

Statutory Reform of Journalistic Privilege

Denis Flynn is a final year LLB student at Trinity College Dublin. He spent the 2013/14 academic year on exchange at Emory University, School of Law, in Atlanta.

Dear Editor,

With the recent revelation that GSOC has been monitoring journalists' telephones to uncover information in respect of their sources, it seems timely to examine the state of the protection of journalistic sources under Irish law. The law offers privilege to many different types of relationships such as that of the lawyer and his client, the doctor and his patient and the priest and the penitent. Another form of privilege in existence protects the relationship between the journalist and his source. The so-called 'journalistic privilege' is the entitlement of a journalist not to reveal the identity of a confidential source in court or to be compelled to give evidence which may result in the source's identity being revealed. The law suffers from a lack of clarity in Ireland at present and it is the contention of the author that this should be resolved by statute.

Almost every constitutional democracy enshrines freedom of the press in their constitutions. In Ireland, this is replicated by Article 40.6.1^o.i of Bunreacht na hÉireann.¹ However, this is not an absolute right and is subject to keeping within the common good and laws such as defamation. A free press is a press which is not influenced by the government or public authorities and is not subject to punishment or recrimination for publication of factual events

¹ This provides that:

[The State guarantees liberty for the exercise, subject to public order and morality, of] [t]he right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

or non-defamatory opinions. The press is regarded as a watchdog of democracy. They have a duty to inform the public on all matters of public interest. In turn, the public has a right to receive such information. Dr Yutaka Arai writes:

The press and investigative journalism guarantee the healthy operation of democracy, exposing policy actions or omissions of government to public scrutiny, and facilitating the citizens' participation in the decision-making process.²

In *Goodwin v United Kingdom*, the European Court of Human Rights stated: '[p]rotection of journalistic sources is one of the basic conditions for press freedom'.³ This author contends that this analysis is correct. If press freedom necessarily involves the freedom to publish without recrimination, it would be illogical to fail to vindicate the journalist's right to protect his source's identity. The reasons for this are twofold. First, the source may be subject to punishment or recrimination for revealing the information involved. This would be contrary to the principle that the press is free from interference from authority. Secondly, a journalist would lose his credibility with current or prospective sources if he was forced to reveal his source in a judicial setting. Other sources would be less inclined to reveal corrupt or immoral practices to journalists if their confidentiality could not be ensured. Furthermore, it would be paradoxical for courts to punish behaviour that reveals illegal, immoral or corrupt practice.

Traditionally, the Irish courts did not recognise the concept of journalistic privilege arising from the protection of freedom of expression in the Constitution. In *Re O'Kelly*, Walsh J

² David Harris, Michael O'Boyle, Edward Bates and Carla Buckley (eds), *Law of the European Convention of Human Rights* (3rd edn, OUP 2014) 460.

³ *Goodwin v United Kingdom* (1996) 22 EHRR 123, para 39.

held: '[j]ournalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence...'⁴

However, with the advent of the European Convention of Human Rights into Irish law, protection of the right is now obligatory for Ireland. This is based on Article 10 ECHR and can be seen clearly in the *Goodwin v UK* case.⁵ However, the Supreme Court decision in *Mahon Tribunal v Keena* has thrown the right into confusion.⁶ While *Keena* confirms that there is a privilege that journalists can avail of in Ireland, it is unclear how much protection it affords to journalists as the right must be analysed on the basis of a proportionality test weighing the competing interests involved.⁷

The Report of the Constitution Review Group recommended that the Article 40.6.1^o be replaced by a text similar to Article 10 ECHR because it would be a more powerful tool for the media.⁸ The report stated:

No private medium of expression can be compelled to express particular opinions or even a representative range of opinions without infringing the right to free speech. It would seem that constitutional provision could scarcely go further in promoting responsible freedom of expression than Article 40.6.1^o.i will, when

⁴ *In re O'Kelly* (1974) 108 ILTR 97, 101.

⁵ *Goodwin* (n 3). Article 10 ECHR provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary...

⁶ [2010] 1 IR 336.

⁷ *ibid*, 363.

⁸ The Constitutional Review Group, *Report of the Constitution Review Group* (Stationery Office, 1996) 295.

amended on the model of Article 10 of the European Convention of Human Rights, as recommended by the Review Group.⁹

It is contended that the most effective way to protect the right in Ireland is to incorporate it into statute. This would have the effect of spelling out in a clear manner when, and to what extent, the law will protect a journalist from revealing his or her source.

It is of course important to limit this privilege to journalists. Twenty years ago, it would not have been difficult to identify who a journalist was. Presumably, it would be anyone who works for a media organisation with allowances being made for freelancers. However, with the advent of new media and forums whereby it has become more difficult to identify journalists, the issue of journalistic privilege becomes an issue in determining who is afforded protection. It is the view of the author that the law should recognise some new forms of media as being capable of attaching protection, taking into account a range of factors including the reliability of the author and the motive for publication. This would give protection to certain blog posters, online newspapers like journal.ie and even Twitter account holders who post content of public importance.

The most important question, however, is whether the privilege should be an absolute or a qualified right in the form of a balancing of competing interests test. It is argued that a compromise test should be adopted where there is a presumption towards absolute privilege whereby in compelling or unprecedented circumstances which make it essential to know the identity of the source, the journalist should be compelled to reveal his source. Such circumstances could include where there is a life in peril or the welfare of vulnerable people is under threat or in the interests of national security. As guidance for establishing a balancing test, we should turn to the following four criteria set out by Wigmore:

⁹ *ibid*, 294-295.

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relationship must be one which in the opinion of the public ought to be sedulously fostered.
- (4) The injury that would insure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.¹⁰

It is submitted that an edited version of this formulation should be enacted in statute in order to give effect and certainty to this privilege. Regarding the fourth condition, it is suggested that it should be edited to read: ‘the interests served by protecting the communications from disclosure will outweigh the interest in getting at the truth in the absence of compelling and extraordinary circumstances.’ Such circumstances should be expressly provided for in the legislation and include instances where there is a life in peril and where there are threats to national security. The purpose of this would be to make the law relating to protection of journalists’ sources very clear and to ensure that journalists are fully aware of their rights. This would ensure greater realisation of the freedom of the press.

Is mise le meas,

Denis Flynn

¹⁰ Wigmore, *Evidence in Trials at Common Law*, Volume 8 (McNaughton Revision, Little, Brown & Co 1961) para §2285.