Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Dr Mark Hanna, Queen's University Belfast

24 November 2021

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

Witnesses:
Dr Mark Hanna Queen's University Belfast

The Chairperson (Dr Aiken): I welcome Dr Mark Hanna from the school of law at Queen's University Belfast. Over to you, Mark.

Dr Mark Hanna (Queen's University Belfast): Thank you, Mr Chairperson. I understand that you would prefer me to open with 15 minutes —

The Chairperson (Dr Aiken): Take as long as you need, and then allow us the opportunity for questions.

Dr Hanna: OK. I do not really have anything prepared as such. I have put a lot of my views in the response. I will just go over those again. Essentially, I understand that this is a complex area of law, and a lot of things need to be considered. In a way, there is too much that needs to be considered at one time. I do think that there is a chilling effect on free speech here because of the defamation laws that we currently have in place. At the same time, it is not a massive chilling effect. We are not living in a totalitarian state, an autocracy or anything to that extent, but we could do better. When you look at the law and analyse it, you can see —

The Chairperson (Dr Aiken): Mark, you mentioned the chilling effect. How do you define that chilling effect? Is there any empirical data or anything that suggests that there has been a chilling effect? Can you put some meat on that?

Dr Hanna: The simple answer is that there is not. How do you say, on an empirical level, that the law is doing anything in society? There are too many things coming from different directions. I looked at the question of whether it could be measured empirically, but there is really too much in the mix. You

can talk about general cultural issues that may lead to a chilling effect. Perhaps it is the view that we generally have about reputation here in Northern Ireland.

I looked at the changes that were introduced in England and Wales by the Defamation Act 2013 and tried to compare them to what the law has been like here since 2014 when that Act was introduced. That does not tell you exactly that there is a chilling effect, but you can certainly see that there is a difference. You can make a reasonable supposition that the changes were introduced in England and Wales to fine-tune the balance of rights a bit more. I can only surmise from that that the law here continues to have a chilling effect. When that is looked at in some detail, it is hard to escape the conclusion, even if you cannot prove it on an empirical basis — there are many things that we cannot prove on an empirical basis — that it would not have a chilling effect, to some degree. As I said, the chilling effect may be modest, but it exists nonetheless. Something could be done to fix that. I wonder why action would not be taken to do so at this opportunity.

The Chairperson (Dr Aiken): OK. Thanks.

Dr Hanna: Many different aspects of the Bill require significant consideration. I wrote in my response that the issues revolve around clause 11, which concerns the reversal of the presumption of jury trials; clause 1, which concerns serious harm; and clause 4, which concerns public interest. If the Bill does nothing else, it could at least do those things. That would be a beneficial change. It would get closer to achieving a finer balance of the rights involved.

Finally, you cannot look at defamation through a legal prism only. That might sound strange coming from me because I have a legal background as a lawyer and I work in a law school, but I think that —

The Chairperson (Dr Aiken): Mark, as this is being recorded by Hansard — it is part of the process that we go through — will you, for the record, speak to clauses 1, 4 and 11? You also said something about clause 7 in your written submission.

Dr Hanna: Yes. I will deal with clause 7 first because it is the most straightforward. There is a real legislative thicket around the issue of privileges for reports, summaries and whatnot. From what I understand, reform in that area was introduced in the 2010 Northern Ireland Order. I provided details on that in my response. There is some coverage in that legislation of privilege for reports and whatnot, but it did not include summaries. My point was that, if that still needs to be done, perhaps clause 7, in its entirety, may not be necessary because a lot of those changes are already in place. Certainly, if the change is made, it should include summaries also.

I will start also with clause 11, because it is the most important in relation to jury trials. My research showed that the effect that jury trials were having on defamation claims in Northern Ireland was profound. Dr Andrew Scott came to the same conclusion in his consultation report and his 2016 report: jury trials were having a profound effect in Northern Ireland. It is interesting to compare it with what happened in England and Wales. From 2010 onwards, we started to see English courts moving away from jury trials because they realised what the problems were for jury trials in defamation claims. Even though Northern Ireland is its own jurisdiction, a lot of the time it will follow English jurisprudence. However, I was surprised that that is an area where that has not happened.

There is a pronounced favouring of jury trials here in defamation claims. That has certain effects. One is that it really kicks things into the long grass, leads to a lot of complexity in the trials and escalates costs. As the Northern Ireland Law Commission recommended in its 2014 report, that should be reformed because it saw that the effect of that is that it weighs heavily on defendants and causes them to settle. Faced with the prospect of litigation in defamation action and a drawn-out jury trial, it makes sense for defendants to come to a conclusion quickly, "Let's settle the thing rather than get engaged in costs and protracted litigation".

There are other inflections of the problems of jury trials in clause 1 and clause 4. I will not get into those now. I just want to say that I realise that juries are a sensitive issue in Northern Ireland, because of the troubled past, the issue with Diplock courts and things like that, and Dr Andrew Scott recognised that sensitivity in his report. However, we have to realise that the virtues of jury trials are simply not transferring into defamation claims. If our concern for having juries in defamation claims is about having the ordinary, right-thinking member of society judging these matters, or that it is about ensuring that unelected judges are not making decisions, we have to realise that very few defamation trials lead to a jury being empanelled.

I was speaking to a senior barrister last week who practised in defamation claims and I asked him whether he had ever seen a jury empanelled in defamation claim. He told me that he had seen them from the back of a courtroom but had never actually seen them empanelled. Typically, what happens is that defendants settle a case before it gets to that point. If you read through the case law, you will see that judges make decisions on a lot of defamation cases and on a lot of factual questions that should be left to juries but which are not.

The theory is that juries have a democratic effect on defamation law, but, in fact and in practice, it is just not happening. Moreover, if juries are leading defendants to settle, are having a chilling effect on free speech and are preventing us from striking a finer balance between the rights involved, you have to wonder what is the point? Is it necessary? Is there any virtue in holding jury trials and maintaining presumption in that respect?

It surprises me, to be honest, how much hysteria has developed around clause 1 in the serious harm test. It has been blown out of proportion. That may have something to do with the history of the legislation in section 1 of the English Act, which it reflects, and the question going to the Supreme Court with the Lachaux case. However, a lot of those problems have been sorted out. It is quite a modest clause in its effect. I see no evidence for the idea that it will stop plaintiffs being able to bring cases for defamation. You have to be clear that what clause 1 requires is not a case that a plaintiff absolutely must show, on a basis of evidence, that harm has been suffered. There will be some cases where that is not possible.

As I say in my response, the nature of reputation is very fuzzy. There will be situations in which it is just not possible to show harm. In those situations, the courts will still make an inference of harm, but it shifts the perspective away from a judge — a jury, in this jurisdiction — being ready to make a quick inference of harm to a situation in which there is a bit more sensitivity to the facts and the question of whether harm has actually been suffered. As I say in the response, in a lot of the defamation claims decided in Northern Ireland for which damages are awarded, the plaintiff will be able to show that. I do not think that it introduces too much complexity into the case —

The Chairperson (Dr Aiken): You think that we should have the serious harm test.

Dr Hanna: Sorry?

The Chairperson (Dr Aiken): We should have it.

Dr Hanna: Yes, I think that we should.

The Chairperson (Dr Aiken): OK. You were talking about the jury trial. What are your thoughts on clause 11, "Trial to be without a jury", being amended to reflect the findings of the Gillen review of civil justice, which suggests that judges should have discretionary powers to select trial by judge only in the case of complex matters and that judges should have discretionary powers to compel parties to undertake alternative dispute resolution or face possible financial penalties?

Dr Hanna: There is a discretion, but I saw very little use of that discretion from 2014 onwards. I compared that with England and saw that, from the early 2000s, there was a practice of using that exception to move away from jury trials. In my research, I found only one case of it being exercised within that time frame. Unfortunately, that was subject to a reporting restriction, as a lot of defamation cases are in Northern Ireland.

I wonder why the judiciary does not make more use of the exception. It seems that it does not make use of it, and I think that the legislation is a way of amending that.

The Chairperson (Dr Aiken): We have heard quite a few times about the vexed issue of websites, social media and hosting. Clause 5 refers to operators of websites. Do you think that it is necessary? Why should operators of websites have an exemption, or a significant limitation of liability, when the term "operators of websites" is not defined. What is your perspective on that, bearing in mind the significant issues that we have with social media at the moment?

Dr Hanna: I do not think that clause 5 is necessary. What Scotland did in sidestepping that complexity is noteworthy. I wonder why the same avenue is not available here. Things have changed since 2013 with the explosion in social media and the way that it provides a platform for people to be defamed so

easily. You have to bear in mind the pending online harm legislation as well. In a sense, that is what I meant about the Defamation Bill trying to do too much in some respects. I wonder whether some of those questions could be handled there.

That is not an area that I have researched in great depth, but I would be cautious. I realise that social media companies have a lot of power. I think that their liability should be captured a bit more precisely than is reflected in clause 5. I am not sure that it is necessary, but that is not an area that I profess to know a great deal about.

The Chairperson (Dr Aiken): OK, thanks. I am going down my list of questions.

Should the Defamation Bill be amended in order to support and encourage the use of discursive remedies, including prompt and comprehensive retractions coupled with a jurisdictional bar to a defamation action in those cases?

Dr Hanna: Yes, for corrections, retractions and apologies. I realise the difficulty of imposing an obligation for retractions and corrections on the press and the media or even on publishers generally. In the HRH Sussex case, for example, 'Mail Online' was ordered to publish a front-page retraction or correction. That has not happened yet. Retractions get kicked into the long grass of appeals and things, and the press are resistant to making them. They may have some reason for going back and forth with stories and whatnot.

My thoughts about the role of retractions, corrections and apologies relate specifically to the public interest defence. There may be scope to include it in clause 4 specifically, in that, when publishers or defendants publish a story that is false and later learn that it is false, there perhaps should be an obligation on them, or it should be reflected in the defence itself somehow, that, if they realise that it is false, and they realise their mistake, they should issue an apology or retraction at some point; not only coming in at damages but coming into the defence.

I do not think that the jurisdictional issue is quite the issue that it was for London. This is not London. We do not have the jurisdictional nexus that that place has, as a global city. I therefore do not know whether a lot of forum shopping goes on here in Northern Ireland. Again, it was the conclusion that Dr Scott came to in his report: that it was not really a pressing issue for Northern Ireland.

The Chairperson (Dr Aiken): Yes: that there was not that degree of litigation tourism.

Dr Hanna: I have not seen it myself either.

The Chairperson (Dr Aiken): OK. I have another question. Some respondents have suggested that clause 1, on serious harm, should be further strengthened in order to include provisions that prevent companies or public authorities from bringing defamation actions. They argue that the protection of reputation is deemed necessary because it impacts on "personal identity and psychological integrity" and that such a justification should not apply to any kind of company or public authority. What is your perspective on that?

Dr Hanna: My understanding is that clause 1(2) refers to:

> *"a body that trades for profit".*

I am not sure whether I am mistaken in that. I think that public authorities are covered by common law, if I am not mistaken. Is there a necessity to legislate on that? I am not sure that there is great debate about the authority of that common-law position.

The Chairperson (Dr Aiken): That is quite clear.

Mr K Buchanan: Are you happy enough if I address you as Mark?

Dr Hanna: Yes. Absolutely.

Mr K Buchanan: Super. Mark, I refer you to the conclusion of your response, in which you talk about the value of free speech and about societal conflict. To be fair, you refer to the conflict in Northern Ireland. We all know what that was, and still is to a degree. Will there be a chilling effect? Is there not

free speech in this country? What is the difference between free speech and lies? You will know from where I am coming. You can publicise anything that you want about me or anybody else as long as it is the truth. People might not like the truth, but it is the truth. What therefore is the difference between free speech and lies?

Dr Hanna: It is said that there is never really a public interest in making false statements. There is a small category of certain types of speech in which there can be a mistake, and it is a false statement, yet there is still public interest, so the law should protect it. It relates to what is called here the Reynolds defence: the public interest defence. There are strict circumstances for what qualifies for meeting that. More generally, a lot of the false communication that is bandied about now is not really speech that one would call high-value speech that the legislation should perhaps step in to protect. That is probably the complex task that you have before you. You have to ensure that there is some kind of protection of what you would say is public interest speech, even if it may be false, and do so in such a way that it does not tip the scales too far.

The Chairperson (Dr Aiken): Sorry to interrupt, Keith. What is high-value speech, Mark?

Dr Hanna: It is public interest speech and speech that has to do with political institutions, public life and suchlike, so things that would qualify under the Reynolds defence and what would become the public interest defence under clause 4.

The Chairperson (Dr Aiken): Right.

Dr Hanna: There is no bright-line test as to what qualifies as that. It is sensible enough: you will know it when you see it. If you are referring to a lot of the things that are posted on social media now, and misstatements that are made there, there is nothing in the Bill, as far I can see, that would allow those to escape any kind of defamation claim. The Bill, as far as clause 4 and the making of false statements are concerned, relates only to public interest speech and speech that is published in some kind of reasonable conduct.

Mr K Buchanan: The Chair referred to clause 5, which deals with the operators of websites. Is that clause of any benefit to a political representative or someone else who gets comment on social media? Does the Bill offer any protection or assistance to that person? If an individual puts falsehoods on social media, whether it is harm or serious harm, it has an effect. We are in this place to legislate to protect everybody, yet now we are going to legislate to let people say what they want.

Dr Hanna: I am not sure that clause 5 is absolutely necessary. What has changed since 2013 is the explosion of social media. Although a lot of harm is done through posts on social media, it is worth bearing in mind that there is a cultural realisation that a lot of the things written on social media are untrustworthy and that there is a lot of fake news out there. You have to credit the public in general for realising that and taking a lot of what they read on social media with a pinch of salt. How far they do so is difficult to say, but it enters into the debate as well, and the legislature should consider that when it is scrutinising the Bill. I cannot say too much about operators of websites. It is not an area that I have looked at in great detail, so I cannot comment on it at great length.

The Chairperson (Dr Aiken): Mark, will you outline the Reynolds case in a nutshell?

Dr Hanna: The Reynolds case involved former Taoiseach Albert Reynolds, who brought a case against 'The Times' for its alluding to some corrupt dealings that it thought that he was having. Before that case, there was the duty and interest privilege in law. It typically applied to writing references. For example, I could not be sued for defamation for making a defamatory statement in a reference that I wrote for somebody, because I had a duty to do so, and the recipient had an interest in receiving it. That was the only privilege that existed in common law at the time.

The Reynolds case came along in 2001, just as the Human Rights Act 1998 was coming into force. At that time, you were starting to see a bit of change in judicial thinking and a realisation that there were some criticisms coming from Strasbourg that the law in England and Wales was having a chilling effect on free speech. The judges were alive to that and tried to protect 'The Times', or certainly to allow for some editorial discretion, and allow media outlets to make statements that are false by giving them some kind of defence. They tried to fit that defence into the duty and interest privilege, however. That was a bit awkward. It took a few cases to work out, and, to be honest, the judicial outworkings were

not perfect. That is why clause 4 is necessary: it states things in more simple language. That, in a nutshell, is the Reynolds case.

The Chairperson (Dr Aiken): Sorry about that, Keith.

Mr K Buchanan: I am fine, Chair. I appreciate that, Mark.

Mr O'Toole: Thank you, Mark, for your written evidence and for your oral evidence so far. You state in your written evidence that you recommend the Bill and that it strikes a more equal and precise balance between the right of people to protect themselves from falsehoods, defamation etc and the right to freedom of expression. I popped out for a second and missed your initial remarks, so will you summarise why you think that?

Dr Hanna: I limit my comments to clauses 1, 4 and 11. As I said at the start of the meeting, the big thing for me is the reversal of the presumption of jury trials. I agree with the Northern Ireland Law Commission report's recommendation that the presumption be reversed, and I agree with its conclusion that the presumption is having a profound effect on defamation laws. It is weighing heavily on defendants and causing them to settle too much. I have looked at the law in this jurisdiction since 2014 and can see that. I have submitted a freedom of information request on the proportion of cases that opt for jury trial and the proportion of those that settle. We know that, in general, Northern Irish defamation cases have a high proportion of settlements. The Scott report underlined that as being problematic and stated that doing away with jury trials was probably one of the bases for overcoming that. I talked about juries being a sensitive issue in Northern Ireland and said that, in practice, the jury system does not bear the fruit that we had hoped that it would. Judges end up taking most of the decisions in defamation claims, and juries are rarely empanelled.

Mr O'Toole: Juries are rarely empanelled, even at the minute.

Dr Hanna: Yes, juries are rarely empanelled. Empanelling a jury is like the last step, as there are costs and complexities involved in organising them. Before it ever gets to that stage, it tends to be the case that people will get nervous and settle, and, generally, that will be the defendant. That is the issue. That is the chilling effect right there.

Clause 1 and the serious harm test will also have such effects. Juries are postponing any kind of harm test being applied in Northern Irish defamation cases until the jury is empanelled. Most plaintiffs will, as a matter of strategy, opt for jury trial. If a jury is involved, all that the judge can ask is, "Is the statement complained of capable of bearing a defamatory meaning?". That is a much lower threshold than asking, "Is there any kind of harm suffered?". By the way, we should note that, under common law, there is supposed to be a harm test. It is not one that asks the plaintiff to prove on a factual basis that harm is being suffered, but there is a requirement that the plaintiff show that there is nonetheless an inference of substantial harm to be drawn. We never get to that stage, however, because of the presumption of jury trials.

My final point relates to clause 4 and the public interest defence. There has never been a successful public interest defence in Northern Ireland: I have not found one anyway, and I would love for somebody to tell me otherwise. I have asked quite a few people who should know, and nobody can point to one. There have been refusals to strike out on those grounds, but no affirmative definition of the public interest defence in Northern Ireland. That is a shame. Are we saying that there has never been public interest speech in Northern Ireland? Are we saying that there has never been a viable defence? There has often been, but, typically, parent companies of media outlets that are located in London or Dublin decide that they cannot be bothered with the trial. It is too costly and complex, so it is easier for them to settle.

Mr O'Toole: That comes on to a point about data. You said that there are multiple data points that we do not have. What data are you using to stand up your arguments?

Dr Hanna: That is also something that I addressed at the beginning. You are never going to get the 100% empirical statement, "Here we can see exactly that the law is having a chilling effect". In my research, I did a comparison between what has happened in England and Wales since 2014 on the presumption of jury trials, the serious harm test and the public interest defence and what has happened in Northern Ireland. I am not saying that England is ideal — it has its own issues — but,

with the 2013 Act, it tried to strike a finer balance. It is hard to debate that it did not achieve some striking of a finer balance between the rights involved.

I therefore used that as a metric to measure against what was happening in Northern Ireland. It revealed that we could do more to strike that balance. As I said in my response, that is the gold standard for defamation law around the world. It strikes a balance between the rights —

Mr O'Toole: The 2013 Act in England.

Dr Hanna: Yes.

Mr O'Toole: What were you specifically comparing?

Dr Hanna: I was comparing from 2010. I looked specifically at how those issues were being dealt with in law: in legislation and in common law. We have a harm test here also. How does it operate in the Northern Irish courts compared with how it has operated in the English courts before and after the 2013 Act?

The same thing applies to the public interest defence. We have a public interest defence — apparently — and so does England. It is also the same thing for how the presumption of jury trials operates there and how it operates here.

Mr O'Toole: Was that a kind of textual comparison of what the law states rather than a comparison of actual judgements?

Dr Hanna: No. It was a legal doctrinal approach that involved reading the judgements and their interpretation of the legislation.

Mr O'Toole: OK. This is not an area with which I am hugely au fait, but, in general, would that comparison, through your textual study of what judges say and the advice that they give to juries, show you that the balance that you are talking about is more heavily weighted against freedom of speech here than it is in England and Wales?

Dr Hanna: It is not a matter of the instructions that judges give to juries but more a matter of the practical realities of what a presumption of jury trial is causing to happen here. My understanding is that, when plaintiffs come with a defamation case to a lawyer, the lawyer will say, "Let's opt for a jury trial, because it is likely that the defendant will get nervous, and perhaps we will get a settlement before it ever gets to any kind of test in court". That is the issue with jury trials rather than the instructions that juries are getting from judges.

Mr O'Toole: We are a tiny percentage of what the population of England and Wales is, so is it possible to say whether there are proportionately fewer writs issued in Northern Ireland or more? Can you do that on a population basis?

Dr Hanna: It is hard to compare, because, again, London is a completely different place for libel law and such things. There is a lot more happening there, and it is a lot more —

Mr O'Toole: There is a lot more economic activity there generally. There is a lot more —

Dr Hanna: Yes. There are more jurisdictional connections with the rest of the world. For example, you will get foreign business people bringing cases there. We do not have such issues so much here. It is therefore hard to answer your question.

One point that is worth making in that respect is that, when you look at the judgements in Northern Ireland, they will commonly refer to English cases. What the 2013 Act effectively achieved here, however, was to fossilise the law in Northern Ireland. We are now left in a bit of a cul-de-sac and do not have that rich jurisprudence to refer to. It is because the English courts are so busy, with so many issues being tested there, that they have to make judgements. We have locked ourselves out of being able to refer to that.

Mr O'Toole: That is interesting. The fact therefore is that the law has been updated in England and Wales, and an NI judge cannot refer to that jurisprudence because the law there is so different, so —

Dr Hanna: Right. We do not have a section 1 serious harm test, so a lot of the courts' time has been taken up with that issue since 2014. As a result, we now do not have any further development on the common law issue of substantial harm. In Northern Ireland, we are locked into a reference to English law from about 2010, or perhaps even, in some respects, before then: before the Human Rights Act really came into force. That is an issue of concern.

The Chairperson (Dr Aiken): Thank you very much indeed, Mark, for coming in. That has given us a lot of food for thought. If there are any follow-up questions, do you mind if we ask you to come back to us in writing?

Dr Hanna: Absolutely. That is no problem.

The Chairperson (Dr Aiken): Thank you very much for your time. I am sorry for starting slightly late.

Dr Hanna: That is no problem. Thank you.