



Freedom of expression was not properly protected under Irish court procedure

In today's **Chamber judgment**¹ in the case of **Independent Newspapers (Ireland) Limited v. Ireland** (application no. 28199/15) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The applicant company is the publisher of the Irish daily newspaper, the *Herald*, previously known as the *Evening Herald*. In 2004 the *Evening Herald* published a series of articles about a public relations consultant, Ms L., reporting on rumours of an intimate relationship between her and a Government minister. Ms L. successfully sued the applicant company for defamation, and a jury awarded her damages of 1,872,000 euros (reduced to 1,250,000 euros by the Supreme Court on appeal). The applicant company complained to the European Court that the award had been excessive and had violated its right to freedom of expression.

Unreasonably high damages for defamation claims can have a chilling effect on freedom of expression, and therefore there must be adequate domestic safeguards so as to avoid disproportionate awards being granted. The Court found that the safeguards had not proved effective in this case. At first instance, this was because domestic law prevented the judge from giving the jury sufficiently specific instructions about an appropriate amount of damages for the libel. On appeal, although the award had been overturned and replaced with a lower amount after a fresh assessment, the Supreme Court had not given sufficient explanations as to how the new amount had been calculated, and it had not addressed the domestic safeguard at first instance and, in that context, the strict limits on judicial guidance to juries.

Principal facts

In November and December 2004, the *Evening Herald* published a total of eleven articles concerning the awarding of Government contracts to a public relations consultant, Ms L.. The articles referred to rumours of an intimate relationship between Ms L. (who was married with two children) and a Government minister, Mr C., and suggested that the awarding of the lucrative public contracts to Ms L. had been improper. The case became the subject of widespread media coverage.

Ms L. sued the applicant company for defamation. The jury hearing the case found that the newspaper had indeed defamed Ms L. by alleging the existence of an extra-marital affair between her and Mr C.. Ms L. was awarded 1,872,000 euros (EUR) in damages by the jury, plus costs. Following an appeal on the issue of damages only, a majority of the Supreme Court lowered the amount to EUR 1,250,000. A third judge would have preferred to return the case to the High Court for a fresh jury assessment and indicated that, were the Supreme Court to substitute the award, he would assess damages at EUR 1,000,000.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Complaints, procedure and composition of the Court

The applicant company complained of a violation of its rights under Article 10 (freedom of expression). It claimed that the award of damages had been disproportionately high, reflecting the inadequacy of domestic safeguards designed to prevent unreasonable awards for defamation.

The application was lodged with the European Court of Human Rights on 29 May 2015. Third-party comments were received jointly by NewsBrands Ireland and Local Ireland, bodies representing national and regional newspapers respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,

Erik **Møse** (Norway),

André **Potocki** (France),

Yonko **Grozev** (Bulgaria),

Síofra **O’Leary** (Ireland),

Carlo **Ranzoni** (Liechtenstein),

Lətif **Hüseynov** (Azerbaijan),

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

[Article 10 \(freedom of expression\)](#)

The Court noted that the award of damages had amounted to an interference with the freedom of expression of the applicant. Furthermore, the Court held that the interference had been carried out with the legitimate aim of protecting Ms L.’s reputation and also her right to private and family life; and that it had been consistent with Irish law.

The main question for the Court was therefore whether the interference had been “necessary in a democratic society”. The interference complained of was not the applicant’s liability for defamation, it having accepted the jury’s verdict in this respect and subsequently published an apology to Ms L. The Court too accepted that the defamation of Ms L, which had formed part of a sustained and unusually salacious campaign in the newspaper, had been a very serious one. It was instead the amount of damages awarded that was the basis for the complaint. The issue for the Court was therefore whether there had been adequate domestic safeguards to prevent the granting of a disproportionate award. The Court examined the sufficiency of the safeguards both at first instance, and on appeal.

First instance

The Court noted that the judge had given directions to the jury to assist it with the calculation of damages. These had included an explanation of the function of damages in defamation, and the relevant factors to be taken into account. However, the judge had not suggested an appropriate figure or a range of possible figures, on the grounds that he was prevented from doing so under the Supreme Court’s case law.

The Court observed that the use of juries to decide defamation cases is entirely legitimate under the Convention. Furthermore, a considerable degree of flexibility may be necessary to enable juries to assess damages tailored to the facts of a particular case.

Nevertheless, while the jury’s assessment of damages for defamation may be inherently complex and uncertain, that uncertainty must be kept to a minimum. The nature, clarity and scope of the directions provided to the jury are key in this regard. Due to the restrictions imposed by the

Supreme Court's case law, the trial judge's directions had remained inevitably quite generic. While the jury had not been left with an unlimited discretion, the directions had not been such as to reliably guide the jury towards an assessment of damages bearing a reasonable relationship of proportionality to the injury sustained to Ms L.'s reputation and private and family life.

The Court therefore held that the safeguard at first instance had proved ineffective.

Appellate review

The Supreme Court had set aside the award given at first instance. To this extent at least, the appellate safeguard had been effective. However, the process for arriving at the new award had also been part of the interference complained of by the applicant. The amount of the substituted award had been higher than any which had previously been allowed, or granted, on appeal in Ireland, and the award had the capacity to act as a benchmark in the future. The exceptional substitution of a new award by the Supreme Court, and its exceptionally high nature, had pointed to a need for comprehensive reasons explaining the final figure.

The judgment of the majority of the Supreme Court had referred to the serious nature of the libel, the factors aggravating the injury to Ms L.'s reputation and rights, and some Convention case law relating to the need to balance the relevant rights. However, the Supreme Court had not explained how it had arrived at a figure of EUR 1.25 million, apart from re-applying the principles of the Supreme Court's case law and comparing (with caution) a previous defamation case.

Though a jury's assessment of damages in libel cases may be inherently complex and uncertain, judicial control exercised at appellate level should, through the statement of reasons for an award, reduce uncertainty to the extent possible. However, further clarification was lacking regarding why, in particular, the highest ever award was required in a case that the Supreme Court had not categorised as one of the gravest and most serious of libels.

Furthermore, the Supreme Court had not addressed the ineffectiveness of the safeguard which had meant to prevent a disproportionate award being made at first instance – namely, the judge's directions to the jury. Yet the failure of this safeguard had had significant repercussions. The applicant had had little option but to lodge an appeal in order for the calculation of damages against it to involve an assessment of proportionality. This process can often entail significant costs and delay, a fact emphasised by other defamation cases both concluded and pending. Furthermore, at the time of this case, the usual practice after such an appeal had been to have a re-trial before a new jury. Finally, unpredictably high awards are considered capable of having a chilling effect on the media, and the potential chilling effect on the Irish media of the system just described could not be regarded as devoid of any foundation.

In light of these shortcomings, the Court also found that, despite the reduction in the award of damages at appellate level, the lack of relevant and sufficient reasons meant the safeguard at appellate level had also proved partially ineffective.

Concluding remarks

The Court stressed that jury trials are an entirely legitimate way to assess defamation cases, and that it was not the Court's task to call into question that legislative choice or take the place of the national court. Rather, the issues were the nature and extent of the directions given to juries to protect against disproportionate awards, and, in the event that an appellate court engages in a fresh assessment, the need for relevant and sufficient reasons for the substituted award.

The Court also recognised that the proceedings in question had been conducted under a legal regime that has since changed with the adoption of the Defamation Act 2009. It welcomed the comments of the majority of the Supreme Court in this case, which noted that under the new legislation it is now possible for the trial judge to give more detailed instructions to a jury as to the assessment of damages.

Just satisfaction (Article 41)

The Court held that Ireland was to pay the applicant EUR 20,000 in respect of costs and expenses. It did not award the applicant company any pecuniary or non-pecuniary damages.

The judgment is available only in English.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

George Stafford (tel: + 33 3 90 21 41 71)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Inci Ertekin (tel: + 33 3 90 21 55 30)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.