Note on the Defamation Bill (NI)

Dr Andrew Scott
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1. My current position is that of Associate Professor at the LSE Law School at the London School of Economics and Political Science. In 2014, I authored the consultation paper on defamation published by the NI Law Commission. Following the closure of that body, in 2016, I submitted a report on defamation in Northern Ireland to the Department of Finance ('2016 report') in which I was able to draw upon the responses submitted to the NILC consultation. I am also an editor of the leading text on defamation law, *Gatley on Libel and Slander*, the latest edition of which is currently in preparation. In that context, I have undertaken a close analysis of a number of aspects of the developing jurisprudence under the Defamation Act 2013.

2. This note is largely confined to observations on the operation of the new legislation in England and Wales. It is intended to add to the analysis presented in the consultation paper and report previously published.

3. The tabled Defamation Bill would emulate for Northern Ireland the changes wrought to defamation law in England and Wales by the Defamation Act 2013. This was one of two options that were each presented as being desirable in the report authored for the Department of Finance.

4. Implicit in the recommendation of the second, alternative approach in the Department of Finance report was the conclusion that 'merely' emulating the Defamation Act 2013 would be a necessary but insufficient response to the concerns generated by the state of defamation law in Northern Ireland. I add a further comment on this theme at the end of this note.

5. I will be happy to discuss any aspect of this note, the reform of defamation law generally, or the wider experience of the Defamation Act 2013 during the in-person session.

The move to judge-only trials: highly beneficial consequences

6. Perhaps the most significant change wrought by the 2013 Act in England and Wales has proven to be that introduced by s.11: the presumption that defamation trials will be conducted by a judge acting alone.

7. This shift has allowed questions of fact that do not require the pleading and cross-examination of extraneous evidence to be considered at a preliminary stage in proceedings by the judge in each case. Preliminary hearings now habitually address the determination of meaning and the matter of whether an impugned statement should be understood as fact or opinion.[1]

[1] A further question often answered at the preliminary stage concerns the defamatory tendency of the impugned statement – a common law threshold test – and, interestingly, not the s.1 issue of whether a publication has caused 'serious harm'.

8. These are foundational issues in the structuring of a defamation action, and their clarification both (a) narrows the focus of legal action that progresses further and (b) sees many cases proceed no further beyond the preliminary stage. Yet the current law in Northern Ireland would often see the determination of these matters left – inefficiently - to the end-point of litigation. This increases costs and expands the opportunity for game-playing by relatively powerful litigants.

9. An additional advantage of the approach under the 2013 Act is that the court now delivers reasoned judgments on these questions, whereas formerly the litigants and wider public were left under-informed as to how such key questions had been determined by the jury.

10. The importance of this change – the move to judge-only trials - cannot be overstated. It was perhaps under-appreciated and hence understated in the 2016 report.

The s.1 'serious harm' test: not what was expected

11. The 2016 report was somewhat ambivalent about the introduction in Northern Ireland of an equivalent to the s.1 serious harm test.

12. When that report was published, the preliminary stages of the *Lachaux* litigation – which focused on the interpretation of the s.1 test, and which ultimately reached the Supreme Court[2] – were still in train, and it appeared that the courts would be interpreting the test as being essentially equivalent to that already present in the common law. Hence, the finding in *Cooke* v *MGN Ltd* [2014] EWHC 2831 (QB) that a swift retraction or correction of defamatory statements would likely serve to neutralise any serious harm and to obviate the risk of liability was considered to make s.1 – primarily, for that reason - a desirable addition to Northern Irish law.

13. Following the decision of the Supreme Court in *Lachaux*, however, the s.1 test is understood to demand rather more of the claimant than was previously required in order to prove liability. In essence, the claimant must adduce evidence of the *actual* harm suffered as a consequence of the defamatory publication, although to some extent this can be done on an inferential basis.

14. Importantly, the evidence and extent of harm have become matters that are usually contested between the parties such that they are subject to cross-examination at the full trial of the defamation action.

15. The s.1 test is not serving as a gateway or threshold test that disposes of trivial cases at an early stage in the manner that was originally envisaged. Ironically, the English courts now tend to revert to the common law tests at the preliminary stage and dispose by that means of cases that are not 'worth the candle'.

[2] *Lachaux* v *Independent Print Ltd* [2019] UKSC 27.

16. What the s.1 test has done is effectively reverse the presumption of harm in English defamation proceedings. Such harm must now be proven if liability is to follow. Whether this adds tremendously to the claimant's burden is open to question, however, and depends on the willingness of the court to accept inferential evidence of harm. Argument on and evidence of the extent of harm would often have been presented to the court at trial in any event, albeit only once the focus shifted to the quantum of damage and the need for compensation.

17. Irrespective of one's attitude towards the impact on the presumption of harm, the s.1 test remains desirable for its incidental encouragement of swift retractions or corrections where these are appropriate. It may be preferable, however, for the utility of such 'discursive remedies' to the wrongs of defamation to be recognised explicitly and included separately in any Defamation Bill (see below).

Consistency with English law: now arguably a more pressing issue

18. A general theme in the 2016 report was the benefit of consistency in the Northern Irish law with that in England and Wales that would be achieved through passing legislation that emulated the Defamation Act 2013.

19. Insofar as that point was valid, it is more powerful today than in 2016. Recent decisions of the English courts have highlighted the fact that the statutory defences found in ss.2-4 of the 2013 Act are significantly different to their common law antecedents. It will therefore become increasingly inappropriate for Northern Irish judges to rely on English law as a guide to the operation of the common law defences retained in this jurisdiction. Moreover, other major (or otherwise relevant) common law jurisdictions either have already revised their laws in a manner consistent with the 2013 Act (Scotland, Australian jurisdictions), or seem likely soon to do so (Ireland).

Section 3 honest opinion defence: necessary tweaks

20. The 2016 report offered as one way forward the introduction of a Bill very similar to the Defamation Act 2013, and hence to the tabled Defamation Bill. The differences between the the report's first proposed Bill and the 2013 Act concerned, first, a minor error in s.3, and secondly a change focused on alleviating the position of social media commentators who might otherwise be required to prove *by proxy* a defence of publications made by others.

21. These revisions involved the inclusion of the emboldened words in s.3(4) of the Act (or similar) and consequential amendments to s.4:

> (4) The third condition is that an honest person could have held the opinion on the basis of… (b) anything asserted to be a fact in a privileged statement published before **or at the same time as** the statement complained of**; (c) any fact that the defendant reasonably believed to exist at the time the statement complained of was published.**

22. It is notable that following scrutiny by the Scottish Law Commission, the Scottish Parliament introduced similar revisions to the equivalent sections when passing its Defamation and Malicious Publications Act 2020. They should also be introduced in the Defamation Bill before the Assembly.

Limitations in the plan to emulate the Defamation Act 2013

23. As was implied by the inclusion of the second reform option in the 2016 report, merely emulating the 2013 Act in Northern Ireland (as the tabled Defamation Bill would do) would be to miss an important opportunity to do more to address the pathological repercussions of defamation law as it stands. There is growing evidence that the law in England and Wales remains manipulable by relatively wealthy individuals and institutions in their attempts to pursue questionable collateral purposes through defamation actions.

24. The Committee and others might consider inclusion of two further elements in the Defamation Bill.

25. First, the 2016 report includes proposals that would encourage the discursive resolution of public sphere disputes by way of the prompt and prominent publication of clarification, correction and retraction. This would be done in order to obviate the need to resort – and indeed, through the introduction of a jurisdictional bar when correction and retractions are made, to preclude the option of resorting - to legal proceedings rather than as a long-after-the-fact remedy that followed from a successful claim (as is envisaged in the current Defamation Bill).

26. As noted above, the s.1 serious harm test may, incidentally, achieve a similar result. As this would be determined only at the time of the trial, however, it would be highly preferable for a discursive approach to be inculcated in the Bill as a standard and pre-emptive feature of the law. This is already the position, in different forms, in a range of European jurisdictions.

27. Secondly, the Assembly might consider the introduction of general measures to disincentivise the bringing of strategic lawsuits against public participation (SLAPPs), such as have been recommended by a coalition of NGOs, media organisations and other groups that often find themselves at the sharp end of coercive threats of legal action (most often, defamation proceedings).