

PT/DW

7th May 2013

Mr Daithi McKay MLA
Chair DFP Committee
Department of Finance and Personnel
Northern Ireland Executive
Craigantlet Buildings
Stoney Road
Belfast
BT4 3SX

Dear Mr McKay,

Re: Defamation Act 2013

In response to recent media coverage, I thought that it would be appropriate to write to you setting out the other side of the argument which the lobbyists have not addressed during the course of a media campaign that has been as intense as that initiated by the tobacco industry several decades ago.

As a libel lawyer of thirty-five years standing, practicing from offices in Belfast, London and Dublin, I have steadfastly opposed the introduction of any changes to the defamation laws in the UK, which have now come about as a result of pressure originating from the United States. I have been a member of various Consultation Panels set up by the Ministry of Justice and remain firmly of the view that the changes in the law of defamation that have been the subject of much debate have been unnecessary, and which have come about primarily as a result of pressure from the newspaper and publishing industries, determined to protect their own financial interests.

I have never had cause to take legal action on behalf of any of the so-called Russian Oligarchs or Saudi businessmen mentioned in recent media reports. Furthermore, a survey conducted by Sweet & Maxwell has confirmed that the number of cases involving *libel tourism* have been negligible, notwithstanding the media hype surrounding this issue.

I am arranging to forward a copy of my book "*Privacy and Libel Law: The Clash with Press Freedom*" (Bloomsbury) which will provide you with some additional background to these issues, but in the meantime I would highlight the following key points that are relevant to Northern Ireland, namely:

- i) Very few libel claims have come before the Courts in Belfast, and this number has declined significantly in recent years primarily on account of the absence of legal aid and the fact that the level of costs

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here make it uneconomic for lawyers to undertake the very specialised and often complex work involved. This fact has been acknowledged and has been a basis of discussion at recent meetings of the Defamation Law Committee set up by Mr Justice Gillen to consider this and other issues relating to libel proceedings.

- ii) Unfortunately the lobby groups have not shown any concern that Northern Ireland citizens have in the past been treated differently from the rest of the UK in relation to libel proceedings. Unlike in London, a Plaintiff in Belfast has not been entitled to include the cost of an After The Event (ATE) insurance premium in the damages awarded. The premium which can often amount to almost 50% of the third party costs exposure, has to be paid out of any damages awarded. Accordingly, if third party costs are estimated at say £80,000, the premium would be somewhere in the region of £35,000 and if the Plaintiff is ultimately only awarded £20,000 then he is faced with a shortfall of £15,000 which means that the ATE insurance is not a viable option. Although this is under review at the moment, up until now such a premium would have been awarded *in addition* to the damages in London;
- iii) In NI, lawyers are not permitted to take on litigation on a *no win no fee* basis, unlike in England/Wales, which is yet another obstacle for the ordinary person on the street to obtain access to justice, particularly in the absence of legal aid;
- iv) The legal costs in Northern Ireland are significantly lower than in the rest of the UK, and therefore the objections raised during the current libel law debate are not relevant here;

My view is that libel proceedings should be made more accessible for the general public in Northern Ireland, rather than more difficult. I also believe that juries should be retained here for libel actions, as remains the position in Dublin. On the basis of my experience over the years, seven (or twelve) ordinary people are in the best position to assess the impact on a victim of a newspaper's "hatchet job".

I would also have thought that it would be in the interests of the Northern Irish economy for companies to be encouraged to locate here in a jurisdiction where they ought to have the same legal rights to protect their brand and corporate reputation as in Dublin. Under the new UK legislation, a company will now have to establish *substantial financial loss*.

Likewise, the new Defamation Act raises the bar for the general public in that in England they now have to prove *serious harm* to reputation, thereby making it even more difficult for the electorate (including politicians, campaigners and indeed journalists) to protect themselves, bearing also in mind the other factors I have outlined above. Furthermore, the proposed removal of the right to trial by

jury deprives the man on the street of his last opportunity to express his views on the conduct of the media, and thus the removal of the most effective deterrent against reckless defamatory publication.

Finally, I would submit that this issue is not so much about *freedom of speech*, but rather *access to justice*. Ironically, I believe that the current law and procedure offers more protection to the former than to the latter.

Please do not hesitate to contact me, should you require any further clarification.

I have also written to the Finance Minister and other interested parties in similar terms.

Paul Tweed