



# Juries in Defamation Cases

A democratic imperative or a barrier to justice?

November 2023

By **PETER ANDRINGA**, MPP, Blavatnik School of Government

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A DEMOCRATIC IMPERATIVE OR A BARRIER TO JUSTICE?

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# Introduction

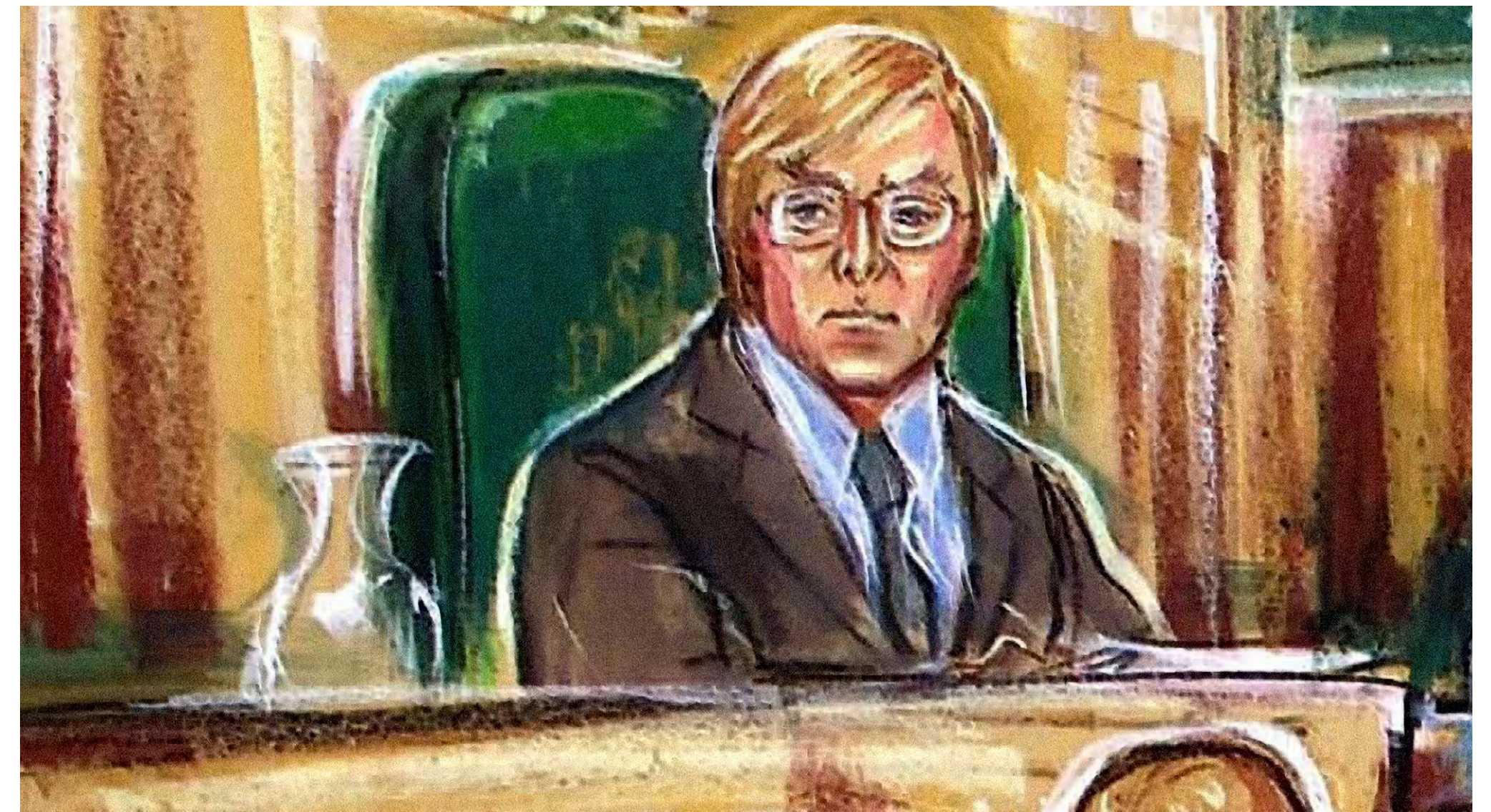
THE REMOVAL OF juries in High Court defamation actions is one of many proposed reforms put forward by the Irish government in the draft scheme of the Defamation (Amendment) Bill earlier this year, but it has quickly emerged as one of the most divisive.<sup>01</sup> Many experts contest the benefits of removing juries from defamation proceedings, arguing that they are too important a democratic institution to do away with.

While most civil actions have been determined by judges since 1988, defamation cases citing damages above €75,000 still come before a jury in Dublin's High Court. The current defamation reform aims to improve the efficiency of defamation cases, which are extraordinarily time-consuming and expensive, while also addressing the outsized damages that juries award and the difficulty they have ruling on an increasingly complex area of law.

The proposed changes to the legislation would remove juries from defamation cases,

allowing them to be decided by judges alone. The Department of Justice has argued that juries are unsuitable on grounds that they: (a) are unreliable in their evaluation of complex arguments, (b) award unreasonably large amounts in damages, (c) create delays in trials, and (d) increase legal costs for all parties.<sup>02</sup> These arguments were heavily disputed during the oral hearings that were held by the Joint Committee on Justice in summer 2023.<sup>03</sup> Some witnesses suggested that judges could equally cause delays, award high damages, and produce inconsistent decisions.

Through a legal review, statistical analysis of the High Court's Jury List, and interviews with experienced practitioners and academics, this report examines empirical evidence on both sides of the debate in order to determine the extent to which juries should have a role in defamation cases. Dozens of judicial decisions and over 400 case records from the Jury List were analysed in preparation for this report, although the lack of information in the public



records limited the scope of the research.<sup>04</sup>

Those who support the removal of jury trials from defamation proceedings give three main reasons: outsized legal costs, extended delays,

and excessive damages. This report will assess each of these arguments in turn.

01: Irish Times (2023), 'Abolishing jury trials of defamation cases is 'inherently undemocratic', says retired judge', <https://www.irishtimes.com/crime-law/2023/06/20/abolishing-jury-trials-of-defamation-cases-is-inherently-undemocratic-says-retired-judge/>

02: Department of Justice (2022), Report of the Review of the Defamation Act 2009 133-136, <https://www.gov.ie/en/publication/4478f-report-of-the-review-of-the-defamation-act-2009>

03: Joint Committee on Justice (2023), Report on Pre-Legislative Scrutiny of the General Scheme of the Defamation (Amendment) Bill, [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_justice/reports/2023/2023-09-27\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-defamation-amendment-bill\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2023/2023-09-27_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-defamation-amendment-bill_en.pdf)

04: Legal scholar (and later High Court Justice) Brian McMahon conducted a similar study ahead of the Courts Act 1988, with similar approaches: Brian McMahon, Judge or Jury: The Jury Trial for Personal Injury Cases in Ireland (Cork University Press 1985) 5-6.

## THE VIEW FROM OTHER JURISDICTIONS

The abolition of juries in libel cases in England and Wales has probably done more to save costs and promote early settlement of claims than any other single reform. Abolishing the jury empowered the judge to rule on meaning at a very early stage. Where the claim has no merit, it can be thrown out. Conversely, where the words are found to bear a defamatory meaning the publisher did not intend, they have a very strong incentive to settle quickly.

**CAROLINE KEAN**, media defence solicitor in the United Kingdom

Sweden's Freedom of Press Act was drafted by a commission in 1947. The commission observed that the Second World War had revealed serious inadequacies in the Freedom of Press Act from 1812. The view was that juries would be best suited to draw the line between legitimate media freedom and when sanctions should be imposed. Parties can now decide to exclude juries from media defamation cases, but in practice they are almost always involved.

**ULF ISAKSSON**, media lawyer in Sweden

Although the right to a jury trial is enshrined in the U.S. Constitution, there has never been a constitutional right to pursue meritless litigation. Because of the lack of procedural safeguards, including costly discovery and no cap on reputational damages, the threat of a jury trial in defamation cases and the excessive legal fees accompanying it have been used to weaponize the court system and silence voices who speak truth to power.

**LAURA PRATHER**, media defence attorney in the United States

# Background

THE RIGHT TO freedom of expression is enshrined in Article 40.6.1(i) of the Irish Constitution, as well as in Article 10 of the European Convention on Human Rights (ECHR). But the Constitution equally provides for the protection of “the life, person, good name, and property rights of every citizen.”<sup>05</sup> Article 10 of the ECHR carves out limitations to expression where necessary for “the protection of the reputation or rights of others.”<sup>06</sup> Balancing these rights is the essential task of defamation law.

Ireland’s defamation law allows for several defences, including truth, honest opinion, privilege (absolute and justified), and “fair and reasonable publication in the matter of public interest”.<sup>07</sup> Each argument requires proving

multiple sub-tests and weighing complex trade-offs, often leading to extended trials.

Juries have been the main adjudicator of defamation claims since before the creation of the modern Irish State.<sup>08</sup> The involvement of juries is often attributed to the fact that defamation is a “unusually societal-focused tort”, with legal tests involving both reasonable interpretation and community values.<sup>09</sup> The argument for juries seems straightforward: who better to evaluate the standards of reputation in a community than community members themselves?

Over the last 150 years, the role of juries in Irish civil cases has - in the words of one judge - been “gradually whittled away.”<sup>10</sup> A series of reforms allowed parties to opt-out of jury trials, before then excluding them from other civil

actions and Circuit Court cases.<sup>11</sup> Many of these reforms were passed in the name of efficiency, as the number of cases and the associated costs exploded. Debate over the Courts Act 1988, for instance, mirrored the present arguments in favour of reform: personal injury reform was prompted by the insolvency of two large insurance firms, who (in part) blamed their collapse on excessive costs and damages awarded by juries.<sup>12</sup> Notwithstanding the accuracy of this claim, it prompted the Oireachtas to let judges decide personal injury cases in an attempt to streamline trials. Yet the legal right to trial by jury for defamation cases remains and it has been reasserted by the courts.<sup>13</sup>

Jury trials in civil actions are uncommon, but not unique to defamation. High Court suits

of false imprisonment and assault are still heard by jury. Parties can also agree to go before a judge alone, which is rare in defamation but more common in cases with strong interests in privacy (e.g. sexual assault). Defamation suits seeking damages of less than €75,000 are also decided by a judge, since they fall in the jurisdiction of the Circuit Courts which eliminated juries in 1971.<sup>14</sup>

While legislation has maintained the role of the jury in defamation cases, case law has altered elements of the procedure surrounding them. Most recently, in the defamation case *Higgins v Irish Aviation Authority* (2022),<sup>15</sup> the Supreme Court encouraged judges to provide guidance and structure for juries’ determination of damages, following decisions by the →

05: Article 40.6.1°, Irish Constitution, <https://www.irishstatutebook.ie/eli/cons/en/html#article40>

06: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(2), [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG)

07: Defamation Act 2009, <https://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/html>

08: Section 94, Courts of Justice Act (Ireland) 1924, <https://www.irishstatutebook.ie/eli/1924/act/10/section/94/enacted/en/html#sec94>

09: Neville Cox (2019), ‘Irish defamation law: the 2009 Act and the need for reform’ (Submission to the Symposium on Reform of Defamation Law). <https://www.gov.ie/en/publication/9ef08-symposium-reform-of-defamation-law>

10: *Lennon v HSE* [2015] IECA 92 [21] (Hogan J)

11: *Ibid* [13]-[19] (Hogan J).

12: Brian McMahon, *Judge or Jury: The Jury Trial for Personal Injury Cases in Ireland* (Cork University Press 1985) 5-6.

13: *Lennon v HSE* (n 13) [41] (Hogan J), in which the Court of Appeals reversed a High Court decision allowing a defamation case to be heard by a judge for case-management reasons.

14: Section 6, Courts Act 1971, <https://www.irishstatutebook.ie/eli/1971/act/36/section/6/enacted/en/html#sec6>

15: *Higgins v IAA* [2022] IESC 13, [https://www.courts.ie/view/Judgments/90539914-5dee-434b-b633-0622f5227056/f72550da-6ec0-4740-abaf-2719956a7eb4/2022\\_IESC\\_13\\_\(Dunne%20J\).pdf/pdf](https://www.courts.ie/view/Judgments/90539914-5dee-434b-b633-0622f5227056/f72550da-6ec0-4740-abaf-2719956a7eb4/2022_IESC_13_(Dunne%20J).pdf/pdf)



→ European Court of Human Rights (ECtHR) concluding that excessive awards chill free expression.<sup>16</sup> The ECtHR has remained neutral about the involvement of juries in defamation cases, deferring the question to policymakers.

Efficiency is often treated as secondary to a case's outcome, but it is essential to a fair

justice system. Article 6 of the ECHR provides that everyone is entitled to “a fair and public hearing within a reasonable time”. This right has been litigated at the ECtHR by claimants frustrated by the stagnation of their cases, and the court has frequently ruled against Ireland.<sup>17</sup> There is no hard-and-fast rule about how long

a case should take; delays are evaluated in the context of each case.<sup>18</sup>

The ECtHR has ruled that states' Article 6 obligations must include a reasonable limitation on costs and provision of legal aid, especially in cases of “inequality of arms.”<sup>19</sup> Since the Irish system doesn't currently allow for legal aid in

defamation cases (although this may change with the forthcoming defamation bill), the State has an even greater obligation to ensure that inequalities are minimised to preserve a fair trial.<sup>20</sup> Doing so requires limiting expenses throughout a case, as well as ensuring costs are properly awarded after its conclusion. →

16: *Independent Newspapers (Ireland) v Ireland* [2006] 42 EHRR 1024, <https://www.5rb.com/wp-content/uploads/2013/10/Independent-News-and-Media-v-Ireland-ECHR-16-Jun-2005.pdf>

17: Article 6 claims have succeeded in Irish civil cases that dragged on for 11 years, 8 years, 16 years, and 5 years; *McFarlane v Ireland* [2010] EHRR 1272.

18: Anthony Paul Lester, David Pannick and JW Herberg (eds), *Human Rights Law and Practice* (3rd ed, LexisNexis 2009) s 4.6.48.

19: *Steel & Morris v United Kingdom* [2005] EMLR 314, <https://www.5rb.com/wp-content/uploads/2013/10/Steel-Morris-v-UK-ECHR-15-Feb-2005.pdf>

20: Section 28(9)(a) Civil Legal Aid Act 1995, <https://www.irishstatutebook.ie/eli/1995/act/32/section/28/enacted/en/html#sec28>

# Costs

THE ECTHR HAS ruled that states' Article 6 obligations must include a reasonable limitation on costs because of the fact that excessive legal fees can effectively act as a barrier to justice.<sup>21</sup> For both claimants and defendants, brief fees for pre-trial preparation can be up to €100,000, while settlement negotiations come with an additional charge. However, the bulk of High Court costs are incurred at trials. Trials last at least three days but can take weeks. Each day in court adds approximately €25,000 to each side's costs, usually covering three barristers (two Senior Counsels and one junior) and two solicitors each. As a result, the pressure to settle is greatest in the moments before the trial begins.

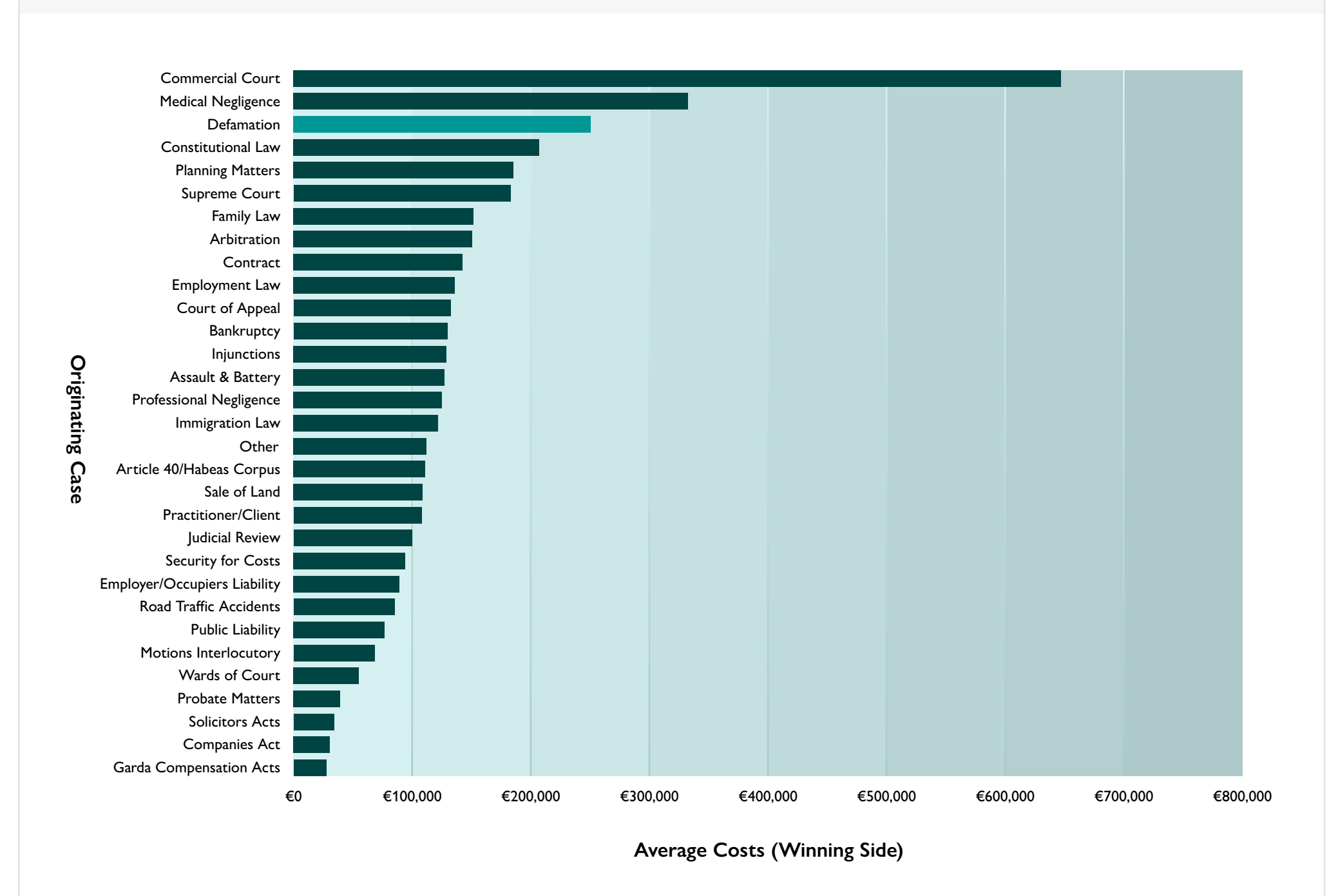
Many will understandably interpret a decision to settle (often accompanied by compensation and an apology) as a defendant's admission of wrongdoing. However, for media outlets in particular, such decisions are primarily based on avoiding years of uncertainty in the form of costly and time-consuming litigation. A report by News Media

Europe said that it is “nearly impossible” to budget for litigation in Ireland, citing the “unpredictable nature of jury hearings”.<sup>22</sup> This inevitably incentivises settlements.

Practitioners told Index that the total cost of a complex defence would be between €500,000 - €1,000,000, while a simpler case might cost €100,000 - €300,000. (Claimants' costs are sometimes lower, since defamation law places a greater burden on the defendant.) Defamation cases in the Circuit Court are less: interviewees quoted figures between €100,000 and €150,000. The lower costs are typically a result of the faster pace of proceedings and the fact that only one (instead of two) Senior Counsels are involved and fewer witnesses are introduced.

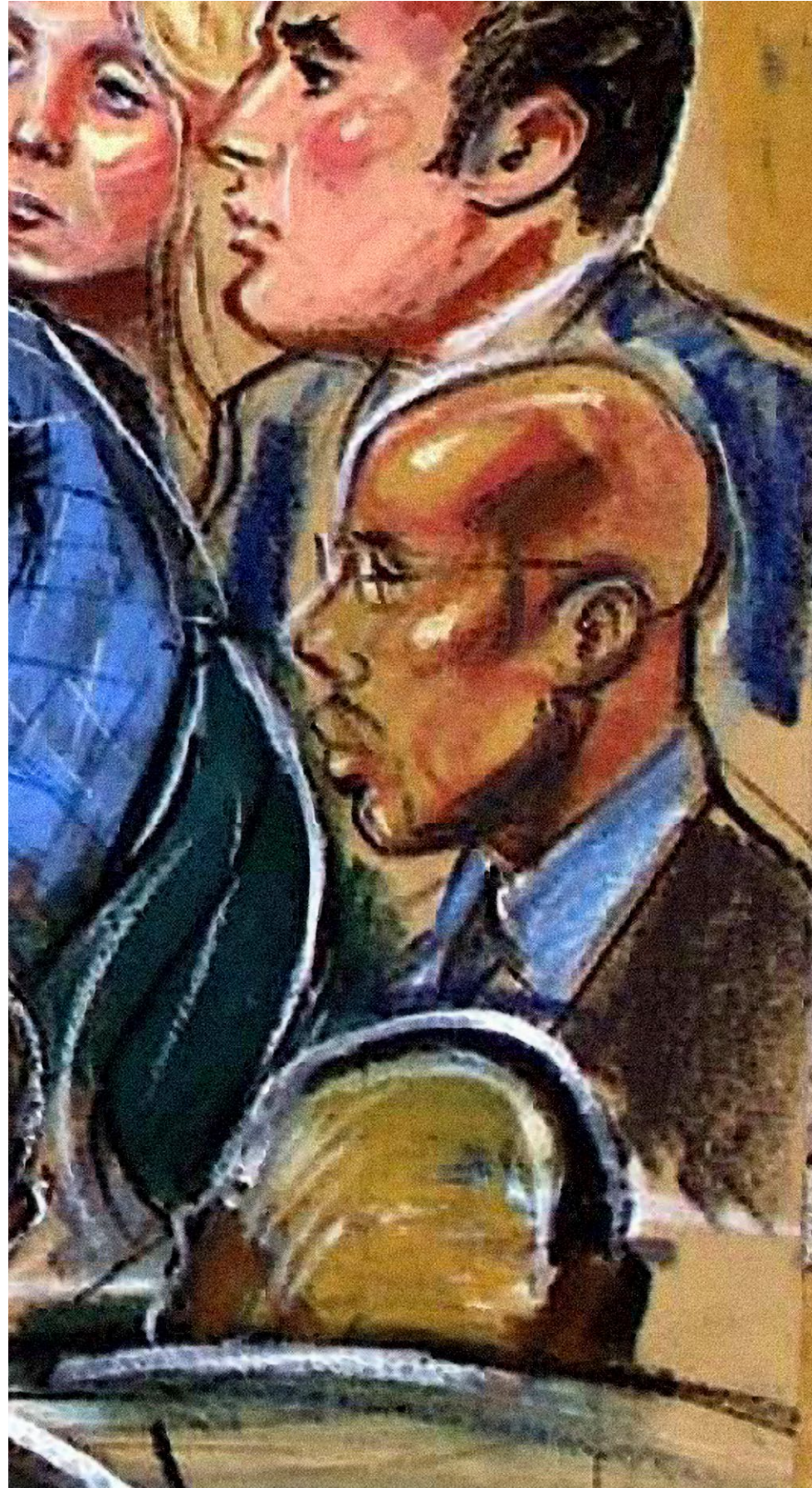
Limited data is available from the Office of the Legal Claims Adjudicator, which resolves disputes over what costs the losing side must pay to the winners. The average costs claimed for a defamation suit was €250,643 in the years with available figures, making it the 3rd-most expensive type of legal action and more than →

**Figure 3: Average costs filings for civil actions**  
SOURCE: OFFICE OF LEGAL COST ADJUDICATORS ANNUAL REPORT 2021



21: Steel & Morris v United Kingdom [2005] EMLR 314, <https://www.5rb.com/wp-content/uploads/2013/10/Steel-Morris-v-UK-ECHR-15-Feb-2005.pdf>

22: News Media Europe (2021), The impact of strategic lawsuits against public participation (SLAPPs) on the news media sector, <https://web.archive.org/web/20211128114622/https://www.newsmediaeurope.eu/wp-content/uploads/2021/10/News-Media-Europe-case-studies-and-recommendations-against-SLAPPs-October-2021.pdf>



→ double the average.<sup>23</sup> This figure represents a weighted average of claimant and defendants’ costs (depending on who wins more often) — so the average claimant’s costs are somewhere below this amount, and the defendant’s somewhere above it.

Practitioners offered differing explanations for this data. Some blamed the high costs on the jury, since it takes longer to communicate complex law to a lay audience.<sup>24</sup> Others pointed to logistical delays juries introduced, especially when they are frequently asked to enter and exit the courtroom. Those opposed to reforms often highlighted that two judge-only actions occupy the top slots on the list: trial costs, they argued, are attributable to the legal complexity and money at stake instead of the jury.

There are reasons to be concerned about legal costs: if they grow too high, they can have a chilling effect on freedom of expression. This is exacerbated when there is an inequality of arms between the parties, as the ECtHR has noted that such an imbalance can impede a fair trial. The high cost of defending a defamation case means that the law can easily be exploited by wealthy and powerful entities, who may be seeking to silence public watchdogs through

strategic lawsuits against public participation (SLAPPs).<sup>25</sup>

Costs’ burden for claimants is lower, since many solicitors take defamation cases on a “no foal, no fee” basis, only being paid if the claimant wins. This has helped Irish defamation law avoid the reputation of a “rich man’s law” (unlike the UK), but only in respect to claimants. The fact that costs are often multiples above damages puts intense pressure on defendants to avoid trials. One defence solicitor estimated that 90% of his cases are settled. Legal costs add up all the same: NewsBrands Ireland spends an average of €4.3m in defamation expenses annually, of which two-thirds (€2.9m) were costs and only one-third damages.<sup>26</sup>

It’s difficult to determine the extent to which costs would decrease if juries were abolished. Most interviewees (including critics of reform) agreed that judge-only trials would reduce a case’s time in court by a few days. This would likely reduce costs by 10-20%. Judge-only defamation trials might also require fewer Senior Counsels, just as personal injury cases have been conducted with just one since the 1988 reforms.<sup>27</sup> A conservative estimate of

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savings could be 20%, which would not be insignificant, particularly for repeat defendants like journalists and media outlets. →

23: Office of Legal Cost Adjudicator (2022), Annual Report 2021, <https://www.courts.ie/office-legal-cost-adjudicator-publications>

24: Interview with Michael Kealey, Solicitor, Associated Newspapers (Online, 15 August 2023).

25: Geoffrey Robertson (2023), *Lawfare: How Russians, the Rich and the Government Try to Prevent Free Speech and How to Stop Them* (TLS Books).

26: Correspondence with Michael Kealey, Solicitor, Associated Newspapers (28 August 2023)

27: Section 5, Courts Act 1988, <https://www.irishstatutebook.ie/eli/1988/act/14/section/5/enacted/en/html#sec5>



# Delays

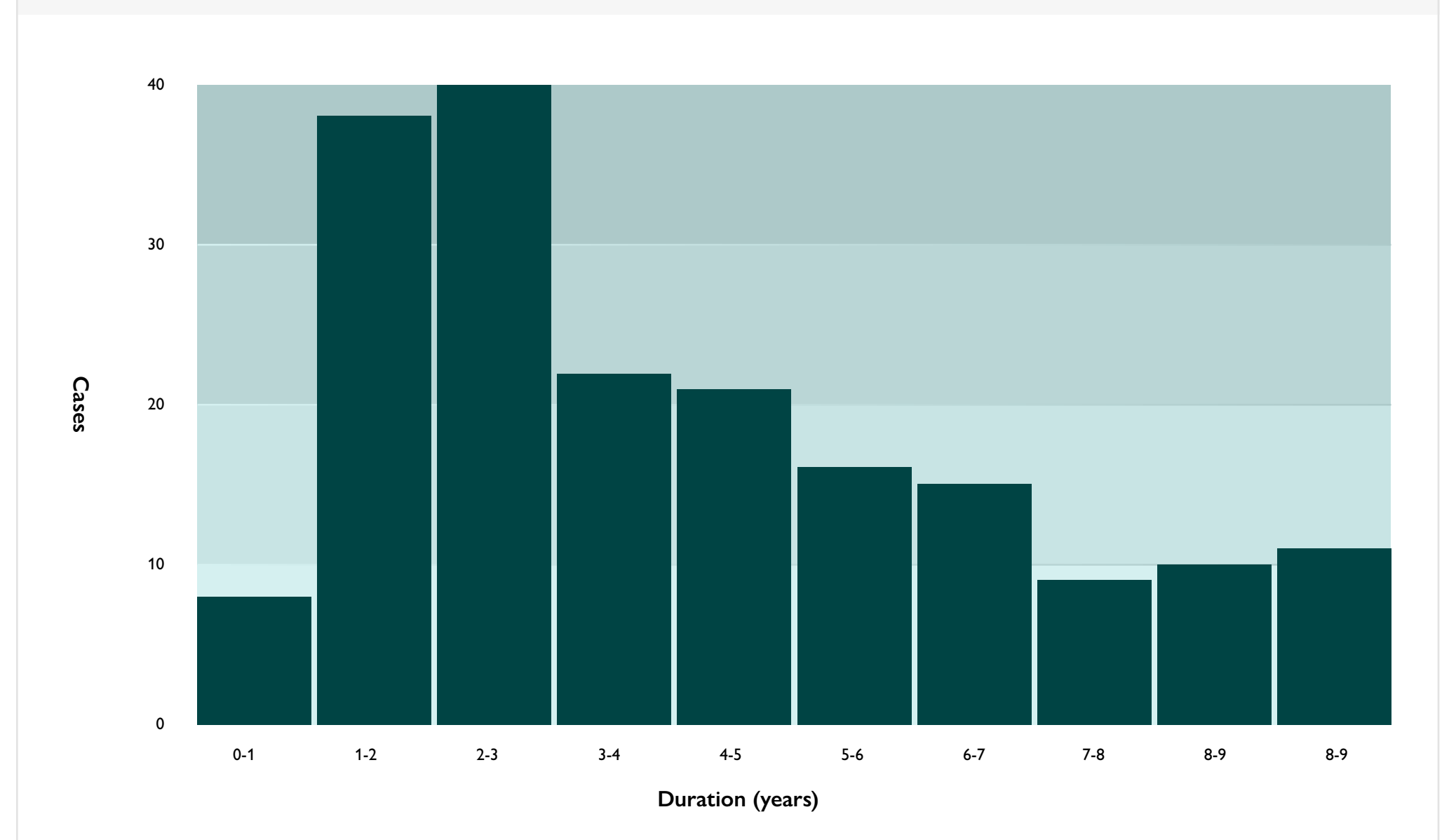
OF THE 140,000 civil cases filed in Ireland every year, very few cite defamation: in 2022, only 282 were filed in Circuit Courts and 104 in the High Court.<sup>28</sup> Even fewer of these are resolved: since 2018, High Court juries have decided an average of only 11 defamation cases annually, while an average of 20 are settled out-of-court.<sup>29</sup>

This slow trickle of decisions is partially because civil juries are only empanelled for two or three weeks of every judicial term, a total of only nine weeks each year.<sup>30</sup> (And trials often take a week or more.) The backlog has increased in recent years: wait times for jury trials since 2018 have averaged 11 months, up from an average of four months in 2013-17.<sup>31</sup> That waiting time only comes after the case is set down for trial, usually following years of pre-trial motions over discovery and allowable arguments.

The Irish Courts Service publishes little public data about each case, although some information about defamation trials can be gleaned from the High Court’s Civil Jury List, which contains 400 unsealed cases scheduled for jury trials since 2010. An analysis of this list finds 292 likely defamation cases:<sup>32</sup> of these, 102 are against individuals, 113 are against media outlets, and 77 against other bodies corporate (most often banks and retailers).

The average case on this list is already about three years old when set down for trial — and once on it, most wait more than a year to be heard. The average case (whether settled or decided) takes four years to be resolved, with almost a quarter taking more than six. Of course, many settle in the interim: around 45% of cases in this dataset reached agreements before they were heard. Still more are settled during preliminary stages, never making this list: one practitioner estimated that 90% of cases →

**Figure 2: Duration of likely Jury List defamation cases, both settled and decided**  
SOURCE: HIGH COURT CIVIL JURY LISTS, 2010-2023



28: The Courts Service of Ireland, Annual Reports (2014-2022), <https://www.courts.ie/annual-report>

29: Ibid.

30: The Courts Service of Ireland, High Court Sittings: Jury Actions, <https://www.courts.ie/content/jury-actions-dublin> (Accessed 31 August 2023)

31: The Courts Service of Ireland (n 42).

32: Jury trials are only used in cases of defamation, assault, and false imprisonment; the latter are nearly always against the state, so they were easily removed. An analysis of public reports of remaining cases finds >90% include defamation claims, suggesting the dataset is fairly accurate.

## If a claimant believes that their prospects are unfavourable, they might simply slow down their filings instead of facing defeat. This is a tactic often deployed by SLAPP litigants

→ are resolved before setting down for trial.<sup>33</sup>

Beyond settlements and decisions, defamation cases sometimes face a quieter death: lingering on, zombie-like, officially open but without activity. If a claimant believes that their prospects are unfavourable, they might simply slow down their filings instead of facing defeat. This is a tactic often deployed by SLAPP litigants, as it helps drive up the time and cost associated with defending a case. Some cases are removed from the list when claimants fail to appear at the termly call-over of pending cases, but this number is impossible to count due to the limited information made public.

While settlements reduce backlogs in the courts and decrease the average case duration,

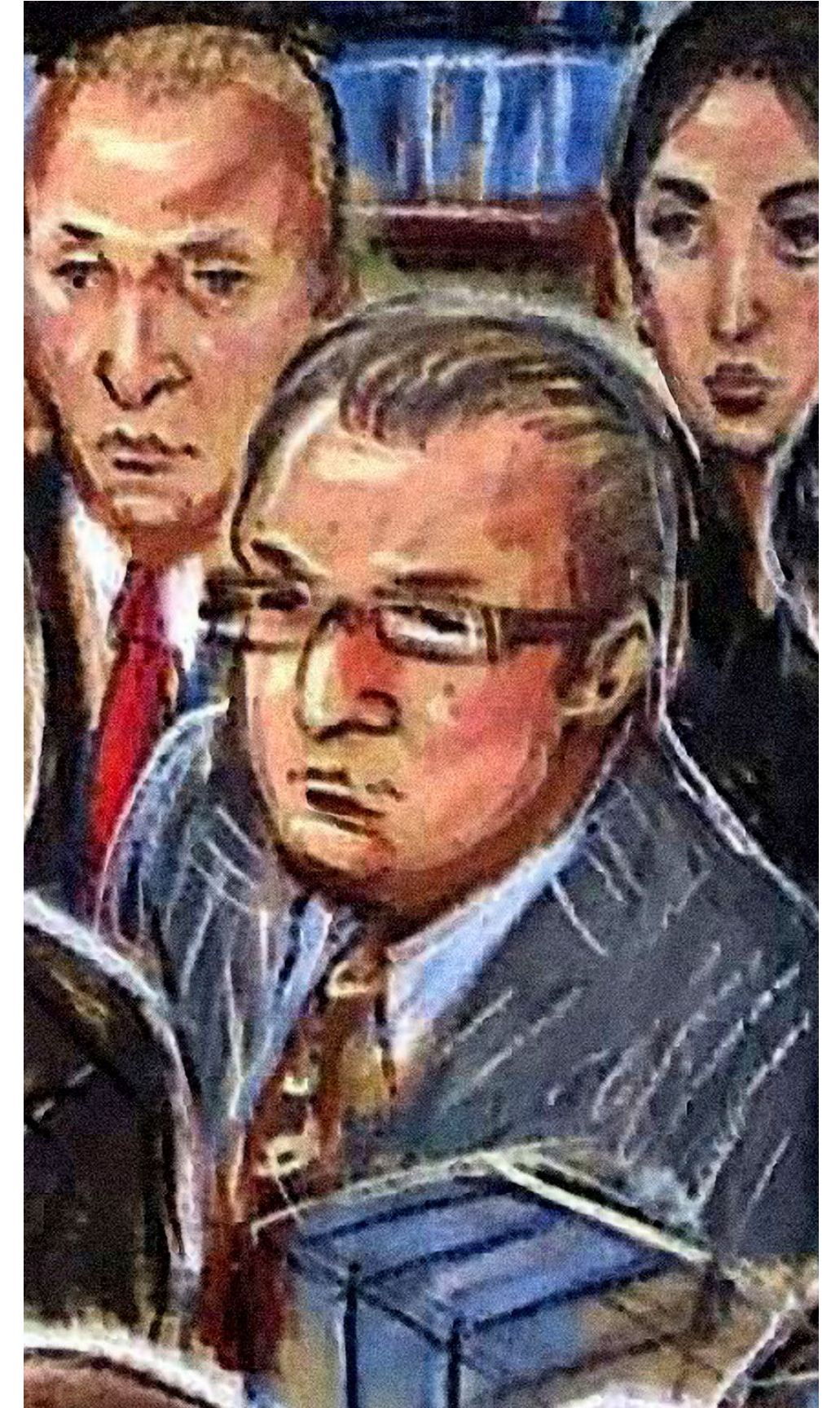
they aren't a victory for human rights. Article 6 of the ECHR guarantees access to a fair trial — but if claimants or defendants are coerced into settlement by overwhelming costs and long delays, that right is effectively denied.

Long delays in jury trials also have a chilling effect on Article 10 rights, both in terms of freedom of expression and the public's right to information. If a case appears to be headed for a jury trial, reporters will sometimes limit or even pause coverage to reduce the risk of being held in sub judice contempt of court.<sup>34</sup> In practice, the prospect of a journalist being held in contempt for such coverage would be without precedent, but some prefer not to run the risk. This can be an advantage to claimants

who wish to keep unflattering coverage out of the public eye. Abolishing juries would not only reduce the duration of these restrictions, but would eliminate the risk of sub judice contempt entirely, since the Supreme Court has ruled that bench trials are not subject to such precautions.<sup>35</sup>

Slow trial scheduling, excessive pre-trial motions, and a lack of procedural restrictions keeping claimants on schedule were the most cited causes for delays by practitioners. Removing juries would at least expedite the scheduling of trials, shrinking the current waiting list.

It is possible to address the long delays by other means. The Joint Committee on Justice recommended that due consideration be given to the prospect of empanelling juries for more weeks within a court term.<sup>36</sup> The former head of the Civil Juries Division of the High Court, Mr. Justice Bernard Barton (ret'd) has long since called for civil jury sessions to be held throughout the law term as was the case previously, and for at least two judges to be assigned to the list, a development which would quickly clear the case backlog and ensure an end to delay in trials. →



33: Interview with Michael Kealey, Solicitor, Associated Newspapers (Online, 15 August 2023)

34: Law Reform Commission (2016), Contempt of Court and Other Offences and Torts Involving the Administration of Justice (LRC IP 10 - 2016), <https://www.lawreform.ie/fileupload/Contempt%20of%20Court%20and%20Other%20Offences%20and%20Torts%20Involving%20the%20Administration%20of%20Justice%20Final.pdf>

35: Cullen v Toibín [1984] ILRM 577.

36: Joint Committee on Justice (2023), Report on Pre-Legislative Scrutiny of the General Scheme of the Defamation (Amendment) Bill, [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_justice/reports/2023/2023-09-27\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-defamation-amendment-bill\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2023/2023-09-27_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-defamation-amendment-bill_en.pdf)

# Damages

IN ADDITION TO findings of fact, juries in defamation cases determine damages based on the severity of the harm. A number of high-profile defamation cases have seen record-breaking awards to claimants, which have sometimes been reversed by appellate courts or the ECtHR.<sup>37</sup> Academics have highlighted the inconsistencies this creates, since jury damages “render awards unpredictable and, in particular, means that awards in one case are not a reliable guide to the probable award in the next.”<sup>38</sup> One scholar put it more bluntly, saying: “I think jurors have watched too much Hollywood and have decided that defamation damages are numbers that should be pulled out of the phonebook.”<sup>39</sup>

The prospect of lottery-sized awards incentivises long-shot lawsuits, forcing media companies to defend more cases and making claimants less willing to settle. Solicitors for media firms said this creates a chilling effect, requiring extensive legal review and instilling a

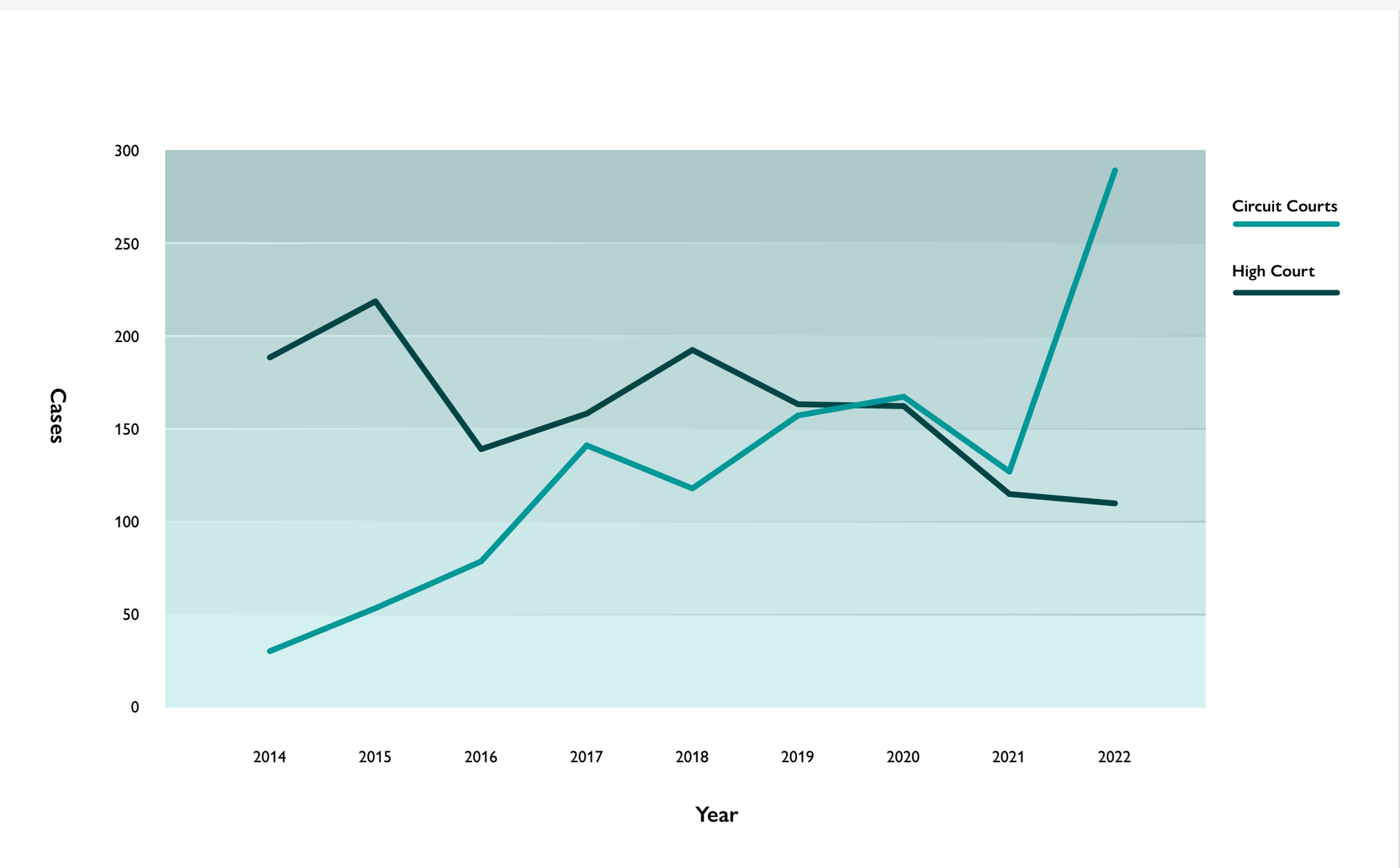
fear of publishing anything remotely actionable, even if it is in the public interest.<sup>40</sup> The ECtHR has also ruled that outsized damages contribute to a chilling effect — imposing an obligation on all member states to ensure their courts are carefully considering the implications of their damages.<sup>41</sup>

The Supreme Court has recently attempted to address excessive damages in *Higgins v Irish Aviation Authority* (2022), creating bands of damages for the instruction of juries. While loosely defined, these bands (“very moderate,” “medium,” “seriously defamatory,” “very serious,” or “exceptional” cases) correspond to awards ranging from €0-€50k, €50k-€125k, €125k-€199k, €200k-€300k or €300,000+.<sup>42</sup>

The Higgins framework is still new, but practitioners are hopeful it will increase predictability and reduce the frequency of awards above €300,000. The precedent will also shape settlement negotiations in the majority of cases that never make it to

Figure 1: Annual defamation actions filed in Ireland

SOURCE: COURTS SERVICE ANNUAL REPORTS, 2014-2022



37: *Independent Newspapers v Ireland* (n 22).

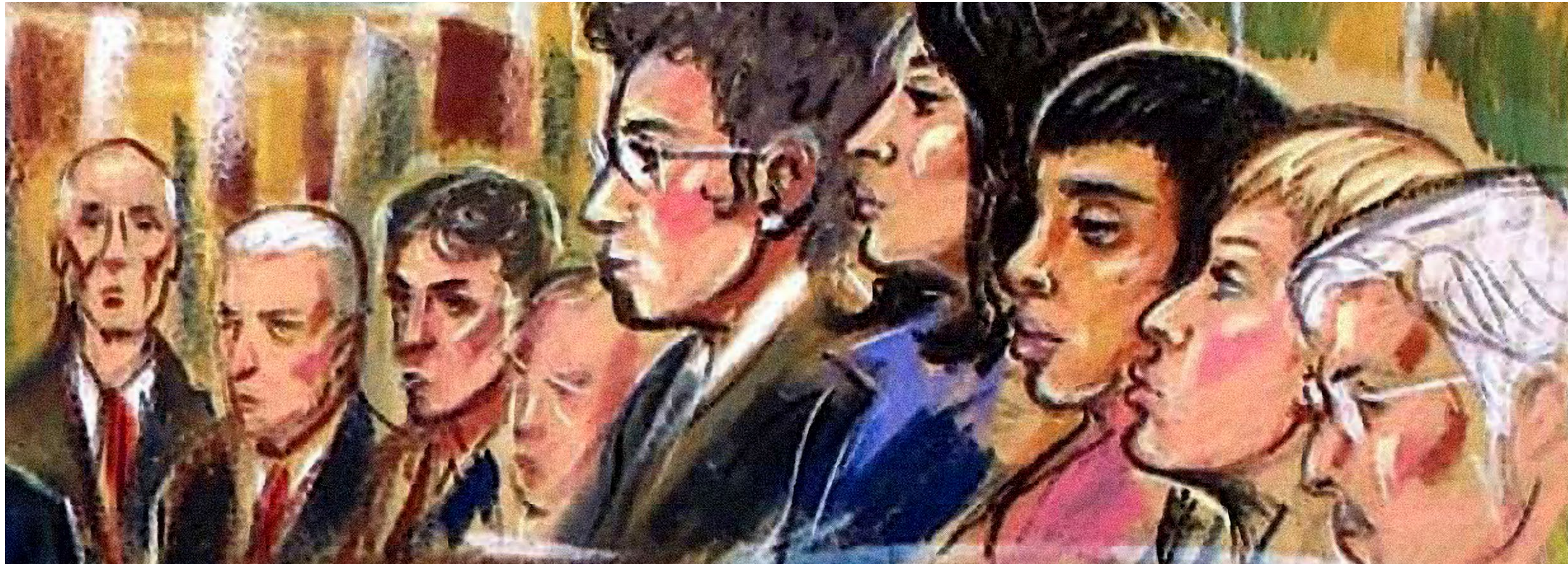
38: Neville Cox & Eoin McCullough (2014), *Defamation: Law and Practice* (Clarus Press) 390-1.

39: Interview with Eoin O’Dell, Associate Professor, Law, Trinity College Dublin (Online, 21 August 2023).

40: Interview with Michael Kealey, Solicitor, Associated Newspapers (Online, 15 August 2023).

41: *Tolstoy Miloslavsky v. United Kingdom* [1995] 20 EHRR 442; *Independent Newspapers v Ireland*.

42: *Higgins v IAA* [2022] IESC 13, [https://www.courts.ie/view/Judgments/90539914-5dee-434b-b633-0622f5227056/f72550da-6ec0-4740-abaf-2719956a7eb4/2022\\_IESC\\_13\\_\(Dunne%20J\).pdf/pdf](https://www.courts.ie/view/Judgments/90539914-5dee-434b-b633-0622f5227056/f72550da-6ec0-4740-abaf-2719956a7eb4/2022_IESC_13_(Dunne%20J).pdf/pdf)



If policymakers take the threat of the chilling effect caused by excessive damages seriously, they should look for levers to help provide more predictable and reasonable awards

→ trial. (Index noted speculation that a recent settlement in *Carey v Independent News and Media* (2023) was encouraged by the decision, which reduced claimants' inclination to hold out for a windfall.)

The courts' annual reports also show a potentially positive effect of the Higgins decision (March 2022): that year saw a dramatic increase in defamation cases filed in Circuit Courts, more than doubling to 282 from an average of 103 from 2014-2021.<sup>43</sup> In

the same period, High Court cases fell to 104 from an average of 163.<sup>44</sup> This suggests that claimants are increasingly seeking damages below €75,000 and opting for the faster, less-expensive Circuit Court proceedings now that juries are less likely to offer lottery-sized awards.

Higgins was welcomed by both sides of the jury debate, but those opposed to reform say they would prefer to observe its long-term effects before making further changes.

Whether Higgins will have an impact on damages remains to be seen: judges aren't required to share the Higgins framework with juries.<sup>45</sup> Some argue that a more prescriptive legislative framework is needed — but additional rules are more easily applied from a judge's bench than the jury room, since jury instructions are limited in length and only serve as guidance. Similarly, in the 1988 personal injury reforms, the removal of juries was merely the first of a series of

changes prescribing more widely agreed-upon standards.<sup>46</sup>

If policymakers take the threat of the chilling effect caused by excessive damages seriously, they should look for levers to help provide more predictable and reasonable awards. While removing juries is unlikely to be a silver bullet, it is a step in the right direction. Letting judges apply the Higgins (or alternative) framework directly would go further to protecting freedom of expression. →

43: The Courts Service of Ireland, Annual Reports (2014-2022), <https://www.courts.ie/annual-report>

44: Ibid.

45: e.g. *Bird v Iconic Newspapers* (App no. 2016/5727P, 3 May 2023)

46: Ms. Justice Bronagh O'Hanlon, Chloe O'Reilly, and Niall Williams (2020), 'Trends and Issues in Personal Injury Litigation' *Irish Judicial Studies Journal* 4(1) 107, 108.

# Conclusion

HERE CAN BE little doubt of the vital role that juries play in the administration of justice. Juries are essential to criminal proceedings, but do they have a role to play in civil proceedings, and in defamation cases in particular?

Opponents to reform have said that the removal of jury trials from defamation proceedings would be “inherently undemocratic”.<sup>47</sup> But our democracy depends on public watchdogs’ ability to hold power to account. As it stands, the excessive costs, delays, and risks of facing eye-watering damages are most acutely felt by repeat defendants, who largely tend to be publishers and journalists. If the proposed reforms improve the efficiency and balance of each trial, it will inevitably reduce the chilling effect that is currently affecting public watchdogs.

Other common law jurisdictions including England and Wales,<sup>48</sup> Scotland,<sup>49</sup> and Northern Ireland,<sup>50</sup> have amended their respective defamation laws in recent years in an effort to increase efficiency and ensure balance between claimant and defendant. All of those reforms



included the reversal of the presumption of jury trials in defamation cases.

Removing juries from defamation cases may

be only one measure in a suite of reforms, but it would be a meaningful step towards ensuring that defamation law appropriately balances

the competing rights of reputation and free expression, and ensuring that public watchdogs are free to hold power to account. ✕

47: Mr. Justice Barnard Barton, speaking in the Joint Committee on Justice Debate (20 June 2023)

48: Defamation Act 2013 (England and Wales), <https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>

49: Defamation and Malicious Publication (Scotland) Act 2021, <https://www.legislation.gov.uk/asp/2021/10/contents>

50: Defamation Act (Northern Ireland) 2022, <https://www.legislation.gov.uk/nia/2022/30/section/3/enacted>



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