

Date: 18/05/2015

Name: Thomas Murray

Word Count: 3,275 (excluding references)

## **Defamation and Honest Opinion**

"Let me never fall into the vulgar mistake of dreaming that I am persecuted whenever I am contradicted"

Ralph Waldo Emerson, *Emerson in His Journals*

In the Committee Stage of the Seanad Eireann debate on the Defamation Bill (2006), in late February, 2007, Senator Norris takes issue with subsection 18(3)(a) of the bill (Debates.oireachtas.ie, n.d.). At that point it was section 18 that provided for the defence of honest opinion, and (3)(a) specifically stated:

"Where a defendant pleads the defence of honest opinion and the opinion concerned is based on allegations of fact to which *subsection (2)(b)(i)* applies, that defence shall fail unless the defendant proves the truth of those allegations, but the defence shall not fail by reason only of the defendant's failing to prove the truth of all of those allegations if the opinion is honest opinion having regard to the allegations of fact the truth of which is proved."

After referring to the concept of honest opinion as a "libeller's charter", the Senator requests that then Minister McDowell return the subsection in question for redrafting into intelligible English, asking rhetorically:

"How in the name of God could an ordinary person or a qualified lawyer understand this collection of gobbledegook? If I read that in a Trinity essay, I would fail the student. It is a collection of suspended clauses and deferred premises. It is ghastly."

My English is not in the Senator's league - he has, after all, no problem with Joyce - so I must respectfully defer. Since I am not altogether convinced that the final draft of the particular subsection, as stated in section 20 of the Defamation Act of 2009 (Irishstatutebook.ie, n.d.a), is that much improved, I went in search of simpler explanations of both it and the defence of honest opinion as a whole.

Esoteric discussions of lexical semantics aside, the Seanad debate actually provides a good starting point in attempting to understand the legal rationale underpinning the defence. After acknowledging that the troublesome subsection was based on a section of the 1961 Act, Minister McDowell goes on to make some useful clarifying remarks. He states that the previous term used, "fair comment", was a poor one since the "issue of fairness did not arise". He notes that:

"If one makes a defamatory comment by reference to facts that are not in contest or can be proven to be true, holding it as an honest opinion is a full defence."

McDowell disagrees with Norris's "libeller's charter" characterisation, asserting that "opinion does not defame"; that providing "one is honest, one can be intemperate and prejudiced"; and that "the proposition that honest opinion on the basis of facts, proven or accepted, should be the subject of a defence" is a valid one which should not be tampered with or further diluted. The Minister goes on to outline what subsequently became section 21 of the 2009 Act ([Irishstatutebook.ie](http://Irishstatutebook.ie), n.d.b), which deals with distinguishing between allegations of fact and opinion. His remarks essentially mirror the final language.

Kieron Wood's site, [irishbarrister.com](http://irishbarrister.com) (Wood, K., n.d.), provides a comprehensive but comprehensible explanation of defamation, including the ingredients of an actionable defamatory statement - it must be published, it must refer to the complainant, and it must be false - and an accessible definition of the honest opinion defence. Wood states that the defence is available providing that:

"at the time of publication, the defendant believed in the truth of the opinion (or thought that its author believed it to be true), the opinion was based on proven (or honestly believed) allegations of fact that were known to those to whom the statement was published, or the opinion was based on proven (or reasonably likely) allegations of fact which were privileged and the opinion related to a matter of public interest."

Wood also details the criteria to be used in distinguishing between allegations of fact and opinion.

Kealey (2014), in an article on the enormous cost of taking a defamation case, while noting the provision of alternative court reliefs with the introduction of the 2009 Act, such as declaratory and correction orders, and mentioning the role of the Press

Ombudsman, argues that "vindication of one's good name through the courts arguably remains the prerogative of the very rich and the very poor." In stating that there has been little practical change to the principal defences, he specifically mentions the Denis O'Brien case.

O'Brien's landmark libel case against the *Irish Daily Mail* was important for two reasons: it was the first significant media defamation case presented to a High Court jury since the Defamation Act 2009 became law, and it was the first time a jury would be considering the new honest opinion defence (RTE.ie, 2013b). O'Brien claims that the article in question, titled "Moriarty about to report, no wonder O'Brien is acting saintly in stricken Haiti", and written by journalist Paul Drury, "accused him of hypocrisy motivated by self interest." (RTE.ie, 2013c). O'Brien disagrees with Drury's representation of his continually "popping up" in RTE news reports about the Haiti earthquake as a PR exercise, stating he had spent less than ten minutes in the company of reporter Charlie Bird, and noting that prior to the earthquake he had visited Haiti - where his telecommunications company Digicel has substantial interests - every five to six weeks, and 59 times since. O'Brien, in labelling the article as insulting and offensive, states that it also betrays a shocking lack of knowledge about economic development.

Michael Smith (2013), in an in-depth, and less than flattering, profile of O'Brien for *Village Magazine*, refers to Drury's use of the phrase "ingenious feint" in describing O'Brien's RTE appearances as an attempt to burnish an image "set to be tarnished by a pending report of the Moriarty tribunal", but also notes O'Brien's contention that, contrary to Drury's claim that Moriarty was "about to report", publication was not imminent, and that anyone with knowledge of the tribunal could have told Drury that. Anthony Sheridan (2013a), in a *Public Inquiry* blog post, notes Senior Counsel Jim O'Callaghan's dismissal of any suggestion that O'Brien was "involved for his own self-interest" as "unfair and grossly defamatory". Sheridan is willing to concede only the possibility of Drury having been unfair, and goes on to write:

"If the precedent of being accused of hypocrisy motivated by self-interest is established we will see a stampede of politicians into the courts claiming damages against the media, ordinary citizens and their fellow politicians."

O'Brien, under cross-examination by Oisín Quinn, SC, for Associated Newspapers, acknowledges that they had helped reporter Bird get on a flight to Haiti, provided him with a car, driver, security and more, but states "they were trying to help everyone."

(RTE.ie, 2013a). He denies living in Malta to avoid paying taxes, stating that he paid all taxes owed in Ireland and elsewhere. O'Brien does agree with Quinn that five largely positive new articles, published in the *Daily Mail* prior to the contested Drury piece, were factual in nature.

Helen Bruce's (2013) *Daily Mail* article provides some interesting copy on the trial proceedings, particularly with respect to cross-examination by Paul O'Higgins SC, for Mr O'Brien. In giving evidence, Drury likens his role, and that of other columnists, to soccer pundits such as Dunphy and Giles, and notes that they "draw on their own knowledge and expertise of the world of football. As a commentator on public affairs I am doing exactly the same". He hadn't called O'Brien but he wouldn't have called Taoiseach Enda Kenny either before he wrote about him. He claims he was "meticulous" in his research, and during cross-examination tells O'Higgins that there no "factual errors identified" in the piece by O'Brien's solicitors which was "on a matter of legitimate public interest on matters in the public domain." Drury corrects Higgins on what precisely he had said, - which he acknowledges as a "serious allegation" - specifically that he believed that "Denis O'Brien decided to use his presence in Haiti as part of a PR offensive to help portray him in a different light to the very dark and unsavoury light he was about to be presented in by the Moriarty Tribunal". Drury states that "in a democracy" he is "entitled to express" his "opinion on matters of public importance", that the media's role is to entertain, inform and stir public debate, and that of those he, as a columnist, was concerned with the latter. O'Higgins and Drury debate the journalist's characterisation of the relationship between Bird and O'Brien, and more specifically, the interactions between the two in Haiti. O'Higgins objects to Drury's interpretation, which insinuated that O'Brien had "hooked up" with Bird, and noted that the reverse was true, while Drury in reply suggests that a requested interview "could not happen if Mr O'Brien did not take a conscious decision to facilitate him." Drury says that he thought "anyone who saw this on television and did not think it remarkable" that O'Brien "gave so much time to Charlie Bird would be naive." He adds that his piece "was not designed to misrepresent or damage Mr O'Brien" and that he "genuinely tried to be balanced and to be fair." Bruce's article also contains some detail on the evidence provided by Paul Field, former editor-in-chief of the *Irish Daily Mail*, who testifies that it was his decision, after discussion with Drury, to put the article in the paper under a headline he himself wrote and that they took "great pride in using columnists who have strong opinions, even though those opinions may not be those of the newspaper itself". In disagreeing with the claim that the article had been motivated by malice, Drury states that "he bore Denis O'Brien no animus whatsoever" (Yor.ie, 2013). "This is

about me writing about something of enormous public interest and being cynical about the motives of a very wealthy and powerful man and about what he chose to say. I believe I am entitled to do that and to come to any other conclusion would be a travesty." Drury says the idea for the article came to him after seeing the RTE interview with Bird. He disputes O'Brien's claim that there were several factual errors, stating that O'Brien was in fact a tax exile in Malta, and had paid no tax on the millions received from the Esat Digifone sale, before admitting he had incorrectly labeled O'Brien as a multimillionaire when he was "in fact a multibillionaire".

In the end a jury of six men and six women found that Denis O'Brien had been defamed by the article and awarded damages of €150,000 (Gartland, 2013). They agreed that the piece was the writer's honest opinion, but decided it was not an opinion based on fact and was not in the public interest. Gartland provides a good summary of the closing submissions by both sides. Quinn SC, for Associated Newspapers, tells the jury that being asked "to stand up for the right of someone to express his view." He notes that the jurors did not have to agree with what Drury's article said but just that "he had a right to say it." Quinn notes "10 facts" in the article that were "right and true" and upon which Drury's article was based and, while conceding that the article was "sarcastic, cynical, with some attempt at humour", states that it was patently an opinion. He asks rhetorically if the jury thinks public figures should be taken at "face value". O'Higgins SC, for Mr O'Brien, notes the emphasis placed on the desirability of comment and "big people being brought to book" but states that comment that couldn't be trusted was useless, and went on to claim that "no research of any kind" had been done before the article's publication, and that because the underlying facts were not true the defence of honest opinion must fail.

Anthony Sheridan (2013b), in a *Public Inquiry* post, is one of those astonished at the jury decision and cannot comprehend how the article was not in the public interest, stating that it was in connection with the Moriarty Tribunal report that the article was written, and that O'Brien had "very serious adverse findings made against him" in that report. Sheridan suggests there is more than a little hypocrisy in O'Brien's post-trial contention that everyone has a right to their good name, especially given O'Brien's harsh comments about Justice Moriarty after the tribunal report was published, including his not being "up to the job", and asks somewhat caustically if a jury would consider those comments as just opinion or defamatory. Sheridan feels that the decision is deleterious to press freedom, and after stating that editors and

journalists will be, prior to expressing opinions, glancing over their shoulders to "check for the shadows of very powerful individuals", concludes that many of them will likely "decide to cower before the shadows."

In addition to discussing the specific award of damages against the *Irish Daily Mail*, M. Smith (2013), claims that O'Brien is "exercising an extraordinary chilling effect on journalism and journalists." Smith goes on to detail several battles between O'Brien and multiple newspapers and journalists including Vincent Browne and Elaine Byrne. However in respect of the particular jury decision Smith admits:

"That Denis O' Brien was genuinely concerned for Haiti and not self-promoting may not suit liberals or begrudgers but it seems to have been the facts, and it explains the finding."

John Maher (2013) disputes that the O'Brien decision is the "death knell for press freedom" and states that the facts do not support those who "fear that the verdict means journalistic freedom of expression has been curtailed." He stresses the importance of the jury element, noting that they spend "hours studying witnesses in the box, assessing their credibility by their words and their demeanour under questioning" and, because of this, "legal systems that use juries place a premium on their views". Maher feels that O'Brien, on screen in Bird's interview from the airport in Haiti, looked "very much like a man shocked by the devastation around him and determined to help" and "did not talk about himself, but called on the EU to send aid quickly, before hurrying away." Maher goes on to point out that only one of the three charity event photographs, produced in support of the allegation that O'Brien was in constant pursuit of a high profile, had actually been widely published and the three "did not look like a treasure trove of evidence." Maher believes the claim of O'Brien constantly "popping up" on broadcasts was also unsupportable as "in fact he was on air only a couple of times, and relatively briefly". Maher reiterates that the "factual foundation is vital" to the defence of honest opinion, which "is not designed to protect opinions about people based on misapprehensions or fallacies."

Maher struggles to understand the jury view that the *Irish Daily Mail* article was not on a matter of public interest, labelling it a "conundrum" and stating that:

"The words and actions of a public figure, broadcasting a political appeal on the national news, on an occasion of international significance, would seem quintessentially a public interest matter of the sort traditionally envisaged by defamation law."

I also found it interesting to read (Kelly / Warner Law, 2013) that a U.S. court would likely not have returned the same result, given that "actual malice has been the standard in American defamation lawsuits brought by public figures" for some time, and that the plaintiff has to "prove how the statement in question was materially harmful".

As O'Neill (2013) notes in a piece titled "Keeping the lawyers busy", the *Daily Mail* "might well have preferred the fairness terminology" which existed in libel law prior to the 2009 Defamation Act, but which was removed by Minister McDowell in favour of honest opinion.

As an aside I cannot be the only one who finds O'Brien's attitude to the Press Council, as evidenced during the trial, to be ironic given that INM (Independent News and Media) is an important member. According to RTE, the businessman immediately sought damages after the Drury *Daily Mail* article was published and refused a right of reply (RTE.ie, 2013a). Quinn SC, for Associated Newspapers, says that O'Brien's solicitors sought damages in the first letter received and that O'Brien "could have had a right of reply of equal prominence to the article or he could have gone to the Press Council." O'Brien in rejecting the right of reply option said that the Press Council did not have any teeth. This is echoed by O'Higgins SC, for Mr O'Brien, who suggests that if someone went with their complaint to the Press Council, newspapers laughed "all the way to the bank" (Gartland, 2013). Sydney Smith (2013) also provides confirmation that O'Brien did not use the Press Council, and notes the receipt of a formal response from the Press Council of Ireland and Press Ombudsman in response to O'Brien's comments, which states that they "appear to be based on a lack of knowledge of the record of these institutions, and a lack of awareness of its effectiveness and relevance in the matter of disputes concerning the press." M. Smith (2013) echoes a concern registered by Justine McCarthy in a *Sunday Times* article about O'Brien's "dismissal during the trial, of the relevance of the Press Council which is intended to mediate defamation disputes." Inform's Blog (2013) sees the Press Council aspect differently, pointing out that Drury, the article's author and one of the individual defendants to the action, is a member of the Press Council, this making it difficult "to see how, if it had been called on to do so, this body could have acted as an independent regulator in relation to the actions of one of its own members."

Perhaps the last word is best left to Paul Drury, who, following the trial, wrote a piece in the *Daily Mail* titled "We columnists live by the sword and die by the sword. And we

are not entitled to any sympathy when that sword is turned against us." (Drury, 2013). Although he describes the trial as the "most gruelling experience" of his "entire life", Drury is remarkably sanguine. He notes that "unrelenting questioning" is at the heart of the adversarial system which "continues to serve us well". He acknowledges that, in putting pen to paper, it had always been a real possibility that any of those he had criticised could "at any time" sue for defamation, and that "as is his Constitutional right, Denis O'Brien did so. And he won." He declines to revisit the case in any detail except to record that he had succeeded in convincing the jury that he was expressing his "honestly held opinions", but had failed to "convince them of the accuracy of the facts upon which" he had "based that opinion or that the subject matter itself was in the public interest." The majority of Drury's article is a reflection on lessons learned in his two weeks in High Court No. 16, including a newfound respect for judges and other court workers; a gratitude for the support received from a network of family and friends; and a renewed appreciation of the privilege afforded him in having a column in a national newspaper. Along the way Drury\* injects some gentle humour such as advising that "if you want to look serious on the way into court, it is a mistake to walk down the quays swinging an umbrella at your side."

\* Mr Drury passed away in March of this year, from cancer, at the age of 57.

## **References**

### Newspapers

Bruce, H. (2013, February 14). Columnists are like Giles and Dunphy. *Daily Mail*, p. 17.

Drury, P. (2013, February 22). We columnists live by the sword and die by the sword. And we are not entitled to any sympathy when that sword is turned against us. *Daily Mail*, p. 12.

### Journals

Kealey, M. (2014). Defamation - Still Costly In 2014. *Public Affairs Ireland*, (100), 11.

### Internet

Debates.oireachtas.ie,. (n.d.). *Seanad Eireann - 28/Feb/2007 Defamation Bill 2006: Committee Stage (Resumed)*.. Retrieved 18 May 2015, from <http://debates.oireachtas.ie/seanad/2007/02/28/00007.asp>



- Gartland, F. (2013). *O'Brien wins €150,000 in damages in 'Mail' case*. *Irish Times*. Retrieved 18 May 2015, from <http://www.irishtimes.com/news/o-brien-wins-150-000-in-damages-in-mail-case-1.1252176>
- Inform's Blog,. (2013). *News: Ireland, Jury award of €150,000 defamation damages against Irish Daily Mail*. Retrieved 18 May 2015, from <https://inform.wordpress.com/2013/02/23/news-ireland-jury-award-of-e150000-defamation-damages-against-irish-daily-mail/>
- Irishstatutebook.ie,. (n.d.a). *Defamation Act 2009, Section 20*. Retrieved 18 May 2015, from <http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0020.html>
- Irishstatutebook.ie,. (n.d.b). *Defamation Act 2009, Section 21*. Retrieved 18 May 2015, from <http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0021.html>
- Kelly / Warner Law. (2013). *Defamation Shocker: O'Brien Wins 'Honest Opinion' Case Against Drury*. Retrieved 18 May 2015, from <http://kellywarnerlaw.com/ireland-honest-opinion-defamation-obrien/>
- Maher, J. (2013). *O'Brien ruling is not death knell for press freedom | The Law of Defamation*. *Johnmaherbl.ie*. Retrieved 18 May 2015, from <http://www.johnmaherbl.ie/obrien-ruling-is-not-death-knell-for-press-freedom/>
- O'Neill, P. (2013). *Keeping the lawyers busy*. *Irishelection.com*. Retrieved 18 May 2015, from <http://www.irishelection.com/2013/02/keeping-the-lawyers-busy/>
- RTE.ie,. (2013a). *Court hears O'Brien refused right of reply*. Retrieved 18 May 2015, from <http://www.rte.ie/news/2013/0208/366807-obrien-says-he-pays-significant-taxes-in-ireland/>
- RTE.ie,. (2013b). *Denis O'Brien wins defamation case*. Retrieved 18 May 2015, from <http://www.rte.ie/news/2013/0214/367770-defamation-denis-obrien/>
- RTE.ie,. (2013c). *High Court hears of 'nasty' Denis O'Brien article*. Retrieved 18 May 2015, from <http://www.rte.ie/news/2013/0206/366478-high-court-hears-of-nasty-denis-obrien-article/>
- Sheridan, A. (2013a). *O'Brien defamed by Irish Daily Mail? I don't think so | Public Inquiry*. *Publicinquiry.eu*. Retrieved 18 May 2015, from <http://www.publicinquiry.eu/2013/02/06/obrien-defamed-by-irish-daily-mail-i-dont-think-so/>
- Sheridan, A. (2013b). *O'Brien's victory likely to result in a media cowering before the shadows | Public Inquiry*. *Publicinquiry.eu*. Retrieved 18 May 2015, from <http://www.publicinquiry.eu/2013/02/15/obriens-victory-likely-to-result-in-a-media-cowering-before-the-shadows/>

- Smith, M. (2013). *Profile – Denis O'Brien | Village*. *Villagemagazine.ie*. Retrieved 18 May 2015, from <http://www.villagemagazine.ie/index.php/2013/10/profile-denis-obrien/>
- Smith, S. (2013). *Irish Daily Mail Opinion Column Led to 'Landmark' Libel Case*. *Imedia Ethics*. Retrieved 18 May 2015, from [http://www.imediaethics.org/News/3785/Irish\\_daily\\_mail\\_opinion\\_column\\_led\\_to\\_landmark\\_libel\\_case\\_.php](http://www.imediaethics.org/News/3785/Irish_daily_mail_opinion_column_led_to_landmark_libel_case_.php)
- Wood, K. (n.d.). *Irishbarrister.com*. Retrieved 18 May 2015, from <http://irishbarrister.com/defamation.html>
- Yor.ie,. (2013). *Defamation Law - Denis O'Brien*. Retrieved 18 May 2015, from <http://www.yor.ie/news/defamation-law-denis-o-brien/>