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Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Defamation Act 2013: Briefing from
Johnsons Solicitors

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such as Van Morrison. The American work then started to come in around 2004 and 2005. I represented various household names that were as well known in Northern Ireland as they were in Wales, Scotland, England, Ireland or wherever.

We developed the libel practice in tandem with our insurance practice but, by a long way at the moment, the biggest group of plaintiff or claimant clients for whom I act is made up of journalists. The second largest group is made up of lawyers. The third largest group is politicians. I like to think that the first group — journalists — have a fair idea when a newspaper has got it wrong and somebody should be entitled to redress. That is a significant point to make.

The second point that I would make is that I also act on both sides of the fence. I act for a number of national and local newspapers, for publishers and, latterly, for bloggers. My perspective on where we are today is that the problem is not the newspapers or the print media in general. I am one of their biggest defenders and probably the most avid newspaper reader in this country, for both professional and personal reasons. Really, the battle now is online, and a lot of the discussion that has taken place has become academic, unfortunately. I am very sad to say that.

I will run through my view. As I said, my background is that I have acted for people from every walk of life and of every political persuasion. I have represented virtually every political party in both Irish jurisdictions and in England. All my clients on the plaintiff side faced the same intimidation from certain sections of the press, with the latter having the financial firepower to sit out a case and test the resolve of a plaintiff who is often faced with putting his or her home on the line. There is a very good reason why you hear only about the cases brought by Russian oligarchs and Saudi businessmen; they are really the only people who can afford to take on the media. It is sad that only wealthy people can get access to justice in our courts.

That said, for the life of me, I just do not know where all these Russian oligarchs and Middle Eastern businessmen are in Northern Ireland. They may be hiding in Omagh or somewhere, but I have unfortunately not had the cause or opportunity to represent any of them, nor, indeed, the scientists and academics who have been such a feature of the recent paranoid coverage by newspapers. I represented Louis Walsh: an example that I cite not to name drop but because it provides a very clear illustration of the problems that I am up against every day. Louis — we — were given four hours' notice that 'The Sun' intended to publish what turned out to be totally fabricated allegations of the most serious kind. The tabloid would not even delay publication to check out the CCTV footage of where the incident was supposed to have taken place, such was the commercial desire to get the story out. There is nothing in the law as it stands that allows me to stop that story. I deal with the press every day. On a Friday night, my clients are hit with 20 questions that have been carefully researched for maybe a week beforehand by the journalists, and they have to answer them for a publishing deadline; they may be given until around lunchtime on Saturday. There is nothing in the current defamation law that gives me any ammunition.

I have nothing to lose; I will explain that in a moment. I am not some greedy lawyer trying to line his own pockets. I cannot make money from media work in Northern Ireland and I am more than happy to have that checked and investigated. I cannot make money from that work; my insurance practice gives me that luxury. In Dublin and London, where the bulk of my practice is, I can make money, but my clients still have the same stress and strain. The concern is the ordinary man in the street. We get five or six phone calls a day from ordinary people from Belfast, from journalists, politicians or whoever, asking me to pull a rabbit out of a hat to stop the paper hitting them the next day. I have very little ammunition. There is only one thing that the papers are worried about, and that is a jury. They do not like being judged by their readership and by the man in the street.

I was fortunate, when I started off in the late 1970s and early 1980s, that juries heard personal injury civil claims. In Belfast, we had a seven-man jury and in Dublin it was 12. I can honestly say that, in my professional career, I have never seen a situation where an ordinary working man in the street has been brought in to judge his peers and has got it wrong. Not once. That applies to libel, to personal injuries or whatever. We can debate, we can go through all the technical detail here for hours, and none of it will make any difference to my clients at all, I am afraid.

As I said, I act on both sides. I was a member of consultation panels that were set up by the Ministry of Justice under both the previous Labour Government and the current coalition Government to consider whether changes were required under English defamation law. I listened intently as usual, and I am probably in a minority of one but I found nothing that persuaded me that there was a need for any change in the law. Indeed, at one stage, and although, unfortunately, all those discussions were subject to Chatham House rules, I can say a little because it has been reported in the press. I asked

for illustrations: I asked whether somebody could tell me where these so-called libel tourists are and where this problem is emanating from. We have had one or two situations: Simon Singh, in fairness, had an unfortunate case that I sympathise with, but that was one. I also act for scientists who are plaintiffs as well as defendants, and they have the same problem of having their reputation protected if a major pharmaceutical company decides to undermine them.

They can afford to take the stance they take in the United States of America because they have got a law of publicity: you can protect your image in the States; there is a law preventing people from undermining your image. A company can have its image protected there, but not here in the UK or in Ireland. Here, you have to rely on the defamation law and the law of copyright. That is the way it stands, and people are ignoring those factors. The problem is that people say about somebody like me, "He is a wealthy lawyer. It is in his interests to keep this going". I am faced with the problem that I am given literally hours to think of something that can buy time so that we can prove that what is about to be published is false.

I am not trying to prevent the press from publishing stories; I am a great admirer of investigative journalists. I acted for Suzanne Breen in a case against the NUJ, and she is someone I admire a lot. I have acted for most of the journalists in this Province at one time or another, including journalists employed by the 'Belfast Telegraph', for instance, which has been my nemesis here in regard to this debate.

The other thing with the US is that you have to buy freedom of speech. It is not freedom of speech as we know it. You have to buy the Fox News channel and use it for the Republican cause so that the Democrats have no chance or whatever; that is the way it works. I have, unfortunately, come to the conclusion that if you want a right of reply published in one of the American broadsheets, I would have a better chance of getting a right to reply published in the Zimbabwe 'Herald'. That is the truth. It is the same for my colleagues in America. I apologise if I am coming across as a bit facetious, but I am trying to make the points that we have got to get real. It is a non-problem. The publicity that the 'Belfast Telegraph' has given it is a joke. It is the same publicity that 'The Sunday Times' gave it, but it is in their interests to get that publicity. Most people do not care. When I do the school run in the morning, people ask, "What is this all about?" or, "Paul, is this you creating some publicity to try to get some business for yourself?" This is a non-issue.

In Northern Ireland, we have always been treated differently from the rest of the UK so far as the libel courts are concerned. Unlike in England, lawyers here have never been allowed to take on a case on a no-win, no-fee basis or a success-fee basis, nor can plaintiffs recover after-the-event (ATE) insurance premiums, which provide protection when a claim is unsuccessful. In the past, I have raised that issue with the Northern Ireland Law Commission and the Queen's Bench defamation committee, of which I am a member. Although the problem has been acknowledged, the position remains that members of the public in Northern Ireland have not had the same options as those enjoyed by their counterparts in England. In the past, the 'Belfast Telegraph' has not shown the same concern about that inequality, in stark contrast to its recent disproportionate coverage relating to its call for the implementation of the Defamation Act 2013 here. Although the law in relation to success fees and ATE cover is due to be changed in England, my point is that Northern Ireland has been treated very differently from the mainland for many years.

If I may, I will highlight briefly the following additional points that are of relevance to the current debate. First, very few libel claims have come before the courts in Belfast over the years. That number has declined significantly in recent times, primarily on account of the absence of legal aid and the fact that a comparatively modest level of costs — you will all snigger at this — makes it less attractive for lawyers to undertake the very specialised and often complex work involved. Legal costs in this jurisdiction are only a small fraction of those charged in London and Dublin. Indeed, from my professional perspective, they are rarely more than the fees in, say, a whiplash-type claim. The disparity with the rest of the UK and Ireland has been the basis for discussion at recent meetings of the defamation law committee, chaired by Mr Justice Gillen, which is considering that and other issues relating to libel litigation.

Secondly, references to Belfast becoming a centre for libel tourism are totally misconceived. Indeed, the myth of libel tourism was addressed in a report conducted by Sweet and Maxwell several years ago, and I have provided you with a copy of the commentary on that. The report found that libel tourism claims are minuscule in the overall scale of things, but that certain sections of the press have capitalised on what they regard as an emotive issue in order to support their campaign for a change in the law.

Thirdly, claims that the press here are likely to be restricted in their reporting if the new legislation is not introduced are, quite frankly, total and absolute nonsense. You have only to read a sample of the headlines in any of our Sunday papers or local papers to see how cowed our local press are.

Fourthly, although I have no particular difficulty in principle with affording protection to scientists, medical researchers and academics, I should say that I am unaware of any such claims having been initiated here, never mind brought to court.

Fifthly, the press have suggested that IT companies may be discouraged from locating to Northern Ireland as a result of our current defamation laws. That certainly has not been the experience in the Republic of Ireland, where companies such as Facebook, Google, Microsoft, Twitter and Yahoo! have not been deterred by the libel law in that jurisdiction, which is similar to our own. Indeed, the Irish defamation and privacy laws have encouraged those companies to improve their internal regulatory measures, which will, hopefully, reduce the rampant cases of online abuse and harassment that are proving difficult to control and have resulted in several high-profile suicides and other devastating consequences. That said, I act for a number of bloggers and online publishers, and I would like to think that I have the benefit of a fairly broad insight into what is fair and what is proportionate on both sides of that argument.

Sixthly, I also would have thought that it would be in the interests of the Northern Irish economy to encourage companies to locate in this jurisdiction. That would mean that they are afforded the same legal rights to protect their brand and corporate reputation as in Dublin. However, under the new UK legislation, a company will now have to establish substantial financial loss, which is often impossible to quantify in specific terms. Likewise, the Defamation Act 2013 raises the bar for the general public in England in that they now 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 in mind the other factors that I outlined above, perhaps the most significant issue is the proposed removal of the right to trial by jury, which would deprive the man on the street of his last opportunity to express his views on the conduct of the media, thus removing the most effective deterrent against reckless defamatory publication. The tabloids have always had a paranoid fear of being judged by a jury made up of the ordinary man in the street, ie their readership and your electorate. Having had 35 years of experience of juries in the three jurisdictions in which I operate, I can honestly say that, even in the late 1970s and 1980s, when juries were involved in most civil cases, they have always managed to get it right. Juries can get behind the nonsense and determine what has been going on very quickly with the guidance of law given by the trial judge. Without the threat of a jury award, I might as well give up most of the libel cases that are brought to me, and the press know that. That is why there is such a push to try to get this new legislation introduced in the Province.

I have no hesitation in saying that, if similar legislation to the English Defamation Act is brought in here, it would effectively remove any prospect for the ordinary man in the street to obtain access to justice. Although very few defamation actions are brought in Northern Ireland — in fact, you could count on one hand the number of claims that have come to court over the past couple of decades — the new legislation would remove the prospects for settlement in those cases that I have managed to resolve before trial.

I will give one example, which my client has given me permission to raise. Earlier this year, I acted for John McAreavey, the widower of the late Michaela McAreavey, who was brutally murdered in Mauritius. He brought a claim, on my advice, against the 'Irish Daily Mail', which had shown stills of CCTV footage, purporting to show the couple arguing minutes before the murder. The footage turned out to be of a German couple, and the paper had interspersed one still of the couple at the hotel reception, and the various headlines, and so on, had given it credibility. If the English Defamation Act had been in force here, John McAreavey would not have had a legal basis to bring a claim.

I can cite dozens such claims. You have to remember that it is all very well posturing, and, as I said, we know that, particularly in the UK, there is a great fear of the press among politicians, as the Andy Coulson scenario demonstrated. Hopefully, he will not turn up here looking for a job. The consequences are devastating. I have dealt with situations, particularly in Ireland, where online bloggers have caused people to commit suicide or go into a state of depression that has required medical treatment, etc. I am fighting a losing battle there, but I need something that will give me at least some form of leverage.

Another example is that of a Belfast man on whose behalf I wrote. There was a blog website called NAMAwinelake. In fairness, I thought that it was doing a reasonably good job, and I had no particular issues with it. However, my client was accused of being one of the so-called Maple 10, which anyone familiar with the financial crisis in Dublin will be familiar with. Basically, he was not, and the website realised that it had got that wrong so it removed his name. There were a lot of other factual inaccuracies. I had the temerity, on his instructions, to write to the blog. We did not claim damages and we did not look for costs. We just wanted an apology and a retraction. We wanted the record set straight, because it was very damning. In the current climate in Dublin, there is great sensitivity over involvement in the Anglo Irish Bank crisis, etc. The blog decided to cock a snook at me by using the headline:

"How Paul Tweed's Johnsons Solicitors are trying to muzzle the NAMAwinelake blog"

It published the letter, and it was full of facetious comments afterwards. I had to take the gloves off, but it was still very mild when I did the follow-up, because my client was anxious that he did not want to get bogged down in litigation, but it was equally important for him to do something. The guy closed the site down but left the letters up in defiance. I have been getting e-mails telling me that an army of bloggers has got it in for me. They say that I need to watch my step and look where I am going. As we all know, coming from Northern Ireland, we do not get too excited about such threats. Nonetheless, as things stand, my client cannot get that removed unless he is prepared to pay a substantial sum to a de-optimising company to get it pushed into the internet stratosphere.

Someone has to tell me how we deal with those situations, because it is quite tricky when you are faced with this scenario. Again, this is all Friday night/Saturday morning stuff. We have to reach a scenario in which people understand that this is not about curtailing freedom of speech. I am in total support of freedom of speech. I do not favour a licence to libel or freedom to libel. There has to be a balance. Our print media deserve and need all the protection that they can get in the battle with their online rivals, and I have done and will continue to do everything that I can to protect them. However, this whole debate is a total farce. I want to ensure that, in the Province, people understand what is happening. Most of my practice is now in Dublin or in London. I have very little media work in Belfast, so, at the end of the day, it does not matter to me at all in a professional capacity.

I do not fully know what is in Mike's private Member's Bill, but, from reading between the lines and from what I read in the press, if it is passed, it will introduce some sections of what is in the English Bill. I want a law that goes the other way and makes it easier for the ordinary person here to get access to justice. In the event that a decision is made to put through the equivalent or something similar to the UK Defamation Act, I say to everyone in Northern Ireland: do not call Paul Tweed if the press come at you; call Mike Nesbitt. You have got to call Mike. Make sure that you have his mobile telephone number, because the hours are very unsociable. You cannot have your glass of wine on a Friday night; you have to wait. You have to be on call until maybe 10.00 pm, and, on Saturday morning, it starts all over again. On a Saturday night, I am normally fighting to try to stop the 'Daily Mail' getting the print edition out, maybe until 9.20 pm or 9.30 pm some nights.

I will be powerless if it comes in, so please do not call me. The only possibility that people will have is if there happens to be distribution in Ireland. If you have a reputation in Ireland, we may have to do it there. The Irish legislators brought in new defamation legislation about two years ago, and they got it absolutely right. When the UK Ministry of Justice was looking at the issue, it paid great attention to that, but, unfortunately, it did not follow it because there was too much pressure from a political end to appease the press. I encourage you to look at the Irish Defamation Act 2009. As I said, it strikes the perfect balance between freedom of speech, the right of the individual and ability to pay for representation. It is still very difficult for the ordinary Irish citizen to get access to justice. There is no legal aid there either, and there are still various cost scenarios, but at least there is a 12-person jury that gives me something to work on.

I apologise if I am boring everyone. Finally, notwithstanding all the comments that I have made, I remain firmly of the view that, for the most part, the UK and Irish media is among the finest in the world, primarily on account of their credibility and accuracy in reporting. That, I submit, is in no small measure due to the defamation laws that are currently applicable in both Irish jurisdictions. Thank you very much.

The Chairperson: Thank you, Paul. You touched on an interesting point about online developments. Anyone who is on Facebook or Twitter knows that there is so much slander on those sites. Where do you draw the line with those cases? Someone can say something on a web page, and the web page

might have only five or six hits, but it is available to the world. Where do you draw the line in such cases?

Mr Tweed: It is a major problem. As I said, none of the legislation, certainly not the English Defamation Act, will make a lot of difference to that. It introduces in section 5 a provision that will make it easier to force the likes of Google to identify anonymous bloggers who are posting this stuff. They are the real difficulty, because it is not as easy as it seems to identify who has posted the offending material. The problem we have is not just with bloggers. If something is posted online by the 'Daily Mail' website for example, that goes from London to Singapore to Sydney to Los Angeles in between five and seven seconds. If I get a postage-stamp-sized apology or make a complaint to the Press Complaints Commission (PCC), how will that help my client? He is done; he is gone; and it does not matter. It took 18 months for us to get the Louis Walsh case to court in Dublin, and, although they put their hands up and said that they were sorry that they had got it wrong, it took 18 months. In this world, the problem is that there are massive difficulties around online bloggers. In fact, the law, to be honest with you, is not geared towards or capable of dealing with them. If it is one of the recognised newspapers or media outlets that have a base here, we can take action. However, for years, up until the decision by Facebook, for instance, to locate in Dublin, most of them were just laughing at us. I was writing and they were in the haven of the United States. The United States, Iceland and Zimbabwe were providing a lot of protection to those people. Then, of course, as we have seen with WikiLeaks, the trouble is that, when the tables are turned, whoops, what do we do? Suddenly, people are starting to panic. Again, I am also a big fan of the American media. I think that they do a great job, but there is a different cultural approach in America. Most people do not believe what they read in the papers because they know that the papers are allowed to print what they want. In Belfast, you like to think that what you are reading is, to a large extent, accurate and true. So, our problem is that, if you do not take action here, people assume that it is correct. That is the dilemma that we have.

The Chairperson: How do you define "serious harm" to reputations compared with the status quo?

Mr Tweed: Put it this way, it was deliberate that they put in "serious harm" in order to raise the threshold to make it more difficult to get rid of what would be regarded as trivial claims. However, the difficulty is this: what is a trivial claim? It is a different thing to different people. To be accused of being somebody who is frightened to go into court is a very serious allegation for a professional lawyer. However, it does not matter a toss to a man who is an accountant, for example. We have debated this. I have been to more committee meetings and debated all those things before that went out. Everyone agreed. However, the press need something. They have got to be appeased. It is as simple as that. This is really what is being done to do that.

Maybe it would be better just to go down the American route. We could get on with it. I will concentrate on privacy. I will take the battle on to super injunctions. We will do the other stuff. That is maybe the way that we would go. To be honest with you, in London now, I would certainly give very serious consideration before I would even let a wealthy person take their case into court. That is where we are at the moment. It has not been tested yet, and we will have to see. Certainly, the key factor here is the absence of the jury. That has been put right under the carpet. Nobody has really noticed or raised that. I have been shouting and screaming about it. They have kept it very quiet. There is no answer. I would simply just ask any newspaper proprietor why they are so frightened of their readership. Why are they so worried about getting it wrong? Yes, they do award higher damages, but they have heard the evidence.

I cited cases at the beginning. In the McCartney case, for instance, people said, "They were fighting over a chocolate éclair. Are you joking me? Have they not got something better to do?" However, they were goaded. Both lawyers were goaded into that position. They would have taken an apology. They wanted the paper just to apologise, but no, no, no, they were goaded and forced to go into court.

No client of mine whom I have watched in a witness box having their reputation analysed and checked and being goaded for two days has enjoyed the experience. I can tell you that. It does not matter who you are or how wealthy you are. It does not matter what part of the world or what part of the city you are from. It is not something we "just do". That has a chilling effect. I invite anyone who is worried about being chilled to get into the witness box to have their life analysed and ridiculed. They will get a chilling then. That is a real chilling.

The Chairperson: What about the cost? Obviously, there is a concern or an argument that, now that the law has changed across the water, there will be a lot more libel tourism and more people will go

through the courts in Belfast. What is the cost to the public at the moment? What do you think the potential cost will be?

Mr Tweed: At present, the costs make it totally uneconomical to bring a libel action in Belfast. That is something that the Queen's Bench defamation committee is discussing at the moment. The taxing master would allow the same rate as you would get if you were to trip on a kerbstone outside Parliament Buildings. That is the basic standard, even though I can assure you of — and I was going to bring my wife along to give side evidence here — the stress levels and difficulties of trying to do that work. People do not realise what you have to do. You have a short time span in which to do it. People are absolutely panicking like mad, and you have to think outside the box the whole time. So, here in Northern Ireland, costs are very low. They are a fraction of what they are in London and Dublin. So, if you are saying to me that it would encourage people to come here, I would say that the libel tourists who are being talking about, when they come in, will just want an apology. Most of the people from Hollywood whom I act for just want an apology. They just want an apology, and to be in and out. They are not going to be encouraged or deterred by the costs per se, although most of them do like to watch the pound or the dollar in their pockets. Fees are not a problem to those people. However, to the taxi driver at the front of the City Hall, it would be a big expense to take on a case. It is a big expense for somebody to risk taking a personal injury claim, but normally, you would have legal aid for that. Or, until recent times, you would have had legal aid. So, you can do it. Without the financial support, it is a big hurdle. However, from our point of view, that is why we say, "No win, no fee". Success fees give me a chance. I can act. The Law Society will not allow me to take on a case the way that I can in Dublin or London. The whole time, we have to be very careful how we do the case. That would solve that problem.

A big thing here is deterrent. I have hours before the publication date. I need something. I will not be having a debate with my opposite number in the legal department of whatever newspaper you pick — the 'Daily Mail', for example. I will not say, "Guys, what does 'serious harm' mean here? Do you think that cuts the threshold here? Is there a public interest scenario?" We do not have those debates. They just ask me what I want them to do. There may be trades. They will do a trade-off or something. They can try to do something like that. There are various means of doing it, but it is certainly not in the Defamation Act, I can tell you.

As you quite rightly pointed out, the big problem is the online stuff. I wish that I could give answers to that. Most of them are cocking a snook at all of us. I do not chill them, put it that way. I am going to have to try to find some way to get them under some degree of respect, if not for the law, for human life, because the harassment and abuse, particularly of politicians in Dublin at present, is absolutely appalling. That scenario is spreading rapidly. Once they see that they are getting away with it, they will get away with it. There is only so much that I will take with regard to the abuse that I am getting all the time. I do not need it, at the end of the day. There are other ways. I will go back to the whiplash claims for a while for my final years and have a nice, relaxing existence, albeit it may not have the same cut and thrust. It is an easier lifestyle.

The Chairperson: I have one final question before I open it up to members, Paul. What is your view on section 4, which creates a new defence to an action for defamation of publication on a matter of public interest?

Mr Tweed: Again, we have public interest defences now. In existing law, there is a public interest defence, the Reynolds defence, and various others. Those remedies are all available. Basically, to a large extent, the new legislation is restating or rewording existing law. Those two factors, raising the threshold of seriousness and removing juries, are the two key points. The rest is cosmetic, again, probably to make the press think that they are getting something. The public interest defence exists here in Northern Ireland at present.

The Chairperson: So, your main concerns are sections 1 and 11?

Mr Tweed: Yes.

Mr Weir: Thank you, Paul. That was very interesting. I do not know whether it counts as an interest, but I declare that I am a former barrister. I suppose that I am still registered as a non-practising barrister. It means that I cannot practise and I cannot get paid.

When you talk about your wealthy clients being on the phone from Hollywood, I wondered whether you meant Hollywood, California, or Holywood, County Down.

Mr Tweed: Both.

Mr Weir: Both. Certainly, that would relate to at least one of the libel actions that you mentioned earlier.

I have a few questions. Obviously, when people think of defamation, they automatically think of libel. How frequent is it for a slander case to be taken in Northern Ireland? That is a lot rarer.

Mr Tweed: It is actually more frequent than you might think, Peter. It is much more difficult to prove, because, of course, it is not in permanent form. So, if somebody slanders somebody else, they can say, "I did not say that." It is about proving that they actually said it. Quite often, it is one word against another. Then, of course, you have got to publish or make the statement in the presence of a third party, etc. So, it is very difficult to establish. We have had quite a number of them. It is surprising. However, again, a lot of the cases — I would say that 99% of my cases — are settled well in advance. You would tend to try to settle the slander cases more quickly because they are much more difficult.

Mr Weir: You have spelt this out reasonably clearly, but I want to be certain about it. There seem to be three options. The first is to adopt the legislation that has gone through Westminster or something akin to it. The second is to leave the legal position more or less untouched. The third is to have some examination of reform of the situation, although the reform should probably be pointing in the other direction and particularly look at the issue of costs and the cost to the ordinary man on the street of taking a case, which is prohibitive at present. From that point of view, particularly with regard to costs, there is a barrier to protect those who are doing the defaming in certain regards. I presume that you would be looking at the third option as the route that we should be going down.

Mr Tweed: Yes, if those are the choices, most definitely. I have got very used to turning away clients who come to consult us. On an average day, we get two or three people consulting us from Northern Ireland who want to get some form of redress against the papers. We take on less than 5% of those cases simply because it is impossible to get access. We cannot expose those people to a situation in which the press have been aggravated, because they will be even worse off. So, unless you are going to finish it off, you cannot start.

Mr Weir: You have touched on this, but I wonder whether there is a wee bit of naivety here. We have this situation, particularly because of the actions that you mentioned around the two key issues; namely, the jury issue and the threshold issue, both of which will have a considerable impact on the number of successful libel actions or, indeed, the extent to which such actions are taken.

For the past year or two, the Leveson inquiry has been hovering as a cloud over the press. Government, of whatever hue, have tended to look to the press to try to foster good relations. To what extent are the additional protections, particularly for press publications and the papers regarding the jury and the raising of the threshold, quid pro quo for what the Government are going to have to do over Leveson? Are they a nod and a wink towards the press?

Mr Tweed: There are two aspects to that question. It remains to be seen what the Government are going to do, if anything, over Leveson. We seem to be very much up in the air about that. My difficulty is that the PCC, which is your alternative to libel litigation, has not been effective in any way over the years, unfortunately. We have used the PCC and Ofcom regularly to try to get a less expensive form of vindication for the client. However, we have one particular case at the moment in which the editor is basically judging himself through the PCC.

So, my preference would be to see, whether it is by royal charter or whatever, some cost-effective alternative for people to go to that would balance Leveson. It is a parallel issue in one sense, but we still have to go back to my original point, Peter: this debate is unnecessary. I am not really in favour of saying, "We will give the press this if we take that." That is not necessary. Of all the stuff we have debated, those are the main two issues that I am concerned about. If the royal charter produces something that is effective, I will be the first to try to use it.

Mr Weir: I am questioning, to some extent, the Government's motivation for being seen to throw some sort of quid pro quo.

I have two final points. For those who express concerns and want to protect academic freedom etc, there are a wide range of defences in defamation cases, and arguably the most pertinent one is that of justification. If you are telling the truth and can show that you are telling the truth, you are in no way defaming anyone.

Mr Tweed: Good point.

Mr Weir: That slightly negates a lot of the stuff that has been said. From the point of view of the concern about protecting academic freedom, how many cases of libel are taken across the UK on the basis of defamation through academic research or academic publications?

Mr Tweed: I do not know. I acted for Oxford University Press many years ago, but it was not an academia one. I cannot cite any examples. Simon Singh is the only one who received massive publicity here; he was sued, and he won his case. That was a scientific scenario. As you know, Peter, you have to remember that the judges are not sitting doing nothing. They will be very objective. Very early in an academic case, they will be scrupulous in how they examine its merits. This is not a scenario in which it is just ducks in a row, and you go out and get chilled. I have never had that experience. I have never seen it, whether acting for defendants or plaintiffs. As far as I am concerned, all the checks are there.

Libel tourism is a myth. You will have seen the Sweet & Maxwell statistics, which everyone has conveniently put under the table in the debate in England. For me to bring a claim on behalf of Jennifer Lopez or whatever — pick a case — I have to go before a judge with an affidavit to convince him that Northern Ireland — if it is Northern Ireland — is an appropriate place to bring the action. The plaintiff has to have a reputation here. We have to remember that, with online dissemination, people have much broader reputations than they would have had. We are getting much more information; we get all the American sitcoms, etc. They have a reputation in Ireland. Jennifer Lopez is known, but the judge might decide that the dissemination of the offending material is so minuscule that the case is inappropriate. He could throw it out, and I might not get the case off the ground. The same applies in London and Dublin.

Mr Weir: I agree that the two key problems are the issue on the jury side of it and the impact on libel. I have particular concerns about the threshold raising. Obviously, that will play a large part in whether a libel case is successful; indeed, whether it is taken. If the goalposts shift to make it very difficult for anybody to succeed in a libel case, particularly because of the current financial situation, people will be deterred.

The flip side of the coin is the extent to which the threat of libel action, and the fact that it can be brought under the current circumstances, acts as a deterrent to any form of broadcast media, be it television, radio or newspapers. To what extent do the changes proposed mean that irresponsible people in the print media — we have, unfortunately, seen that that has happened on occasions, particularly in England — will feel that there is a much freer hand to be a lot more casual about defamation as a result of this?

Mr Tweed: You have certainly hit the nail on the head. I need some form of deterrent, unfortunately. Otherwise, the press will not listen. That said, it may be that, after 35 years, I am losing my touch. They do not seem to be that frightened of me whenever I am threatening it. I need something to try to balance and discourage. As you say, if it is the truth and it is accurate, nobody has anything to worry about. The pressure is on the plaintiff. I can threaten everything, but, at the end of the day, if we bring a case before a jury and it turns out that the press have got it right and it is true, my client is financially ruined in most cases, having gone through the stress of maybe a year or 18 months of absolute turmoil. I would not recommend it; it is only when people have been forced into that position. Do not forget that, whenever you talk about deterrents, the press will test the resolve of my clients, primarily their financial resolve. They will get them right up to the door of the court to see whether they are going to go in, and then they will settle. That happens very frequently. It is a reverse situation. You will, no doubt, hear from other witnesses about a chilling effect. It is not the chilling effect that they are making it out to be; it is a two-way slot.

Mr McCallister: There are several things. Would access to justice not apply to a lot of other cases as well? Even for neighbourhood disputes, the cost of settling or going to court is prohibitive for most of us.

Mr Tweed: In most of those cases, you get legal aid if you do not have financial means. The big difference is that you cannot get legal aid for defamation.

Mr McCallister: But it is difficult to get legal aid if you are on middle-income. You almost have to be either very rich or very poor. If you are in the middle, your access to that type of justice can be effectively restricted. I take the point that you have no way of getting legal aid in defamation cases.

Mr Tweed: To be honest, I would be happy for no win, no fee arrangements to being place for neighbourhood disputes. I am a great believer in trusting my own judgement and the advice that I give my client, and I will stand by that. I take your point. The same criteria and problems that apply to defamation actions can also apply to certain other types of litigation. It is just that there is no legal aid, no financial support in the media cases, and they are far more difficult and subtle to fight, whereas in the case of somebody who has, for the sake of argument, a skiing accident or you trip in front of the City Hall and you have a fractured arm or whatever, that case is much more black and white and a more tangible type of claim. In the media world, cases are much more subtle in many ways, and there are these defences of public interest etc that make it much more complex. It is not a question of just publishing something that is false; it has got to be defamatory, satisfy all the criteria and must not be subject to these various defences that are open to the press to claim.

Mr McCallister: Why have we never moved to no win, no fee?

Mr Tweed: I raised that with the Northern Ireland Legal Services Commission about five or six years ago. I had a client who was bringing a claim. I am hesitating because I am not sure whether I am allowed to say what it was. Anyway, to cut a long story short, he ran out of money and just could not do it. We were trying to help him as best we could. Do not think that I am so callous as to say that you pay up before we do this. We bent over backwards, within the rules, to be able to give him a chance. I wrote to the commission but was told by its chairman at the time that it was, unfortunately, not a priority and that defamation, understandably, was small compared with the issues that had to be addressed in criminal law. Basically, criminal law had to get priority. I can produce that letter, if you wish. I should have brought it today.

Mr McCallister: Is the presumption against using a jury or can you absolutely not? Can you insist on a jury trial under the new law in England and Wales?

Mr Tweed: No.

Mr McCallister: So, you just would not get a jury. On the jury issue, was there not a case about a restaurant critic who lost on a jury trial but won on appeal? You are probably familiar with the case that I am talking about.

Mr Tweed: Yes.

Mr McCallister: The jury got it wrong on that one. If you are looking at some of these bits where you give an honest opinion, you see that the very definition of being a restaurant critic, art critic or whatever is to give an opinion.

Mr Tweed: You make a very fair point, but other legal factors involved in that case led to that decision. I do not really want to go into the detail of it, although we have privilege here, but there was a reason for that decision. It was not just a jury coming to a finding that might appear inappropriate. It was not just a straightforward situation.

Mr McCallister: Right, but on the appeal, the jury was found to have been wrong.

Mr Tweed: Yes, it was overruled.

Mr McCallister: The finding was completely overturned —

Mr Tweed: I was not involved in that case. *[Laughter.]*

Mr McCallister: No, the important one.

The online stuff has probably been a wake-up call for a lot of people. Peter talked about Leveson, and there is also all the stuff around Lord McAlpine and the issues that it raised about how people need to be careful what they put on Facebook and Twitter. Is there now a difference in liability between here and in England and Wales? Is it with the publisher of an online blog or with me as the author?

Mr Tweed: The law on that is still very much embryonic. A number of cases are pending against Facebook, and some have been heard and it is not absolutely clear. I take the view that the host of the website, that is the company with the control, is the publisher and should be liable. In England, section 5 of the new legislation gives the publisher, say it is Google for the sake of argument, an opportunity to identify the person who posted the offending material and take it down. The section is still under a degree of debate; they have not decided exactly. As I understand it, however, they are going to be given four days to liaise with the poster of the material. If the poster says that they are not standing over that, Google will take it down and will be in the clear. If the poster says that it is true and they are standing over it, Google will be required, if this section goes through, to identify the poster and give that information to the complainant, then the complainant can take direct action against the person who posted the material. The problem we have with that is that, in the real world, four days is an awful long time in the online world. The material is going around the world, and this is the big difficulty that you have.

Mr McCallister: Once it is out on the web, can you ever get it back completely? You are saying that, if it is on Google or Facebook, that is where you would go. However, if you write a piece in the 'News Letter' or reply to an article or write a blog or make a comment, are they liable or do you go back to their internet provider?

Mr Tweed: I take the view that Google is in the same position as the 'News Letter'. If the 'News Letter' publishes something defamatory, it is as liable as the author of the material. The same thing applies to Google. It is the newspaper, if you like, and it is facilitating the publication and profiting from it. Therefore, it must be liable. There is a debate in law as to whether that is correct. There have been a number of cases, just in the past three or four months, going both ways like a roller coaster.

Mr McCallister: So, in your view, if I posted something on the 'News Letter' website, would the 'News Letter' and I be liable?

Mr Tweed: Both of you would be, yes.

Mr McCallister: The two of us would be liable even though I was the author of the material and the 'News Letter' was simply the facilitator?

Mr Tweed: Yes, but the 'News Letter' is the publisher and it has to exercise responsibility in publishing that material. A newspaper is a commercial animal; it makes money from what it is doing. Therefore, it has to be accountable for doing that.

President Obama signed the Speech Act into law as a result of probably the most effective lobbying campaign since the one that the tobacco industry conducted about 15 years ago. I volunteered to speak to the Senate Judiciary Committee when it was hearing evidence, but it obviously did not want to hear a dulcet Belfast accent. It had four witnesses, all of whom were pro the issue. Senator Cohen asked one simple question. He asked for some examples of attempts to enforce UK and Irish libel judgements in the United States, because that is what this is all about. There was a deafening silence.

I implore you all, when you are questioning other people who are giving evidence, to ask for specific statistics for everything, whether it is libel tourism or attempts to enforce Irish libel judgements abroad. The statistics do not stand up.

Even with that deafening silence, the Speech Act still came into law because that is what the US publishing industry demanded, and it got what it wanted. It has not caused me any loss of sleep. I have never, in all my years, attempted to enforce such things in the United States because I knew that the courts already had the facility to stop the enforcement of any libel judgement that a US court would not have awarded in the first place.

Mr McCallister: In that example, if someone from the US posted a statement on the 'News Letter' website, you would presumably sue the 'News Letter' in Belfast but would have to go to the States to —

Mr Tweed: I could, but I would not have to. The 'News Letter' has the primary responsibility. It would be the more obvious target because it is based here. If somebody is doing it from the haven of the United States, it is very difficult for me to take any enforcement action against that person.

Mr McCallister: In that example, you are moving the responsibility away from the individual and onto the —

Mr Tweed: Because I have to. If no one takes responsibility, I could write a letter to the 'News Letter' saying that John McCallister is a burglar in his spare time. If the 'News Letter' publishes that, do you not think that it should be responsible for it?

Mr Weir: To be fair, there would be a justification. *[Laughter.]*

Mr McCallister: Then do that. You should not really be encouraging Peter to write things like that. *[Laughter.]* You have a long list of clients. I have listened to your evidence, Paul, and it has been fascinating this morning, but my point is about making sure that you have separation between politicians who you represent as clients and any advice that was given or sought between you and any political clients who might be, for example, a Member of the Northern Ireland Executive or anything else. I think that it might be useful for the Committee to clarify that there were no conversations or lobbying on that level, given that the Executive made the decision.

Mr Tweed: Absolutely none whatsoever. I have never met Mr Wilson, and I have never spoken to him; I would have no need to do that. I first read about it when the 'Belfast Telegraph' reported that it had not gone through. As I said, this is not for Paul Tweed. If this legislation goes through, it is a kick in the stomach for the people of Northern Ireland. I operate in Dublin or London or wherever, equally comfortably, and that is the way it will be. It will be a very sad day. I reiterate that, even at the moment, it is virtually impossible to get access to justice here as the law stands, so anyone even thinking of making it more difficult —

Mr McCallister: As to balance, you praised the Irish model highly. Is that more of a compromise or a halfway house? Where do you see the key differences?

Mr Tweed: There are a few differences in that they have a single publication-type rule. They have a fast track means, which, I think, is a very good thing. That is a much more cost-effective means of getting vindication of your reputation, where you waive your right to claim damages and can go into the Circuit Court, which is the equivalent of our County Court, and apply for a declaration that you have been libelled and that the allegations are false. Again, it is very useful in this day and age of the internet, because you can get that declaration pumped back down the internet where it came from, and it gives you some vindication. It does take time, but it is still much quicker than the normal course.

Mr McCallister: Does the single publisher bit get around the issue of our earlier conversation in that you just go to one —

Mr Tweed: Again, there is a lot of concern, particularly with the rapid development of online publication, that stuff can be out there for years and nobody sees it. Let us say, for the sake of argument, that the 'Sunday Times' libelled me in 2001 and has not bothered to take it down, and I have not seen it — or even if I have seen it, but that may be a separate issue — but I see it today. Under the previous law, I could sue on that basis regardless. The way the law is now, your year runs from the date that it is published for the first time, and you do not get the repeat goes that extends the limitation period. Both here and in the Irish Republic, you have one year to bring a claim. The single publication rule is very relevant to that, because, if you do not get in on the date of the publication, under the rule, you are statute barred.

Mr Cree: Thank you very much for your presentation. It has been most helpful. Clearly, sections 1 and 11 are my main concerns. I have an interest in the tension between common law and statute, and I know that you have touched on it a little, but how seriously concerned are you about sections 3 and 4?

Mr Tweed: I think that two or three of the problems that we have here relate to the fact that once you try to codify something, it immediately means that you are put back to square one, because the courts then have to interpret the meaning of the words. What is "serious"? What is "substantial"? You get into a debate where the case runs on and the costs mount up, and you are back in the same position as before the legislation was introduced. People want the changes because they want to reduce the financial exposure and make it easier for people to sue. Codifying any terminology immediately creates debate. Debate leads to delay, and delay leads to increasing court costs.

I have no strong views, one way or the other, on the other sections. We can work around them. However, if the objective of the legislation is to simplify and reduce the cost, it is certainly not doing that. That is something that we debated at length during the Ministry of Justice panel discussions. What is there is there. It is certainly not my hand in the legislation. I do not think that I got one concession out of the whole scenario. However, we are where we are.

The Chairperson: One final point, Paul: I watched a documentary that you were involved in about a case in which a magazine reported something allegedly false about a marathon organiser. I think that it was New York —

Mr Tweed: Richard Donovan, yes.

The Chairperson: — and you advised that that case be taken through Belfast. Why was that? How would that case be affected by this legislation?

Mr Tweed: Richard Donovan is an ultra-runner and is one of the bravest people that I have ever come across. He has tremendous guts. 'Forbes Magazine' libelled him in an article that caused him serious concern. He decided that the vast majority of the publication was in the United States, and he did what we are being told to do — go where the substantive publication is. So, we took on Forbes in New York. That was against my advice, but he was very courageous and decided to do that. We employed New York attorneys. In America, costs do not follow the event; each party has to pay its own costs, regardless of the outcome.

I saw the costs starting to mount up, so I said to Forbes, as I tried to settle — I try to settle in every case — "Look, I will come out and meet". I met. It was something similar to this room; there was me and the rest were in-house and outside lawyers. The magazine was spending money on those lawyers, but it would not give money to my client, nor would it change what was reported. He organised the North Pole marathon, and it was suggesting that he had put his clients at risk by flying them out in a Soviet plane in which seats were collapsing. It said that luggage had been piled at the safety exit. It forgot that a BBC team was on board and filmed the doors, showing that there was no blockage, but that is another issue. It was also reported that a bulldozer collapsed into the ice and there was a risk to clients.

They just laughed at me. I was basically dismissed. I went all the way out and was totally dismissed. I said, "Right, OK", and this is probably the worst question that you have put to me today, because I am now going to let myself down totally. But I thought, "Right, stuff that, I gave them their chance". So, I issued in London, Dublin and Belfast simultaneously, which I am entitled to do under a European case called Shevill. It means that, in every case, you have the choice of suing in every jurisdiction where you have established a reputation and have been libelled or suing in one jurisdiction for all damage. We did that. Again, Richard was using his own funds to try to keep this case going. We eventually had to pull out of London because of price pressure there. We were left with a choice between Dublin and Belfast, and there was a time factor. I thought that we could only go on for so long against Forbes. Belfast gave us the quickest potential court date, so we abandoned Dublin and concentrated our efforts in Belfast.

Unknown to Forbes, the BBC was doing a fly-on-the-wall documentary on me on a number of cases. That was just one of those that it included in one of the documentaries. The other lawyer knew. I told the lawyer in Belfast, which is another story that we will not go into. The bottom line was that Forbes lawyers tried everything that they could but apologise and pay compensation, which we needed at this stage to pay for the costs. In the end, they backed down when they saw the door of the court, and they paid a six-figure sum. They had to do it, but they would not apologise in the end. However, we used it, and one of the reasons why Richard and I participated in the BBC documentary was that we were able to let the world see how difficult it is to bring a libel action and to take on a multinational, wealthy corporation. It is very, very difficult. No wonder Richard does all these marathons in absolutely bizarre places. The strength of character that the man has is absolutely tremendous. As I

said, we won the case. Even right up to the last minute, Forbes tried to stop the BBC. It was threatening the BBC to try to stop it broadcasting. That is freedom of speech in the United States. That is the way it works; there is freedom of speech for publishers but not the rest of us.

The Chairperson: Paul, thank you very much for that.

Mr Tweed: Thanks very much. I hope that I did not go on too long there.