Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Dr Andrew Scott, London School of Economics and Political Science

3 November 2021

NORTHERN IRELAND ASSEMBLY

Committee for Finance

Defamation Bill: Dr Andrew Scott, London School of Economics and Political Science

3 November 2021

Members present for all or part of the proceedings:
Dr Steve Aiken (Chairperson)
Mr Keith Buchanan (Deputy Chairperson)
Mr Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Philip McGuigan
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:
Dr Andrew Scott London School of Economics and Political Science

The Chairperson (Dr Aiken): Andrew, welcome. Sorry that we are running a bit late. We were dealing with rates and revaluations and the rest of it. We are moving on to defamation. Andrew works at the London School of Economics. He has written extensively on the issue of defamation and the rest of it, and he actually lives here as well. Thank you very much indeed for coming here in person. The evidence session is being recorded by Hansard. Andrew, can you make your opening statement, please?

Dr Andrew Scott (London School of Economics and Political Science): Thank you very much for inviting me. As you said, my name is Andrew Scott, and I am an associate professor at the London School of Economics. In 2014, as you know, I authored a consultation paper on defamation for the Northern Ireland Law Commission, and I subsequently wrote a report for the Department of Finance in 2016. Since that time, I have served as an adviser to the Scottish Law Commission and sat on the advisory board of a similar study conducted in Ontario, so I can bring some insight to the table as to what is going on in those jurisdictions.

You are probably aware of the fact that the Scottish Parliament recently passed the Defamation and Malicious Publication (Scotland) Act 2021. That was modelled on the Defamation Act 2013 passed by the Westminster Parliament, but it is somewhat more simple in character and does some things slightly differently. I have recently undertaken a review of the operation of the law in England and Wales on account of authoring aspects of the most recent edition of 'Gatley', which is a leading text on defamation, so I hope to be able to offer you some further insight into how the 2013 Act is operating.

Aside from that, I am in your hands today as to the subject matter for discussion. I direct your attention to various points made in the briefing note that I sent through, with particular regard to section 11 on the default position being trial by judge acting alone; section 3 on the honest opinion defence; and the points made about discursive remedies. In addition to what is in the briefing note, it is worth

highlighting the interplay between section 5 and section 10 of the Defamation Act 2013, because that is one area in which the Scottish Parliament has acted somewhat differently from what was done in England and Wales.

The Chairperson (Dr Aiken): Why did it do that? Is it because of the peculiarities of Scottish law?

Dr Scott: To be clear, section 10 in the English Act provides for a default rule whereby an action should be brought against the primary publisher, so either the author, editor or publisher of the material, and not against any secondary publisher — retailers, distributors, online intermediaries and so on — unless it is not really possible to bring an action against the primary author. Section 5 provides for a scheme whereby there would be some interplay between, let us say, an online intermediary and the anonymous author of some material online and, on account of that, a process would be set in train whereby it might become possible for a claimant to bring an action against the actual author rather than the intermediary. Regulations passed under section 5 provide for a rather convoluted scheme to allow that to come about.

In Scotland, the idea essentially was that things did not need to be that complicated. It introduced in, I think, section 3 of its Act a default rule whereby you can only bring an action against the author, editor or publisher and not against intermediaries of any nature, subject to an override provided for in section 4 whereby somebody who had been a recalcitrant publisher by inviting defamatory material on to, for example, a website that they were hosting could be designated as a publisher so as to allow an action to be brought against that person directly.

More generally, as a matter of principle, it is desirable to have actions brought against the primary progenitors of the defamatory content. It is almost a sideline to allow an action to be brought against somebody who is rather under-involved in the immediate publication. From a societal perspective, there is a concern that an internet intermediary, for example, will be likely to take material down when contacted by a claimant's lawyer, and that has a detrimental impact upon the material that is available in the public domain, which is sometimes of potentially profound public significance.

The Chairperson (Dr Aiken): Andrew, just because this is being recorded by Hansard as part of our evidence-gathering on the Bill, can you specifically talk us through your note as you go through, just so that we can get that on the record? That might trigger some other questions as we go on. I am sorry about that, but it means that we can build up the evidence. The amount of time that we have for legislation in the Assembly, and for getting the necessary information, is fairly compressed. Please.

Dr Scott: I am in your hands. Sorry, do you want me to go through it?

The Chairperson (Dr Aiken): Yes, please. If you could.

Dr Scott: In the note, I highlighted the beneficial consequences of section 11 of the English measure, which provides for the move towards trial by judge alone. There are obviously constitutional reasons for keeping a jury in place, although it is notable that defamation is the only area of private law where a jury is used. When we conducted the studies in Northern Ireland, we heard evidence from a number of people who suggested that it would be desirable to keep juries in position. That position is readily acknowledged. The downside of maintaining a jury is ultimately that everything of a factual nature is decided at the end point of legal proceedings, rather than, as we see in England now, matters being able to be dispensed with or determined relatively early in the legal process because judges are able to determine factual matters by themselves. That is particularly important when you think about the section 2 defence of truth — "justification", as we call it in Northern Ireland. The meaning of the words, in particular, and also whether what has been published is a matter of fact or the expression of an opinion, is enormously important. Instead of having a case that involves multiple arguments, with a tremendous amount of pleading of evidence, all running alongside one another, to be determined by the jury at the end point, you end up with the clarification or narrowing of the focus of legal proceedings onto specifics early, which allows everybody to know what the case is from a relatively early stage in proceedings.

The Chairperson (Dr Aiken): OK.

Dr Scott: Would you like me to continue?

The Chairperson (Dr Aiken): Yes, if you could.

Dr Scott: The second point I raised was in relation to the section 1 serious harm test. There is a bit of background here with regard to the jurisprudence as it has developed under this provision. Primarily in a series of cases called Lachaux, what we saw was the original intention of section 1 being to introduce a means of striking out, or getting rid of, trivial cases early in proceedings. It was always a slightly curious provision, in that there were already two bases in the common law that allow that to be done. However, it was deemed desirable by the Westminster Parliament that this should be emphasised. In an early case in this area — a case called Lachaux — a preliminary matter concerned the interpretation of section 1. What the judge at first instance determined was that section 1 required something more of the claimant than was required under the common law: that is, they had to plead actual evidence as to the harm that they had suffered.

At the time when I was writing the documents for Northern Ireland, we had had the Court of Appeal ruling in Lachaux. It essentially determined that section 1 would be interpreted along the lines of the pre-existing common-law rules, providing for a strikeout of trivial cases or cases that did not involve substantial harm. At that point, I thought it reasonable to recommend that Northern Ireland should also include an equivalent of section 1 in any prospective defamation Bill. Subsequently, in the Supreme Court in Lachaux, there was a reversion to the position adopted by Mr Justice Warby, as he was, in the first instance ruling. That leads us to a position where evidence of actual harm has to be pled by the claimants. The important thing about that is that that type of evidence is often contested between the parties. Therefore, it is the sort of thing that has been determined by the courts at the final trial, rather than at the preliminary stage. Therefore, it is not serving the purpose of acting as a gateway provision or an early hurdle that a claimant has to jump over. It is effectively serving as a reversal of the presumption of harm in defamation proceedings.

The irony here is that what the English courts have done is to revert to the common-law rules and utilise those to strike out trivial actions, as was originally envisaged with section 1. In the Northern Ireland documents, I suggested that section 1 was still a desirable provision because, early in the interpretation and deployment of section 1, in a case called Cooke v Mirror Group Newspapers, the judge, Mr Justice Bean, said that if, and insofar as, a publisher offered a correction or retraction of a defamatory statement early on in proceedings — in response to a complaint, essentially — that could likely negate any finding of serious harm in the future. That is desirable in itself, and it emphasises the potential value of discursive remedies, such as corrections and retractions, to obviate the types of harm that defamation is intended to redress. For that reason, I suggested that section 1 was still highly valuable, and that is probably still the position. It might be preferable for provision for discursive remedies to be introduced directly into a Bill rather than by this circumlocutionary route. If you are relying on the serious harm test to validate and valorise discursive remedies, effectively, that will only be obvious when serious harm is considered by the court at the final trial, whereas it may be better for everyone to know from the outset that any prospect of proceedings has been precluded.

The third theme highlighted in the briefing note concerned a general point that was often made to us in the Northern Ireland Law Commission, which is that there is a real value in consistency or harmony between the jurisprudence in defamation law in Northern Ireland and that in England and Wales. There is a benefit to being able to piggyback the Northern Irish jurisdiction on the very much more frequently delivered jurisprudence in England. The point in the briefing note is that the current inconsistency between the main defences in defamation law, as between the statutory version in England and the common-law version in Northern Ireland, is becoming increasingly problematic. The English courts have been emphasising section 3 and section 4. However, more broadly, the statutory defences and their construction are different to the old common law. The questions being asked are distinct, and therefore attempts by counsel — and even the decisions of subordinate courts — to rely on the pre-existing jurisprudence are now inappropriate. If we transpose that to the Northern Irish context, we can see that the potential value of English jurisprudence is lessening over time. It is not a problem in and of itself, but it makes a comparative exercise of less importance or value.

The next point concerns section 3 and the structure of the honest opinion defence. I made two general points there, both of which have been picked up in the Scottish legislation. First, there seems to be a minor error of construction in section 3 about the type of publication that can be relied on as the basis for one's opinion. Secondly, an innovation in the report written for the Department of Finance here was the idea that it should also be possible within the honest opinion defence for a publisher to rely on facts that he or she reasonably believed to be true at the time of publication. The illustration there would be someone reading 'The Times' or watching 'Newsnight' and maybe tweeting about what they have just seen. Essentially, that person is being allowed to rely on facts that may, ultimately, prove to be false reporting by the major national entity in order to defend or protect their expression of surprise or distaste. It is a desire to allow that person to avoid having to prove a major defence, effectively by

proxy, to prove that what the mainstream publisher had done was true or had been responsibly developed.

The Chairperson (Dr Aiken): How far do you take that down, do you think?

Dr Scott: Can you say that again? Sorry.

The Chairperson (Dr Aiken): How far would you take that? Obviously, you referred to 'Newsnight'; there have been problems with 'Newsnight', the Bashir issues and the rest of it. One of my concerns is how far you go down. It is easy for scientific journals — has it been peer-reviewed? Yes? OK, that takes it into that position. However, if you are reflecting opinion that is being produced by the media, how do we get to a point where there is an accepted understanding? That is the bit I cannot get to.

Dr Scott: The point is that you want to see the law reflect sensible public policy in that area. We are talking about somebody who is effectively doing what we want people to do whenever they receive, listen to and read quality journalism. We want people to talk about the things that they have read. We want them to communicate on matters of public importance. That is ultimately what journalism is for. We are talking about a situation in which somebody does what we hope that they, as a citizen, will do, and maybe expresses, perhaps even in vituperative terms, a viewpoint that is based on what they have heard. We are saying that they should not face liability for having done that. At the same time, we are really refocusing attention on the primary author. If 'Newsnight' fundamentally gets it wrong, it should be held to account for what it has done, or likewise 'The Times' or anybody else. There is a balancing act here. There is a tension between allowing people to recover and to vindicate their reputations on the one hand and, on the other, allowing people to act the way that we hope that people will act in the exercise of their free expression rights.

The Chairperson (Dr Aiken): You can take that expression from the national level to the Northern Ireland level, so that you drill down one level to where it gets to the point of honest opinion. Obviously, in Northern Ireland, of course, you are at that next level down. The ability to say, to that degree, that a piece of information has been fact-checked and has not been slanted in one particular area creates quite considerable concerns.

Dr Scott: I absolutely see what you are saying, but ultimately it comes down to the reasonableness of the belief that the person had in the underpinning facts. That will be a question of fact to be determined by an individual judge in an individual case. Is it reasonable to rely on 'Newsnight'? It probably is. Is it reasonable to rely on what your cousin told you down the pub? It probably is not. There is no doubt, however, that there is a grey area between those two things.

The Chairperson (Dr Aiken): Thanks.

Dr Scott: The final two points that I made in the briefing note generally concern the desirability of discursive remedies and the opportunity to rely on corrections or retractions to preclude the prospect of future action.

The final point really relates to a more general sort of dissatisfaction with the reform process in England and Wales, and equally here. People were very often concerned about abusive or exploitative legal actions being brought. In England, however, there was no movement towards trying to directly address that specific type of abuse. We have seen the introduction of statutory intervention in many other jurisdictions, as well as rules being developed by common-law judges that provide for the more ready striking out of abusive legal actions. At present, there is a movement abroad across Europe, in the wake of various cause célèbre libel concerns and the experiences of various investigative journalists, to respond to what are known as SLAPP actions — strategic lawsuits against public participation — and respond to those directly. In the English context, there has been a movement among a number of NGOs and media organisations to try to develop momentum towards specifically addressing that type of abuse of process. That is something that a Committee like this, or any legislative body, should think further about. There are an increasing number of exemplars around the world, most notably in Ontario in Canada, that show that this type of legislation can be sensibly introduced and can work solidly well.

The Chairperson (Dr Aiken): You have probably answered your own question and sorted this out, but do you think that we need this legislation to be brought forward in Northern Ireland?

Dr Scott: The Defamation Bill?

The Chairperson (Dr Aiken): Yes.

Dr Scott: That was implicit in the fact that there were two proposals in the report published by the Department of Finance. The first of those proposals was for a Bill equivalent to this one. I think that it is implicit in the fact that there was a second Bill that I thought, and a number of the respondents to the Northern Ireland Law Commission consultation thought, that more could be done. However, the proposed Bill is sensible as a first step, subject to appropriate revision.

The Chairperson (Dr Aiken): The Bill proposes that the presumption in favour of jury trials for defamation be removed. Your report in 2016 supported that, as long as the bipartite proposal, which relates to the single meaning rule, was adopted. Can you explain what you believe the benefits of the judge-only trial might be? Is it just that it will simplify the process or that there will be a higher threshold for bringing it forward?

Dr Scott: We can draw a comparison with England and Wales. What you see there is that a number of fundamental questions in any defamation action can be brought to the court early, because the judge is able to determine the factual dimensions of the questions. Questions over the meaning of what has been published or whether something is factual or opinion in character, or about the defamatory tendency of what has been published, can be determined quickly. I say "quickly" in inverted commas, because we are still talking about something that, in some cases, happens about three or four months into the process, but, in many cases, a year or a year and a half into the process. Fundamentally, what you are getting at that stage is the clarification of the proceedings and the dispensing with a lot of the fluff surrounding factual questions, and, because of that, you see a much more efficient dispensation at the final trial.

The Chairperson (Dr Aiken): You will have seen the issue with Facebook renaming itself Meta and the implications for websites and hostings and that information as well, and the social media aspect. Do we have to have protections built in for website operators?

Dr Scott: The background to this is that our definition in law of who is a publisher is extremely broad, so, without legal protections for such people, they will be caught by that definition and, hence, potentially be liable themselves — liable, jointly and separately, for all the harm that has been caused. If you are an online intermediary of that type, and somebody presents a legal action, or prospective legal action, to you, your natural inclination is to try to minimise your legal risk by taking down the content that is being complained about. Many times, that will be great, because the content is clearly defamatory and outrageous, so that is a good outcome, but, sometimes, it will not be a good outcome in the sense that important material will be taken down, essentially because the online intermediary does not have an iron in the fire and does not care less whether the material stays up or comes down. The over-definition of "publisher" creates a situation where the wider public can be under-informed.

The proposal in the second version of the Bill in the report for the Department of Finance, and what has now been legislated in Scotland, takes that secondary publisher outside of the definition. Ostensibly, when you look at that, you think, "Hold on a second, this is just going to allow a free-for-all online". That is clearly not an outcome that anyone desires. However, if we dig deeper into what would actually happen, we see that the solution probably already exists in the law. Take a step back. Currently, the rules on takedown in privacy law are different from those in defamation law. It is very difficult to get an interim injunction from a court to require takedown at a preliminary stage in defamation, whereas that is the standard approach in privacy proceedings. The reason for the difference is a concept called the rule in Bonnard v Perryman. It says that if a complaint is brought to a court, and the publisher says to the court, "We're going to defend this action", no interim order will be given.

I will jump back into the context of online publication. Usually, the problem there is with anonymous publishers — people whom we cannot identify. If you can identify the publisher, you sue them, straightforwardly. However, when you have an anonymous publisher, you are in the quagmire where you have no one against whom you can bring an action other than the intermediary. If we moved towards a Scottish-type situation, the plaintiff would bring a complaint to the court saying, "Look, this has been written about me. It's untrue. I want it to be taken down", and there would be nobody on the other side to argue the case for an interim order not to be made. When they come to the court, the claimant's lawyer is under a professional obligation to give the gist of the argument that might be presented from the free speech or publisher side of the fence. Therefore, the court is in a position to

get some insight into what the relevant balance should be, and will decide whether an interim order should be made. The Scottish position was that, under their rules of civil procedure, that can happen extremely cheaply and extremely quickly such that a court order is presented to the online intermediary to which they will respond for fear of being in contempt of court, and, very quickly, the material will be taken down. Importantly, the difference there is that the online intermediary has not just taken the material down in order to minimise its own legal risk, but, in shadow form, a judge has determined the balance between article 8 reputational and article 10 expression interests and acted appropriately.

That can all be done, essentially as quickly as making a complaint to an online intermediary, but you are more likely to get the intermediary responding as you would hope that they would respond because it is a court order. Despite what people tend to think, the Twitters and Facebooks of this world do tend to respond to court orders in a way that, sometimes, they do not respond to the threat of a legal complaint being brought.

Mr Allister: Professor, you do not like juries.

Dr Scott: As I said earlier, there is a profound constitutional role for juries, certainly in criminal law and, potentially, in defamation proceedings. That is why they are there in defamation proceedings.

Mr Allister: Given that defamation is, fundamentally in our definition, whether one's reputation has been lowered in the eyes of others, is there not a prefect match between that and a jury making that decision?

Dr Scott: In principle, one would say that it is desirable for a jury to take that decision because, as you imply, it brings you closer to a correct decision with respect to the nature of the harm that has been wrought. The essential problem, however, is one of efficiency. In an ideal world, yes, you would empower a jury to take these types of decisions.

Mr Allister: Which is more important, efficiency or justice?

Dr Scott: Your comment implies that you would not get justice through a judicial decision, and I think that that is not entirely correct.

Mr Allister: Your response suggests you might not get justice through a jury?

Dr Scott: In a ideal world, you would get a jury taking that decision, but —

Mr Allister: Under this Bill, you are taking that away.

Dr Scott: In the real-world situation, given the impact of the law as it operates at the moment upon wider interests, alongside the question that you are speaking to in terms of access to justice for publishers and complainants, the ascription of that role to a jury effectively defeats the purpose. So, nobody is getting any justice on account of the system that we have at the present time.

Mr Allister: Of course, this Bill does much more than that. It makes it much more difficult to bring a libel action because of clause 1, in that the lie told can be mitigated by the fact that it is quickly taken down, or apologised for or does not actually cause, in consequence, serious harm. Are you not inviting irresponsible journalism where they know, "We can take a risk here. We can say what we want to say about the footballer or the politician because all we have to do is get it out there and then, tomorrow, apologise for it."?

Dr Scott: I can see that point. There are two responses to it. The first thing to say is that one of the primary things that a claimant will say that they want whenever they bring a libel action is a swift correction of what was published. At the present time, with the libel system as we have it, that type of swift correction will never happen, essentially because it amounts to a concession on behalf of the publisher. *[Pause.]* Sorry, I have lost my train of thought.

Mr Allister: Do you accept that it gives more scope for reckless journalism by virtue of the fact that they know that if they publish something that they cannot stand up but swiftly apologise for it, they

have denuded the defamed person of any remedy, because that person cannot then show serious harm because so much weight is put upon the fact that the publisher so honourably withdrew it?

Dr Scott: If we are talking about journalism in this context —

Mr Allister: Yes.

Dr Scott: — and not just the citizen journalist or random social media commentator, we have to recognise that media organisations themselves rest upon their reputations for credibility. Ultimately, if you are, in the Northern Irish context, the BBC, the 'Belfast Telegraph' or 'The Irish News', and it is widely understood that you publish nonsense with regularity, nobody is going to pay you any attention. Those organisations must pursue quality journalism or their role in broader society will fall apart.

Mr Allister: That is not much comfort to the person who has had the nonsense journalism published about them.

Dr Scott: There is another response: many of the greatest scandals that have been protected or prevented from coming in to the public domain have not come in to the public domain because of the existence of libel laws of the type that we currently find in Northern Ireland. Sometimes it would be desirable for a journalist to be able to make an allegation without fear of —

Mr Allister: Does the person who is genuinely defamed just have to sacrifice their reputation for the greater good?

Dr Scott: You are suggesting that the discursive remedy has no impact. I suggest that it has a profound impact. In fact, it is precisely what claimants say that they want when they bring legal proceedings in the first place.

Mr Allister: It successfully defeats the action being brought. The consequence is that the serious harm is so diminished that the action loses its traction and capacity under clause 1 to proceed.

Dr Scott: If there were serious harm of the type that you are describing, after the apology, correction or retraction has been made, you would be able to demonstrate that in court.

Mr Allister: You are saying that you should be able to bring a libel action only if you can show serious harm. The small lie, so to speak, is OK; you just suck that up.

Dr Scott: I think that that is the policy choice.

Mr Allister: That is a horrendous choice to impose on the innocent citizen. Is it not?

Dr Scott: It is a horrendous choice in circumstances where the allegation is a profound one.

Mr Allister: Yes.

Dr Scott: However, a mere retraction may not amount to a negation of serious harm in such circumstances.

Mr Allister: Surely the issue about the trivial damage is met by trivial damages. Is that not the right way to approach this? If you are only slightly damaged, you get slight damages.

Dr Scott: It is not actually what claimants say that they want. Claimants tend to want a correction or retraction as early as possible, and they are able thereafter to point to the correction or retraction in order to highlight that what was published about them was wrong.

Mr Allister: The retraction goes some way, but the only thing that anyone who brings a claim for defamation can get, ultimately, is damages.

Dr Scott: You have to look at the purpose of damages and defamation proceedings. One of the primary purposes is vindication. If vindication is achieved through other means, you do not need that

measure of damages. Beyond that, there are damages for distress, which are meagre. There are damages for notional harm.

Mr Allister: Yes. There can be exemplary damages and all sorts of things.

Dr Scott: One of the primary components of the damages that are received is vindication. If you have already been vindicated, you do not require those damages.

Mr Allister: It is not much of a price for a libelling publisher to say, "Sorry".

Dr Scott: As I said, I suggest that somebody who is in the game of publishing has to maintain a reputation for quality work.

Mr Allister: I am struggling to find in your evidence and what I have read any empathy with the defamed.

Dr Scott: As I said, if I were in a position in which I had been defamed and somebody published within seven days a retraction or correction of what they had done, to which I could thereafter point, any time that anyone ever raised the suggestion that I had done something that was wrongfully alleged about me, that would be effective.

Mr Allister: Do you not think that it would be much more effective if the publisher of that libel had to punitively pay for it?

Dr Scott: You are suggesting that the law should operate as a form of media regulation. There are other systems of media regulation.

Mr Allister: In part, it does.

Dr Scott: There is no doubt that it does, because of the paucity of media regulation, but that is a separate question. If the media need to be regulated, they should be regulated. We should not be doing it by individual —

Mr Allister: You are totally deregulating the punishment that can come from publishing something that is defamatory.

Dr Scott: I am suggesting that we are changing the nature of the punishment that happens.

Mr Allister: Is it any surprise that the backers of this sort of proposal tend to be the media organisations?

Dr Scott: Some of the backers of proposals of this type are media organisations —

Mr Allister: Yes. Why do you think that is?

Dr Scott: — but there are many other backers of this type of measure.

Mr Allister: Why do you think the media organisations are backers of this?

Dr Scott: What I was going to say is that there are many other types of person who are equally interested in the legislation of measures of this type. Certainly, as I understand it, the people who were really driving these proposals forward were people who were concerned about the impact on the work of NGOs or of scientists who are working in the public interest and so on. Each category of persons regularly faces the threat of punitive costs and damages and, therefore, is precluded from pursuing public interest purposes that they would otherwise choose.

Mr Allister: That is the sector that you are trying to protect. That can be protected without the revolutionary idea of punitively putting defamation beyond the reach of the average citizen because they have to now cross that high threshold of serious harm — serious harm that can be readily overturned by a mere apology.

Dr Scott: You talk about the average citizen, but the plain fact of the matter is that the average citizen currently cannot go to law —

Mr Allister: *[Inaudible.]*

Dr Scott: — and has no prospect realistically of vindicating their reputational rights.

Mr Allister: They would have less prospect now. Not only do they have to take the risk —

Dr Scott: If they have not suffered serious harm, then they do not need to go through the legal process.

Mr Allister: Ah, but the test — that is because you want to change the test to serious harm.

Dr Scott: No, it is not just the test. What I suggested to you earlier on was that, in fact —

Mr Allister: It goes back to the point of saying that the small lie is OK.

Dr Scott: What I suggested to you earlier was that, in fact, the way in which the law is operating in England and Wales is exactly the same as the way in which it is currently operating in Northern Ireland in this regard.

Mr Allister: Well, not exactly the same, because we have —

Dr Scott: In terms of dismissing trivial cases, it is exactly the same.

Mr Allister: — the Supreme Court ruling of what serious harm means, which is what you would have to show under clause 1. So, that increases the burden on the plaintiff. That raises the bar. He has to get over that bar, so he is taking extra financial risk, not just in bringing a case but in bringing one that is now harder to prove.

Dr Scott: I do not think that is correct. Fundamentally, the rule with regard to trivial cases is effectively the same. When you come to the final trial, and this issue is litigated, what you will find being presented to the courts is exactly the same type of information that would have previously been presented to the court with regard to the determination of damages. So, yes, it is speaking to the question of liability, but it is the same information, developed in the same way and presented to the court at the same time. So, that is not changing the burden in any respect.

Mr Allister: You have to break the liability barrier.

The Chairperson (Dr Aiken): Please make your remarks through the Chair. Andrew, just for my education, what change did the Supreme Court ruling make that raised the bar?

Dr Scott: Well, it does not raise the bar. What it does is speak to a different issue. The way in which the Court of Appeal had interpreted section 1 would, effectively, have kept the rule the same in Northern Ireland as it was in the common law. When the case went to the Supreme Court, what they required was that you demonstrate evidence of actual harm. That evidence could be inferential evidence, and there is a question about how far or how readily the court will infer the evidence of harm, but it tends to be only in serious cases.

What is happening now is that, at the final trial, the claimant is having to plead evidence which demonstrates the amount of harm that they have suffered. Now, why that is different to the trivial cases scenario is that, formerly, the position in Northern Ireland and the position under the common law in England and Wales was that that harm would be presumed. Then, the court would take a view as to what the likely extent of the harm would have been and so on. Now, in taking that view, it would have been informed by evidence pled with regard to the nature of the harms that have been suffered. That evidence will still be pled to the court of first instance, but when that happens, they will be speaking not only to the question of the measure of damages but to the question of liability. Both of those things are happening at the final trial. The getting rid of trivial cases or cases where substantial harm has not been caused is now going to be happening, still, at the preliminary stage before a judge.

The Chairperson (Dr Aiken): Right, OK.

Mr Allister: But under a different legal test of —

Dr Scott: Well, ultimately, it does not matter what the legal test says.

Mr Allister: The point is that you have to get through it.

Dr Scott: The practical impact is the same.

Mr Allister: If you have to get over the test, it matters if it is a higher test than it previously was.

Dr Scott: It is not happening at a preliminary stage. It is not speaking to the question of getting rid of trivial cases. It is happening at the final trial, where the issues have been narrowed and the evidence being presented would normally have been presented to the court anyway. I do not see that as a particularly significant increase in the burden on claimants.

Mr Allister: So you think that it makes no difference to say that, as the law presently says, you can bring defamation proceedings if your reputation has been lowered in the eyes of reasonable people or that you can bring now bring proceedings if you can show that you suffered serious harm? You do not think that there is a difference there. If there is no difference, what is the point of clause 1?

Dr Scott: Quite. What is the point of clause 1?

Mr Allister: Could we remove clause 1 and do no damage?

Dr Scott: No. The change is not to the question about substantiality of harm, which is, if you like, the threshold test or the gateway aspect, but to the presumption of harm at the later stage. As I suggested, in practical terms, that does not significantly increase the burden on claimants.

Mr Allister: There is no presumption now.

Dr Scott: Will you say that again?

Mr Allister: There is no presumption now under clause 1.

Dr Scott: There is a presumption of harm at present.

Mr Allister: Yes, but it is not a presumption of serious harm. You still have to prove serious harm.

Dr Scott: In England and Wales?

Mr Allister: Yes.

Dr Scott: Yes. There is now effectively no presumption of harm in England and Wales either.

Mr Allister: I have one other point. When people were advocating for the legislation back in 2013, they said, "If we do not do this, we will have libel tourism". That turned out to be nonsense, did it not?

Dr Scott: In England and Wales?

Mr Allister: We were told that we would have libel tourism in Northern Ireland, if we were out of step. That has not happened.

Dr Scott: I am not surprised that it has not happened.

Mr Allister: Was it a straw man?

Dr Scott: I do not think that it was a straw man in England and Wales. It was overdeveloped as a complaint in England and Wales, but there are certainly multiple places where that has happened.

Mr Allister: The argument was that, if England and Wales went with the Defamation Act in 2013 and we did not, we would become the object of libel tourism. That did not happen.

Dr Scott: The proof is in the pudding.

Mr Allister: We had more libel cases before 2013 than we have had since 2013.

Dr Scott: I have not looked at the data as to what types of cases —

Mr Allister: There were 35 cases per year before 2013, and there have been 30 cases since 2013.

Dr Scott: Sorry, do you mean 35 libel tourism cases in England and Wales?

Mr Allister: No, 35 libel actions —

Dr Scott: In Northern Ireland?

Mr Allister: — pre-2013 per annum in Northern Ireland.

Dr Scott: As I said, I am not surprised that we have not seen a particular uplift from that type of claimant.

The Chairperson (Dr Aiken): Bearing in mind the English and Welsh legislation, I know that we do not have specific defamation legislation now, but would we have been in a better position to use a legislative consent motion?

Dr Scott: I have no real insight as to why that did not happen. You are talking about introducing an equivalent measure to what would have been introduced through a legislative consent motion. I have no real insight into that.

The Chairperson (Dr Aiken): Andrew, you talked about how long you have been involved in the process. Will you go through the timelines? You talked about the Department of Finance's first belt in 2014.

Dr Scott: I may need to correct myself, but I think that the Law Commission's study began in 2013.

The Chairperson (Dr Aiken): Yes.

Dr Scott: I think that its consultation was published in 2014, and, from memory, the Department of Finance published the report that I wrote for it in 2016.

The Chairperson (Dr Aiken): Five years ago, yes. Now we are having to think about a private Member's Bill to deal with something that went through that process.

Dr Scott: It is certainly quite remarkable that that time period has passed. You can compare the situation to that in Scotland. Scotland has gone through a similar process to Northern Ireland. It has seen the need for legislation and has now legislated on the issue. We are not that far behind Scotland, but, if the Bill is passed, we will be up to speed, relative to where Scotland is now.

Mr McGuigan: On that point, without going into the delay, there is a review of the English Act and of the legislation in the South. Would it not be better to wait for the outcome of both of those reviews before introducing legislation?

Dr Scott: There is certainly a review being undertaken in the South. I think that it is a five-yearly review. It depends on which body of law you think it is more important to align with. We received evidence from the Law Commission, which suggested that the general perception was that aligning with the English law was more important than aligning with Irish law.

The point of the discussion is that the substance of the law is not really the concern. The concern is about the extent of costs and the respective amount of damages that would be faced, which obviates the possibility of people going to court to vindicate their rights or to defend themselves. So, in that respect, it does not really matter which body of law you emulate because the two sets of law are functionally equivalent. The difference in the Republic of Ireland is the way in which you have integration with their system of media regulation, which we do not have here.

Mr K Buchanan: I have a quick question. What are the benefits of the Bill?

Dr Scott: To some extent, it is like the hunting of the snark because you are talking about actions that do not come to court. Very often, people are frightened out of pursuing the complaint or are unable to pursue it if they have something defamatory written about them and they perceive that they are unable to defend themselves before the court if they are sued. So, they tend to capitulate and settle actions. The data stacks up around the frequency with which people bow out of legal action honourably or dishonourably.

There is very little hard data, but the information that we had suggested that the per capita rate of libel actions being brought in Northern Ireland was relatively high. It was in the order of six or seven times as high as what you would find in England and Wales. The general academic research evidence suggests that there is such a thing as the chilling effect, and it is felt most profoundly by what you might broadly describe as local or regional media, which is what you have in Northern Ireland.

There is an element of, "Well, they would say that, wouldn't they", but the impressionistic evidence that we received during the Law Commission's study was that there was a real and biting impact of the threat of libel actions in Northern Ireland. That is impressionistic evidence, but, in some measure, that is the more important type of insight that one can glean because if publishers are acting in accordance with their perceptions of the risk of libel proceedings being brought, they are not exercising their free speech rights in the way that we might, as a society, hope that they would.

So, it is difficult to provide you with any hard evidence as to what the potential benefit will be, but the impression certainly is that it will be a significant impact.

Mr K Buchanan: Does the Bill protect the big fish from the wee fish?

Dr Scott: My diagnosis of the problems of defamation law in Northern Ireland is that it cuts both ways. The problem is one of access to justice. That is, for sure, for publishers, but it is also for people who want to vindicate their reputations by bringing legal actions. So, the small fish in both those scenarios is profoundly disadvantaged.

Mr K Buchanan: I have one final question. Section 5 of the Act relates to websites. I asked a question of the Bill's sponsor regarding websites, and he referred to Facebook and Twitter. We assume that those are classified as websites. Jim Allister referred to it, but does the Bill strengthen that for the individual? If an individual says something tonight on social media that is incorrect about me or Pat or whoever, that will have lasting damage. If it is removed tomorrow, that is no good. It has lasting damage. So, does the Bill strengthen that for the individual, whether it is a politician or whoever?

If it is factually wrong, whether the website is wrong or the individual who put it up is wrong, it has affected those individuals. It might not cause serious harm, but it causes them harm. Does the Bill strengthen the law? Does it put that individual in a better position to go after the individual who said it? It goes on daily. We can classify it as serious harm or harm. There is no politician in this room — I am referring only to politicians — who does not get it daily. It is not acceptable. We have seen the outworkings of that more recently, where the hate goes on and on and on. So, will the Bill be beneficial or will it make things worse?

Dr Scott: The straightforward answer is that this Bill will not likely make a tremendous amount of difference to that situation. That is because when we look at the way that things have played out in England and Wales, under section 5 of the regulations that have been passed, nobody is really operating under that regime. They are all still operating under the pre-existing regime, which is what we have in Northern Ireland. Under that pre-existing regime, if you make a complaint to an intermediary and they do not take down the material, they will be liable from that point forward. So, that position will not change.

Mr K Buchanan: OK. Thank you, Andrew.

The Chairperson (Dr Aiken): We have some further questions that we would like to ask you, so we will send those to you and you can respond to the Committee to help us with our evidence. We would also like you to look at paragraph 25, on the introduction of a jurisdictional bar and prompt corrective action. You can have a look at those as well.

You have written down, "SLAPPS" — I am still trying to read your writing —

The Committee Clerk: Strategic lawsuits against public participation.

The Chairperson (Dr Aiken): — and whether the law could dissuade that. I am afraid that I do not quite understand that. If we send those to you, you could address those. Thank you very much for coming in and giving evidence.

Dr Scott: Thanks for the invitation.