[IE] High Court rejects application to remove court report from media website

IRIS 2016-4:1/18

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On 8 February 2016, the High Court delivered its judgment in Philpott v. Irish Examiner Limited, concerning (a) the circumstances where a court will order the media to cease further publication of a defamatory statement, and (b) the defence of absolute privilege for "fair and accurate" court reporting.

The case arose following publication of two articles by the Irish Examiner newspaper in 2015, headlined "Former CEO loses case against hospice," and "Ex-Marymount Hospice executive's legal case resolved." Both articles reported on a court action taken by a hospital official against his employer, following the official's dismissal. The articles included the statement that the official "was dismissed from his post in February after seven months for 'significant interpersonal difficulties' between him and other staff members."

The hospital official initiated defamation proceedings against the newspaper, arguing that the articles were defamatory, and sought "removal of the articles from the internet." The official argued that "it is proving difficult for him to get employment." The official sought an order under section 33 of the Defamation Act 2009, which provides that a court may grant an order prohibiting the publication, or further publication, of a statement where, in the court's opinion, (a) the statement is defamatory, and (b) the defendant has no defence to the action that is reasonably likely to succeed.

In the High Court, Justice Max Barret first examined section 33, noting that because of the "premium placed by our society on freedom of speech," section 33 "merely" provides that the court "may" grant an order, "even when the court is of the opinion that an insensible defamatory statement" is published. The judge then laid down a test for the granting of a section-33 order: in the opinion of the court: (1) is the statement complained of defamatory?; (2) does the defendant have a defence to the claim of defamation?; and (3) is that defence reasonably likely to succeed?

Importantly, Justice Barrett held that there is now an "even stronger" threshold for plaintiffs to satisfy under section 33 than existed under the pre-2009 law. Under section 33, the court must be of the opinion "that an impugned statement 'is defamatory', not that it is arguably or even unarguably so, but that, in the

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court's opinion, it 'is' so." Justice Barrett added that given the "very height of the that threshold," and the legal costs involved, section 33 orders would only be available to "the very rich" and "those who have been so demonstrably and disgracefully defamed that the justice of their case cries out for injunctive relief." Notably, Justice Barrett also held that "there is nothing in the technology-neutral wording of s.33 to suggest that Internet publications fall to be treated differently from other publications when it comes to the granting of a s.33 order."

The Court then examined section 17 of the 2009 Act, which provides a defence of "absolute privilege" for "a fair and accurate report" of court proceedings. Justice Barrett approved 13 principles from the textbook Gatley on Libel and Slander (12th edition) on "fair and accurate" reporting, as "good law in this jurisdiction." Notably, Justice Barrett rejected the argument that "a court reporter needs to be present for any, let alone every, aspect of court proceedings on which s/he reports," and stated that "this proposition is entirely rejected by this Court."

Justice Barret stated that he saw "nothing in this text but an abridged, condensed or summarised account of the trial and appellate proceedings." The judge concluded that both articles were within the "liberality and latitude that is afforded court reporters and court reports pursuant to, and consistent with" the defence of absolute privilege of fair and accurate reports of court proceedings. The Court then applied its three-step test, and concluded that neither of the articles was defamatory, and the defence of absolute privilege was open to the Irish Examiner in respect of both articles. The Court therefore rejected the hospital official's application.

Philpott v. Irish Examiner Limited [2016] IEHC 62

http://www.bailii.org/ie/cases/IEHC/2016/H62.html

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