abolish the legal right to trial by jury in High Court Defamation actions represents a far reaching and fundamental alteration in the law which, if enacted, carries with it serious consequences not only for the legal rights of any citizen or corporation bringing defamation proceedings to recover

damages for injury to his, her or it's good name but also for the administration of justice. The primary consequences of the proposal are inherently undemocratic.

Primary Consequences of Abolition

The primary consequences of abolition of the citizen's legal right to jury trial are twofold, firstly the litigant is deprived of the right to choose whether or not to have the case heard and determined by a jury of fellow citizens and, secondly, as a jury will no longer be required to decide the facts in such cases, the public will in effect be removed from involvement in the administration of justice.

In essence, if the proposal were enacted the democratic input into the decision-making process inherent in a trial by jury would be extinguished.

Moreover, it is in my view imperative that the enormity of what is being proposed in public policy terms is fully appreciated by the members of the Oireachtas. Abolition of the legal right to trial by jury would constitute a fundamental and profound shift in public policy which has long underlain the administration of justice in Ireland both before and after independence. Put simply, the legal right to jury trial lies at the heart of our system of justice.

Public Policy

For centuries it has been established public policy that in proceedings for serious criminal offences and Torts (civil wrongs) fact finding should be carried out wherever possible by a jury of fellow citizens and not by a judge or judges alone (Bench Trial). Indeed, the legal right to trial by jury for non- minor criminal cases was considered so fundamental to the law that it was afforded Constitutional protection by **Art. 38 of the Constitution**.

Rationale

As long ago as the 18th century the famous jurist Blackstone in his Commentaries on the Common Law observed in relation to public policy and the right to trial by jury in civil proceedings that

“ It secures in the hands of the people that share which they ought to have in the administration of justice, and prevents the encroachment of more powerful and wealthy citizens”

In his opinion it was the most effective and independent means by which the civil liberties of the citizen might best be secured and by which the litigant would be protected against judicial caprice. An observation which, in my experience, is as valid today as it was when first made.

The Right to Trial by Jury

The concept of Jury Trial is as old as the law itself, coming down to us from the Vikings and the Normans. This mode of resolving serious disputes was perceived to be the most effective way of ensuring respect for the rights of the subject/citizen and was recognised as a bulwark against the abuse of executive power.

The right to this mode of trial rather than a bench trial was considered so fundamental to securing the civil liberties of the King's subjects that it was enshrined in the ***Magna Carta*** 1215 (the Great Charter). It was enshrined for Ireland the following year in the ***Magna Carta Hiberniae*** 1216 (the Great Charter of Ireland) and has been part of our law ever since.

I have endeavoured to deal in my written submission as substantially as possible with the evolution of the right to jury trial in civil proceedings. Suffice it to say at this juncture that in comparatively modern times the right to jury trial was preserved and declared as a statutory right by **s. 48 of The Judicature (Ireland) Act 1877** and was continued as such after Independence by **s. 94 of The Courts of Justice Act 1924**.

And so it is that the Tort of Defamation is but one of many civil wrongs triable by judge and jury as of right in High Court proceedings. If the proposal is enacted, defamation will be the only wrong in respect of which the right to a jury will be removed completely.

Although restricted by the **Courts Act 1988** in respect of claims for damages for accidental/unintentional injuries, the right is otherwise preserved and subsists for all civil wrongs recognised by the law at the time of the passing of **The Courts of Justice Act 1924**

Stated Objective of the Proposal

As discussed in my written submission, following an analysis of the contributions made during the public consultation process the review identified a number of matters to be dealt with amongst which the first was

how best the law on Defamation could be amended to avoid the risk of disproportionate and unpredictable awards and legal costs having ' a chilling effect' on the right to freedom of expression, particularly on investigative journalism or public debate on issues of public interest.

Having reached a conclusion based on awards in a tiny minority of cases, two of which predated the coming into force of the 2009 Act, the review recommended the abolition of the right to trial by jury as the best means of achieving the stated objective. The premise on which the recommendation is based is legally flawed and factually incorrect; it has been overtaken by recent developments in the law of a fundamental nature.

Flawed Premise

The approach to the question / issue identified and the conclusions on which the recommendation is based are misconceived, incomplete, distorted by factual inaccuracy, fails to take into account a significant development in the law which has since occurred and is consequently profoundly flawed.

The perceived problem/ issue and the approach thereto is based on examples of cases which are no longer relevant, these having been surpassed by the significant development in the law of defamation which has taken place since the public consultation process ended, particularly the decision of the Supreme Court in *Higgins v The Irish Aviation Authority* [2022] 2 ILRM 122.

The seminal importance of the decision in the *Higgins* case is that it comprehensively addresses the risk of disproportionate awards occurring in future defamation cases by setting out parameters/ guidelines which must hence forth be given to juries to assist them in reaching a proportionate and reasonable award fair to both parties.

Guidelines on Damages; Role of the Judicial Council

The Oireachtas has already addressed the issue of achieving proportionality in the level of awards in proceedings for civil wrongs involving personal injuries by empowering the Judicial Council to draw up appropriate guidelines; these were drawn up by the Council and now have the force of law. The purpose of the guidelines is to provide guidance on proportionality in any given award and to ensure improved consistency of awards, in the process making award levels more predictable.

The effect of the decision in *Higgins* is designed or aimed at achieving the same objective in Defamation actions. While the judgement of the Court is binding on the High Court and the guidelines/ parameters within which future defamation awards will be assessed if, nevertheless, it is considered desirable that the parameters/ guidelines set out in *Higgins* should be put on a statutory basis there is no reason why this could not be done through the Judicial Council in the same way as guidelines were set out for personal injury cases, with regard being had to the decision in *Higgins*. Nothing of this fundamental development in the law is reflected in the conclusions reached or the premise for the recommendation.

Unique role of Juries in Defamation

Finally, a word with regard to the role of the jury in a defamation action. The nature of the tort of defamation is unlike other civil wrongs which are visited on the person, in defamation the wrong is committed by publication of a defamatory statement or statements to others, to the public. It is amongst others that an injury to a person's constitutional right to a good name occurs.

It is for this reason that the Supreme Court has observed on more than one occasion that the jury are in a unique position to decide whether or not a statement is or is not defamatory in the eyes of reasonable members of society, who better than the representatives of society, the jury to make the decision.

Conclusion

It is not just the right of the citizen but also at this role, the role of the public in the administration of justice, a particularly unique role in defamation at which the proposal strikes.

At the very least, if only out of respect for the Supreme Court, the parameters/ guidelines for juries in all future High Court Defamation cases should be given a reasonable opportunity to take effect before the drastic step of abolition is adopted.

Case duration/ Legal Costs

Finally, the suggestion that cases would be significantly shortened and legal costs reduced by abolition does not withstand careful scrutiny. Cases tried without a jury in this jurisdiction and the experience in England and Wales since the presumption to jury trial in Defamation (the law was different to Ireland) was removed in 2013, would suggest otherwise; if anything legal costs

have risen since abolition in that jurisdiction, the most recent example being ***Vardi v Rooney*** [2022] EWHC 2017 QB,

I would be pleased to expand on any aspect of my submission or otherwise as may arise during discussion to assist the Committee in whatever way I am able to do so.

Bernard Barton.