

Defamation Bill response

From: Sam McBride <[REDACTED]>
Sent: 05 October 2021 09:10
To: +Finance Office Public Email <finance@niassembly.gov.uk>
Subject: Defamation Bill evidence submission

Dear Mr McCallion,

I am responding to the Finance Committee's call for evidence in relation to Mike Nesbitt's Defamation Bill.

I am the Northern Ireland editor of the Belfast Telegraph and the Sunday Independent and for 12 years prior to that was the political correspondent and then political editor of the News Letter. However, this evidence is not submitted on behalf of any of those organisations and is instead my personal view as a working journalist, with particular reference to my experience as the author of Burned, an investigative examination of the RHI scandal. I have also been defamed by a Member of Parliament but chose not to take action against him after he publicly apologised, so I have experience of both sides of this equation.

I write in firm support of the great bulk of this legislation, something which I would almost never do because I believe that journalists should as a rule eschew support for a politician, political party or a piece of legislation. However, there is an onus on journalists to defend the principle and practice of free speech – something increasingly not taken for granted even in western democracies – and I also have considerable personal experience of the behaviour in response to which this legislation has been presented.

You are likely to hear evidence from those who do not have direct experience of this problem, whose homes have not been on the line because of libel threats, and some who do have experience in this area as lawyers but who will seek to downplay the scale of the problem. For those reasons, I believe it is important that you hear the reality of what the current law means for journalism in Northern Ireland.

It is difficult for anyone outside the relatively small worlds of the NI media or defamation lawyers to comprehend the enormity of this issue with the current defamation regime in Northern Ireland. I do not say that to seek to restrict debate about this issue because clearly this is a matter for all of society. However, the small – and shrinking – size of the media in Northern Ireland and the particular nature of our society creates an unusual problem whereby some of the wealthy and powerful (to their credit, many such people do not engage in this behaviour) use the more restrictive nature of Northern Ireland's libel law to attempt to suppress the emergence of material which may be embarrassing - or devastating - to their reputation.

In some instances, those people can be faced down. As a journalist, that is my instinctive position and it is what I did when several senior members of the DUP threatened to sue me after I asked them questions ahead of the publication of my book, Burned. However, that meant that my house was on the line if they sued me and won – and perhaps even on the

line if they sued me but at a certain point I couldn't afford to fight the case any further. That was an unusual case in that it involved me as an individual. Generally it is journalistic organisations which make these decisions. The reality of virtually all journalism in Northern Ireland outside of the BBC is that it is a commercial business. Journalists are only one part of that business and it is a brave publisher who decides to defend in court an action which their lawyers are unsure they will win and which will cost hundreds of thousands of pounds if they lose. Ultimately, that means jobs losses because in my experience (despite the very interesting anecdote from the bill's sponsor at second stage), most media in NI do not have libel insurance.

Some of you may be tempted to believe that this problem is being overstated. The reason you could reasonably form that view is that there is an insidious secrecy in what really happens in this area. When person X (in my experience often senior politicians) gets an expensive libel lawyer to write a ferocious letter alleging that a news report or opinion article has defamed their client and demanding a lot of money to resolve the issue, in the overwhelming majority of cases this never goes to court, and indeed never emerges publicly in any form, meaning that an examination of court lists or the number of libel writs which have been issued does nothing to reveal what is going on. Either those claims simply melt away after a robust response, or else the media organisation decides that it needs to settle the claim because there is uncertainty about whether it will definitely win at the end of a vastly expensive court process. These claims often involve tens of thousands of pounds going to claimants – and almost invariably even someone looking at the register of interests of a senior politician who has received such a payment would see no hint of what had gone on. Sometimes gagging orders are involved to restrict those involved from talking about what has gone on. As legislators, you will immediately appreciate the profound problem with such secrecy around stories which in my view are overwhelmingly accurate and in the public interest.

Raising the threshold to 'serious harm' would not prevent libel actions from being taken, or from being won by claimants. That is clear from what has happened over recent years in London. However, it would provide additional confidence for publishers. There was understandable concern expressed at second reading about this opening the way for lies to be published which, if they did not involve serious harm, would be deemed acceptable. I hold no brief for liars, but if lies are not causing serious harm, should we not prioritise free speech? Perhaps not, if there was no particular problem with the status quo, but in this instance the current law is preventing the sort of investigative journalism which we need more of and which ultimately involves the triumph of the truth because the powerful cannot bully or buy their way to silencing the messenger.

Another concern expressed at second stage by Jim Allister was about the suitability of judges to determine what constitutes serious harm. That point is particularly valid here given that the essence of libel law is about how one's reputation has been diminished in the mind of the hypothetical reasonable person who is Mr or Mrs Average – and therefore not a High Court judge. However, resolving that problem links into the question of juries and clause 11.

The one significant area of this bill about which I am very uncomfortable is the restriction on juries. Some of my journalistic colleagues feel that juries increase costs (which they do, but I think cost can never be the sole determinant here) and more seriously that the complexity of libel law is such that juries can lead to utterly perverse outcomes, the most infamous of which was the finding that The Irish News had libelled Goodfellas pizzeria over an honest restaurant review – a case which brought our entire legal system into disrepute until overturned by the Court of Appeal.

Perverse outcomes such as that would be made less likely by some of the other provisions of this bill, without altering the current provisions for juries in libel actions. The recent review of civil justice by Mr Justice Gillen (the senior judge who heard libel actions in NI prior to his retirement) aptly quoted Lord Denning on this point: “It (trial by jury) has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man’s honour or integrity is at stake – then trial by jury has no equal.” Mr Justice Gillen’s report also noted: “It is worthy of note that each member of the defamation sub-group who primarily acted for media clients agreed that juries should remain”.

That point excepted, my final observation is the importance of legal parity with England and Wales in this area of law. Northern Ireland is a tiny jurisdiction and very few libel actions are tried in the courts here – in large part because so many are settled out of court, as outlined above. Therefore, a substantially different legal regime here would involve greater complexity, more uncertainty for everyone because of the lack of case law, and greater cost – three things which all sides of this debate agree would be regressive.

In the area of the serious harm test, for instance, there has been concern about how this would be defined. However, here Northern Ireland can benefit from clarifying case law emanating from the Supreme Court without the need for hugely expensive test cases. This also gives certainty to newspapers and broadcasters operating on a UK-wide basis that our law is consistent to that of London, where many of the key editorial decisions will be taken. The idea put forward by the finance minister that NI could maybe partly harmonise its libel law with the Republic strikes me as fairly disastrous in terms of simplifying and clarifying what is an already highly complex area of statute and case law. There are inevitable tribal political arguments about whether we should follow London or Dublin, but libel law is uniquely unsuited to such crude considerations.

There are areas where there is no point in having devolution if we simply rubber stamp everything coming from London. But in this area – as in RHI – I believe there is a firm case for doing what Northern Ireland historically has done until the secretive decision to block libel reform nine years ago, and that is to follow the law in England and Wales.

Thank you for considering this evidence and I am happy to clarify anything which the committee believes I have not made clear.

Best regards,

Sam

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Dear chairman,

During my evidence to the committee on December 1, I began by asking for clarification about comments which Paul Tweed had made as part of his evidence, which was heard immediately before mine. Due to the covid restrictions, I was unable to be in the public gallery and only picked up some of what he said in relation to an image of Christian Jessen which was used to illustrate one of my columns in the Belfast Telegraph, However, I thought that I heard enough to discern the essence of his complaint.

I expressed shock that he had claimed this image had not been removed from our website because when I loaded the page on my phone, there was a stock court image. That was the image which when Mr Tweed contacted me in September to raise this issue, I had immediately agreed with my editor should be used to illustrate the story. I immediately accepted that the image of Dr Jessen was a poor choice, although that choice was by one of my colleagues who had no conversation with me about the story and so innocently chose the picture on the basis that Dr Jessen was mentioned in the copy in the context of me making clear my distaste for his conduct. There was a second issue in relation to the caption stating that Dr Jessen was coming to Belfast to "seek justice", which was clearly wrong and at variance with my copy. I had replied to Mr Tweed at the time to say that I accepted he had a valid complaint, and that the image would be removed. I had heard nothing more about the issue and assumed it was resolved.

However, subsequent to Wednesday's hearing, I have realised that while the photo was removed as the main image, it remained as part of a gallery which included an image of Mike Nesbitt and Peter Wilsmhurst. Readers could scroll to those images, and from speaking to Mr Tweed I understand that he did so the night before his evidence (which explains why he did not raise it with me prior to then) and that was the basis on which he printed out the article and held it up at the committee. The failure to remove the image was the result of human error, partly due to clunkier communications as a result of us mostly working from home, and not because of any attempt by the Belfast Telegraph to convey some innuendo about Mrs Foster's action against Dr Jessen. We have no possible motive to do so, and I have already made clear in several forums my abhorrence at how Dr Jessen conducted himself in relation to that issue.

My evidence to the committee was given in good faith, but there was a genuine misunderstanding here and so Mr Tweed was right to say that the image had not been removed from the website and I was wrong to say that it had been taken down.

We all make mistakes, and I have made a mistake here. For that I have apologised to Mr Tweed in conversation, and I am copying this letter to him. He has acted fairly and reasonably in bringing this to my attention. I have clarified this issue publicly on Twitter, but wanted to ensure that you are aware of this caveat to the start of my evidence to the committee. I do not know whether Hansard can add this clarification to their record of what I said at the committee, but if that was possible, it would add to the accuracy of the record and reduce any possible chance of a casual reader misunderstanding the situation.

Thanks again for taking the time to listen to my evidence and consider this important legislation.

Best regards,

Sam

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