

## **NewsBrands Ireland**

### **Submission on Review of the Administration of Civil Justice**

#### **INTRODUCTION**

NewsBrands Ireland, formerly National Newspapers of Ireland, represents seventeen national newspapers - print and online - with a combined weekly print circulation of over three million copies and an estimated 300 million page/screen views online per month.

The organisation promotes the essential role of the media in a democracy and the need for a free, vibrant and strong indigenous press to keep the public informed. That includes reporting on proceedings before the Irish courts.

Consequently, NewsBrands Ireland (“NewsBrands”) welcomes the opportunity to contribute to the Review of the Administration of Civil Justice.

This submission will initially focus on paragraph (d) of the areas identified by the review group. This is “*the use of electronic communications including e-litigation and possibilities for making court documents (including submissions and proceedings) available or accessible on the internet*”.

It will then move on to matters which, in NewsBrands’ view, would improve procedures and practices in media cases, especially defamation proceedings, and, thereby, achieve more effective and less costly outcomes for court users (paragraphs (a) and (e)).

#### **OPEN JUSTICE**

Article 34.1 of the Irish Constitution provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public”.

The Irish Courts have long recognised the role of the media in representing the eyes and ears of the public when reporting on court proceedings. The courts should therefore ensure that members of the press obtain prompt access to the information needed to ensure the ability to report on court proceedings and to do so accurately.

However, at present, documents which are opened in court are often not formally read through by counsel, but instead are taken as read or extracts are quoted. Even if they are opened in court that can be done hurriedly as the parties and judge have access to physical copies of the material in question. These factors, and others, give rise to difficulties and the risk of error in reporting on the proceedings. Any such errors are in no one's interests.

Court reporters are also hindered by the Practice Direction which prohibits access to documents filed in the Central Office of the High Court save for the parties to the proceedings and their legal advisors.

As an important objective of the relevant constitutional provision is to provide an open, accessible and accountable administration of justice and courts process, NewsBrands submits that bona fide members of the press should have access at the earliest opportunity to all material that has been filed in the relevant court offices or opened in court or considered by a court. This should be done whether the documents are filed in the relevant court office (e.g. the Central Office of the High Court) or provided to the court in electronic or physical format.

In the event that the review group was to decide that court documents (including submissions and proceedings) were to be made available or accessible on the internet, NewsBrands would suggest that the Irish Courts adopt a system similar to the online PACER (Public Access to Court Electronic Records) system in the United States of America. There, to access electronically filed court papers, persons must register to obtain a PACER account and then pay a modest fee per page of material copied or downloaded, which is capped for lengthy documents. There are currently more than one million PACER users which include attorneys, government agencies, researchers, educational and financial institutions, commercial enterprises, the media, and the general public. It is widely acknowledged that the PACER system works well and has led to a greater understanding of the court process and better reporting of proceedings.

There is a similar system in place across the courts – civil and criminal – in England and Wales. However, access is limited to parties, their representatives and the media. While this is a largely online system, the rationale behind it was to give the media the tools to enable them properly to report on the workings of the court, especially in the age of electronic and digital communications. While some reservations were expressed about the potential for prejudice of court proceedings, in advance of its establishment, those fears have proven unfounded. No trial – civil or criminal - has been inhibited or has collapsed as a consequence of the press having access to this material. Indeed, it is recognised by the UK's Court Service that the opening up of hitherto inaccessible material has led to a much greater understanding of the courts process and of the legal system.

Thus, with the Constitutional imperative in mind, a presiding judge should ensure that bona fide members of the press are provided with a copy of all material - including but not limited to pleadings, motions, affidavits and exhibits, written submissions, correspondence, expert reports, photographs and videos -whether filed or opened in court or considered by the court.

A bona fide member of the press is a person who is in court for the purpose of reporting on the proceedings for an organisation that is subject either to the Press Council of Ireland and the Code of Practice for Newspapers and Magazines or the Broadcasting Authority of Ireland and the Broadcasting Act, 2009.

The provision of documents to the press would, of course, have no bearing on whether any particular proceedings were heard in open court or in camera, or whether there were restrictions on reporting. It is understood and acknowledged that these are matters to be determined by the presiding judge in accordance with the Constitution, statute and applicable laws.

Further, journalists reporting on court proceedings are subject to a range of laws including but not limited to: the law on contempt of court; individual statutory restrictions on court reporting / the media covering a range of issues; the Data Protection Act 1988, as amended; the Freedom of Information Act 1997, as amended; the European Convention on Human Rights Act 2003 and equality legislation. All journalists must satisfy themselves that their reporting and associated actions do not breach any law.

### **PRE-ACTION PROTOCOLS**

NewsBrands believes that the introduction of pre-action protocols would assist in the early, efficient resolution of litigation.

Part 15 of the Legal Services Regulation Act 2015 provides for the introduction of pre-action protocols in clinical negligence actions. NewsBrands suggest that pre-action protocols should also be introduced for defamation actions, and other similar claims, such as alleged breach of privacy. The introduction of pre-action protocols would assist in early consideration and identification of the issues in dispute between the parties. They would be of benefit to both parties to the litigation. From the perspective of Plaintiffs in defamation actions, pre-action protocols would facilitate an early resolution and allow for early publication of an apology (where agreed by the Defendant). From the Defendant's perspective, they would assist in reducing the very significant cost burdens which currently must be factored in to the defence of any litigation by the Defendant in a

defamation action. There would also be an important and corresponding reduction in claimant costs.

We would suggest that any pre-action protocols would provide for consideration of alternative dispute resolution methods, such as mediation. Even in the sometimes fraught atmosphere of defamation claims, mediation has proven effective in the UK.

### **CASE MANAGEMENT**

NewsBrands would welcome the introduction of rules providing for active case management in relation to civil litigation, including defamation claims.

NewsBrands and its members believe that active case management by the Court, of a type seen initially in the Commercial Court and subsequently adopted in other areas, assists in efficiently managing litigation. It leads to early identification of the issues in dispute and can often assist both parties to the litigation in considering on an early basis whether a mutually acceptable resolution of the proceedings may be possible. In the event that there is no early resolution of the proceedings, case management assists in narrowing down the issues to be dealt with a hearing, thereby assisting with costs reduction.

As the pre-trial procedures in defamation proceedings are not as sophisticated as those in equivalent civil actions, a recurring difficulty for the parties and, especially, for the judge with seisen of the civil jury list, is the inaccurate estimate of the length of trial should it go ahead. This can have significant knock on effects for other actions in the list and those effects are exacerbated with the involvement of juries. Greater case management from an early stage would ameliorate those difficulties.

### **PRE-TRIAL MOTIONS**

NewsBrands would welcome any steps which the Review Group might deem appropriate in order to encourage the utilisation of pre-trial Motions with a view to narrowing down the issues in dispute or to be resolved at hearing. For example, in the context of defamation claims, the deciding of preliminary issues or the use of pre-trial Motions can assist in the early resolution of proceedings. For example, in some cases the issues in dispute may ultimately just be whether a particular publication has a defamatory meaning, or alternatively for example whether the Plaintiff was identified in the publication. There may be cases where it is possible to isolate and deal with issues of that type prior to progressing to a full plenary hearing, thereby ultimately reducing the time and costs associated with the litigation.

As with other causes of action, defamation cases should be certified as ready for hearing before a notice of trial is served. At present, many actions are set down for trial in the civil jury list immediately after delivery of the defence but while significant matters, especially

in relation to discovery, remain unresolved. This often leads to unsatisfactory requests for adjournments by plaintiffs and defendants. Difficulties caused by the lack of certification are heightened in defamation cases by the usually relatively short period between the call over and the commencement of the civil jury term.

We do understand and accept that Court Rules, and the civil justice system generally, do already allow for the hearing of pre-trial issues and issuing of pre-trial Motions. We raised this issue here in the context that we believe that it could be of assistance if the Review Group identifies any appropriate steps or changes which may encourage the parties (whether Plaintiff or Defendant) to utilise such steps in appropriate circumstances if it would assist with the efficient progression of the litigation.

NewsBrands made a submission to the current ongoing Review of the Defamation Act 2009. In that Submission, NewsBrands submitted that a provision should be introduced into Irish law similar to the provisions of the Defamation Act 2013 in the UK which (in summary) provides that a publication is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the Defendant. This has led to a situation where NewsBrands understands from UK practitioners that the issue of whether “serious harm” has been caused to the Defendant is often dealt with as a preliminary issue in UK proceedings, and that the decision by the Court of that preliminary issue often in itself leads to the prompt resolution of the proceedings without further progression. While we appreciate that there is currently no provision in Irish law similar to Section 1 of the Defamation Act 2013 in the UK, we mention this as an illustration of where the hearing of a preliminary issue by way of pre-trial Motion can lead in the UK to the early resolution of defamation litigation.

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