Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Mr Peter Girvan

8 December 2021

NORTHERN IRELAND ASSEMBLY

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

Witnesses:
Mr Peter Girvan Independent

The Chairperson (Dr Aiken): The Committee will now receive oral evidence from Peter Girvan on the Defamation Bill. The session will be reported by Hansard. Have we got Peter on StarLeaf?

Mr Peter Girvan: Hopefully so. Can you hear me?

The Chairperson (Dr Aiken): Yes, I can, Peter. Can you hear us loud and clear?

Mr Girvan: Yes, indeed. Thank you, Mr Chairman.

The Chairperson (Dr Aiken): Thanks very much indeed. Peter, you are more than welcome to the Committee. I invite you to speak to your submission to the Committee Stage of the Defamation Bill. Take around 10 minutes or so to tell us about the Bill, what you like or dislike about it, and how you might want to see it amended. Over to you, Peter. Off you go.

Mr Girvan: First of all, thank you to the Committee for the opportunity to attend. Secondly, it is important to make clear that I am attending in my own capacity, as opposed to as a representative of the Bar Council, so my views are my own. In broad terms, it seems to me that the Bill, first, does not meet the stated policy objective of making it easier and less expensive to take legal action when you have been defamed and, secondly, is skewed too heavily in favour of publishers, particularly website publishers or operators.

On the issue of making it easier and less expensive to take legal action for defamation, as I understand it, Dr Scott identified that as a core issue prior to the reforms and made clear that litigants cannot afford to defend or vindicate their reputations. As the Committee has already said today, the position in this jurisdiction is that legal aid is not available for defamation actions. The reality is that this legislation does not do anything to address that issue, and, in fact, imposing a new legislative scheme

that raises threshold conditions will have a chilling effect on any potential defamation claim or plaintiff, whatever their level of funding. It is also important to note that the additional protections that are offered to website operators and social media sites have a particular resonance for, if you like, normal people or not spectacularly rich people, because that is the medium through which they are most likely to be defamed and to seek relief.

There was reference earlier to the availability of some sort of acknowledgement via the Independent Press Standards Organisation (IPSO) mechanisms, and there were some anecdotes about alternative mechanisms available to people, but none of those really operates on a level that compensates the individual concerned or rights the wrong. In fact, subject to checking, certainly until fairly recently, a number of our media outlets were not, as I understand it, signed up to the IPSO code. They may well have joined it subsequently.

The next issue is the fact that it seems to me that the legislation is skewed too heavily in favour of publishers, or of the defendant generally. As has been acknowledged, the Bill cuts and pastes, in large measure, the English provisions. There is not much to suggest that the Defamation Act 2013 reduced complexity in this area of the law. In fact, it was acknowledged by some of the participants earlier that a series of cases had to establish what all these new things meant, and that meant that the first litigants experienced the increased risk and costs of having to establish what the law is and means. The adoption of a serious harm test similar to that in England seems to me to significantly increase costs at an early stage of litigation, particularly if it is to be brought in here by an amendment to the rules to allow claims to be struck out pursuant to serious harm being a threshold. It seems to me, from my experience, that the common law provisions or authorities have already established mechanisms to get rid of trivial claims, and, at the minute, the County Court has a jurisdiction of £3,000, I think, for defamation claims, so smaller claims can already proceed in that arena at a low cost and at a fixed cost for plaintiffs and defendants. It seems to me that cost allocation, fixing costs or scaling costs may be a different avenue to pursue in trying to address some of the concerns that are raised by legitimate investigative journalists, as opposed to people who publish defamatory content but are not serious investigative journalists.

There is another issue that skews it in favour of defendants and publishers, and that is the adoption of a single publication rule, as has been acknowledged. That is aimed at preventing a plaintiff from deciding to sue on repeated libels by the same defendant, which, it seems to me, ignores two things. One, you may get to a stage that, if you like, breaks the camel's back, where you are repeatedly defamed in the same way. Not everyone rushes into court the first time. The second is that, in this jurisdiction, it is a particular feature of our tabloid press that it repeats the same libels multiple times, as a theme, usually every four to eight weeks or so. It gives a nickname to someone, it gets a story, and, on pretty thin grounds, it reruns the same story with the same nickname and the same libel.

That relates to publishers generally. Of particular concern to me are the provisions that are even more heavily skewed in favour of so-called website operators. The Bill will obviously be welcomed by traditional media organisations and free speech groups, as has been pretty clear from the evidence that I have listened in on, but it will represent a red-letter day for website operators and big tech companies that host social media platforms. That is because they, too, benefit from the protections that I have just outlined that apply to every publisher, and the combination of clauses 5, 9 and 10 makes it almost impossible, or at least very difficult, to advise anyone to bring a defamation proceeding against a website operator or social media site, particularly if the operator chooses to locate itself, for the purpose of its terms and conditions and to avoid liability, somewhere outside the UK or the EU, such as, most notably, the United States.

I note that, according to the debates that I have read, the Bill sponsor had to seek the permission of the Secretary of State to include provisions relating to website operators. The Bill itself seems to cut and paste from the 2013 Act, meaning that it grounds itself in an understanding of the internet that is at least eight years old. This is seriously outdated and does not respond to the zeitgeist of the memorandum, which suggests that defamation laws here predate the invention of the internet and so there is a compelling case for review. If that is right, one needs to look at the internet and our understanding of it as it is today, rather than cutting and pasting an English provision from 2013.

To my knowledge, there has been no reported case of a direct claim in England — at least, one that has got very far off the ground — against a large tech company or website operator, for defamation. That is either because technology companies do not publish defamatory content, or because they are virtually impossible to sue. Given that the former clearly cannot be correct, even on the terms of the Bill sponsor, the latter must be the position. The Bill sponsor said:

"If we are looking for a medium where reputations are trashed, not on a daily, hourly or even minute-by-minute basis but on a second-by-second basis, it is on the World Wide Web on social media sites." ." — [Official Report (Hansard), 14 September 2021, p9, col 1].

The Bill, however, seeks to put in place further protections for these companies, which, unlike some of the examples of journalists and so forth given earlier, have vast resources and algorithms that control content and derive huge profit, including from defamatory content. As anyone who has been a victim of defamation online can attest, large tech companies already put up every conceivable roadblock in their armoury to the enforcement of reputational rights, especially with regard to anonymous or troll accounts. Those include providing deficient and ineffective online notification tools, especially with regard to libel claims; requiring court orders to provide information on the account holder, which often turns up information of no utility; seeking to impose Sisyphean requirements upon a notice for correspondence providing notification of a claim; disputing jurisdiction; and arguing that the defamatory meaning, as set out in the initial correspondence, must precisely align with the meaning that is later determined by the court.

The new provisions in the Bill provide even greater scope for those companies to avoid liability, which is one of the few checks on the operation of the platforms. To me, much of that seems to be premised on the stated objective to:

"Provide increased protection to operators of websites that host user-generated content".

For the reasons already stated, I do not agree with that objective, which seems to run against everything that we have learned about these so-called intermediaries in the last 10 years. Earlier, I heard a reference to the Online Safety Bill that is making its way through the UK Parliament. It seems to me that the policy objectives underlying that Bill flatly contradict those underlying this Bill. To my mind, this Bill does not meet the objective to:

"Take better account of the impact of the Internet".

Clause 5 is of particular concern. Clause (5)(2) provides a pretty unspecific or ill-defined defence. The process for providing notice to website operators or social media companies is not straightforward in my experience of making claims, whether on libel, data or other grounds. The other troubling matter about this provision is that subsection 6 makes reference to regulations that are not before the Committee, or indeed planned to be before the Assembly, but rather derogated in some way to the Department to make. It is not clear to me, where regulations are not proposed alongside the Bill so we can know how such a claim is to be made against internet operators. If it is simply a cut and paste of the English model, presumably the intention is for the Department to adopt the same regulations that have been so ineffective there. It is also unclear why that extremely important issue is to be derogated to the Department at all. Then it moves to the method of contacting and what has to be provided. I note that, at Second Stage, the Bill sponsor stated that, somehow, subsection 6 is meant to lead to the claimant needing to know the name and a way of contacting the person who has defamed them. I can see nothing in this Bill that refers to what the information is for a way of contacting the person.

Subsections 7 and 8 seem to be fairly meaningless without the actual regulations in your hand, and they raise the question of whether the clause, as a whole, is going to be operable pending regulations. Subsection 11 is particularly concerning because it requires malice to be proven, which is impossible to satisfy in reality. Subsection 12 is of particular concern because it makes it clear that the fact that someone moderates content does not open them up to liability. Why should that be the case if a complaint is made via the usually deficient online moderation function and rejected? Why is it that the operator should be able to avoid liability for its act of moderation?

Clause 9 deals with supposed libel tourism, a problem that the Bill sponsor and previous participants in this afternoon's session acknowledge does not exist in Northern Ireland. All it achieves is yet further protection for internet intermediaries who choose to place themselves outside the UK and the EU, which can be a paper exercise carried out by simply inserting into your terms and conditions that that is where you are based. The example given by the Bill sponsor was that, if a statement was published 100,000 times in Australia and only 5,000 times in Northern Ireland, that would be a good basis for concluding that the most appropriate jurisdiction was Australia. That seems to suggest that there is an increased threshold, way beyond substantial harm, for those defendants that choose to locate outside the EU. It involves an uncalibrated numbers game, which no plaintiff could be sure of in advance of disclosure by the selfsame defendant that they are proposing to sue. Obviously, no one would proceed to sue any defendant domiciled outside the EU in those circumstances, or very few would. This provision seems particularly absurd given the Bill sponsor's reference to the fact that it is meant

to build in a "common-sense approach". It does not seem to be common sense to me, and nowhere in the provision does it refer to common sense.

Clause 10 is yet another hurdle to sue social media, tech companies or website operators. Under the provision, you cannot sue those companies unless it is not "reasonably practicable" to sue the primary publisher. In my view, there are myriad problems with that provision. First, what does "reasonably practicable" mean? Secondly, what if the primary publisher is entirely impecunious and has no fear of damages? Thirdly, what account is taken of the platforms themselves providing the platform for mass publication? Fourthly, what, if any, impact does this have on the already loose rules around registering and operating accounts online, where the terms and conditions of the tech companies specifically allow people to register anonymously?

I do have views on other parts of the Bill. They are, perhaps, not terribly strong views on statutory defences and on the abolition of the presumption in favour of jury trial. I am happy to address the Committee if it feels that that would be helpful, but, otherwise, that is my opening submission.

The Chairperson (Dr Aiken): Thanks, Peter. In the last bit, you were talking about clause 11, which covers the jury trial issue. Can you elucidate a bit more on that, please?

Mr Girvan: I do not have a particularly strong view either way. I can see pros and cons of judge and jury or with reversing the presumption in favour of judge alone. There is a notion afoot that, somehow, juries will give spectacularly high damages and will swallow plaintiffs' cases easier than defendants', but I am not sure that that is borne out in practice. Also, I do not particularly agree with some of the remarks that were made earlier about how this all adds some terrible uncertainty into the litigation process that does not exist in all litigation.

That having been said, a reasoned judgement from a judge can, in itself, indicate someone's reputation as much as a jury award. Jury awards are constrained and can be appealed, anyway, if they are excessive. I can certainly see pros and cons. If you were to ask me for a preference, I would probably wish to retain the jury system, but I can see arguments either way, and I do not think that it would make a huge difference in practice. The reality is that the other provisions of the Bill would preclude an already small group of plaintiffs from even bringing proceedings anyway.

The Chairperson (Dr Aiken): Peter, what is your view on alternative dispute resolution?

Mr Girvan: Generally, I think that, for all litigation, not just defamation litigation, it is a move in the right direction. There are already provisions in various protocols that encourage alternative dispute resolution and for the court to take account of rejections of that. I think that, in the Republic of Ireland, there is a statute that requires the parties in a more formal way to consider it.

This is a bit off the question, but reference was made earlier to correspondence that was sent by lawyers in advance of even claiming, and this was, somehow, turned into an admission, I think by Mr Tweed, that I do not recognise, that he engages, or lawyers engage, in intimidation by pre-action correspondence. That is just not right. There is a pre-action protocol that was brought in — I cannot remember on which date — by Mr Justice Gillen, when he sat in the division, that requires plaintiffs to write pre-action protocol letters that set out their claim. In fact, if you do not follow that protocol, you are criticised. So, I found some of that very difficult to follow.

The Chairperson (Dr Aiken): Peter, for the record, can you state that again? Are you saying that, actually, Justice Gillen has stated that pre-action protocols have to be done?

Mr Girvan: There is a pre-action protocol for defamation actions in Northern Ireland that sets out what the requirements are of a plaintiff and a defendant. You have to write to the proposed defendant saying, "I am going to sue you for defamation. This is the meaning I attribute. This is why I say it was bad etc, etc". They then have to respond within either 21 days or 28 days, I cannot remember which. I can certainly send you a copy of that document.

The Chairperson (Dr Aiken): Yes, please.

Mr Girvan: The notion that engaging in pre-action correspondence is to be taken, somehow, as some sort of limp intimidation of free speech or journalists seems to me to be complete nonsense. In fact, if

someone abused pre-action correspondence in that way, they would be heavily penalised by the court.

There also seems to be a little bit of a tendency to descend into anecdotes about specific cases, which are then meant to provide some grounding principle on which to proceed. I do not recognise that either. I do not perceive there to be some vast quantity of libel claims in this jurisdiction, or people willing to bring them. There is talk about libel tourism. Why would you sue in Northern Ireland when you can, more or less, depending on the publication, sue in the Republic of Ireland, where, under its 2009 Act, the requirement is that you should establish publication to one person? Why would you bring an action in Northern Ireland, when the test is already higher than that? Some of it seems to intermingle a lot of different issues.

Another issue that seems to be intermingled is the fair point about investigative journalists and free speech. The problem is that the serious harm test does not do away with claims against proper investigative journalists, who, to be frank, will not really get the benefit of it if they publish on some sort of national platform anyway. The public interest defence, which I do not have much difficulty with, achieves that. In fact, a defendant can publish something that is untrue, as long as they can stand over their journalistic method. Why should someone be afraid of that? That provides a defence, whether the allegation is proven to be true or not, as long as the journalist has followed good journalistic practice. Why, if you are protecting investigative journalism, does one need provisions other than that one? I do not have particularly strong views about reforming the way in which the defences are termed or about putting them on a statutory basis. It does not seem that those statutory defences have changed that much from what the common opposition was. People argue a lot in England about whether it is serious harm; they invest lots of money at an early stage to argue about that point.

The other thing is that it kind of ignores the reality of who would be the defendants and the plaintiffs in Northern Ireland. I do not perceive there to be a huge queue of mega-rich plaintiffs lining up in the Northern Irish courts to sue for libel. In fact, most of the defendants seem to be well-moneyed media organisations that are, usually, ultimately under one company's ownership, or the BBC, which, apparently, has complained about having to deal with litigation here. There is already a massive imbalance between most plaintiffs and most media defendants. What seems to then happen here is that there is reference to the solo investigative journalist or the public interest body making a publication, which is meant to read across to tabloid newspapers or huge media organisations. I just do not follow that logic, to be frank. I see policy reasons behind changing the defences, but there is a lot of it that I do not follow.

The Chairperson (Dr Aiken): OK. Thanks for that, Peter.

Mr Allister: Good afternoon, Peter. Thank you for what I found to be very refreshing and informed evidence.

I want you to give the Committee the benefit of further exposition on the point relating to the current common-law test that is applicable to what are perceived to be trivial cases. A very misinformed component of the arguments of advocates of the Bill is the contention that it would filter out trivial cases. Could you expound, for the benefit of the Committee, the existing common-law provisions relating to real and substantial tort and the effective threshold that has to be crossed in that regard before you sustain your case?

Mr Girvan: Certainly. It is accepted as a broad proposition that the 2013 Act in England increased the threshold from what had existed under common law and that that was what it sought to achieve. There are three possible options for a threshold. At the minute, Northern Ireland sits, if you like, in the middle. The Republic of Ireland has a law under statute that requires publication to one person, which is not much of a threshold. The English provision has the serious harm threshold, the meaning of which is arguable, and which has already gone to the Supreme Court. The threshold that we apply is based on the Jameel case, and that has been adopted persistently by judges here.

The best way to explain it is that the court can look at the case in the round — in particular, the number of people to whom the allegation was published, the types of people to whom it was published and the nature and seriousness of the allegation — and decide whether or not that is trivial or vexatious. It may decide, as it is sometimes put, that the game is not worth the candle; in other words, suing for defamation, particularly in a High Court suit, with all the costs, is not approved by the court based on the circumstances of the case. For example, if someone sent an email to four work

colleagues that said something defamatory about someone else, but which they did not believe when they read it, that would unlikely be actionable in Northern Ireland.

It is not just a numbers game in terms of circulation. There is already a well-established test. The notion that a serious harm test somehow creates certainty, or more certainty than that test creates, seems wrong too. If it did so, why do cases in which the meaning of serious harm is argued consistently go before the English courts, including the Supreme Court? There is a common-law test there, and it is as certain as the serious harm test. It just has a slightly lower threshold, which, in my experience, seems to get rid of the frivolous and trivial cases that seem to be of concern to people.

Mr Allister: Trivial cases, as you call them, also have the safety net that they can be remitted to the County Court. Is that not correct?

Mr Girvan: Yes.

Mr Allister: So, if a defendant wants to make the argument that the case amounts to nothing and is trivial, they can apply to remit the case to the County Court, at which it is dealt with in circumstances where the costs are limited and specified. Is that not correct?

Mr Girvan: Yes. Exactly. There is a precise scale of costs for defamation claims, for libel or slander, in the County Court that go up to £3,000 — last time I checked.

If one is concerned about exorbitant legal costs for High Court claims, another option, rather than using a hammer to crack a nut by adopting an entirely new test or threshold, is simply to increase the County Court limit. The County Court limit in other claims is now set at £30,000. That would get rid of a lot of the problems that free-speech advocates argue about. If you were to raise the defamation threshold to something like £10,000 or £15,000 in the County Court, most of those smaller claims would go there. If claims against bloggers, broadcasters or small groups that are likely to have a smaller publication were brought to the Country Court, they and the plaintiff would have the comfort of knowing that the costs would be fixed.

Mr Allister: I agree.

I want to take you to clause 5, which I find troubling because of the advantage that it would give to the greatest offenders, namely social media platforms. You have articulated the obvious problems with that and the fact that cutting and pasting from the 2013 Act does not really deal with the modern social media phenomenon. What do you think is the best way to deal with the free-for-all in social media when it comes to defaming people?

Mr Girvan: The rubric that is already in place for all civil claims derives from the e-commerce regulations, which, themselves, have been subject to debate. What they require is that, in order for a website, intermediary or so forth to be liable in damages, as opposed to there being an injunction, adequate notice of the claim must be provided to them. The tech companies, which have money to spend on such things, then argue that the notice provision is a Sisyphean task and that even a 30-page letter of claim would be inadequate to give them notice of the content. They attempt, if you like, to put requirements on top — for example that you have to give the uniform resource locator, say what the words are, say what they could mean, convey every conceivable legal claim that you may rely on etc.

I am not against some sort of rubric for bringing claims against website operators. The problem with clause 5 is that it starts from the presumption and on the basis of a policy that the companies should be immune, which is wrongheaded.

Secondly, it sets the law on a pretty poor footing if the regulations are not even to hand. Given that the 2013 Act did not, at that stage, have the English regulations — as far as I can see, they have been a bit of a disaster anyway — the policy to cut and paste it eight years later but not look at the regulations that were adopted off the back of it seems to be wrongheaded too. In 2013, defamation may not have been a massive issue that people were thinking about. Certainly, at that stage, the tech companies were very good at convincing the world that they were really a sort of middleman that had no interest, involvement or editorial function in relation to content. That whole notion has dissipated now. Everyone realises that the companies have a significant amount at stake, that they, in fact, promote content that is controversial and defamatory and that they make money from it.

Clause 5 gets off on the wrong footing, because it does not start from a neutral position. I am all for having a rubric for how one would bring claims, because that would define what needs and does not need to be said rather than there being an argument about it later. Without having any draft regulations in place, however, the provision is doomed to fail or will just be argued about endlessly.

The reality about whether it is a defamation claim is that, quite often, the claims are to do with multiple defamations — a form of harassment, if you like — and invasions of privacy all at the same time, being made by targeted pages or trolls. The provisions therefore need to be tailored not for some clever lawyer but for a consumer or a normal person to be able to make their complaint.

The Committee should, maybe, take a step back from legislating for so-called website operators until members can understand what those operators offer at the minute. I do not want to engage in rhetoric, but if you try to make a complaint about defamatory content that is on a social network via the network's online moderation function, you will find it a pretty stretching exercise. It does not actually ask the question, "Do you say that you have been defamed?". Usually, the question is, "Have you been harassed?" or "Are you being bullied?". The simple question for those websites on those sorts of forms should be under data provisions, not libel. It should be: "Do you consent to your data being processed?". Answer: "No". Result: it should be taken down. All that the legislation seems to do is perpetrate buttress defences for the companies that control most of what is published at the minute and what we see. It is concerning.

Mr Allister: Maybe, therefore, it is no surprise that the evidence that we have heard in support of the Bill has come almost exclusively from potential defendants.

Mr Girvan: Yes, and I am pretty sure that all of them said that it is a very good idea. The submission that the National Union of Journalists (NUJ) made earlier was quite interesting about why it supports website immunity. It was based on the fact that, for example, a tabloid website that prints content also allows people to comment and that it might, therefore, be able to avail itself of that defence if someone adds a snipey, defamatory comment below its article. It does not want to moderate its own page, but it wants to encourage people to comment on it. That is pretty extraordinary. They were not really saying anything about protecting the investigative journalist; they were just saying that they would not want 'The Sun' or the 'MailOnline' to be sued for a comment that someone left below their article because they do not want to be bothered moderating it. That does not seem to be a legitimate policy objective.

Mr Allister: Thank you very much.

Mr K Buchanan: I have one question, Peter. You talked about the single publication rule. Correct me if I am wrong, but that means that if somebody were to publish something about me now, that article could run and run, but this rule will change that to one year. Say they put something up about me, the year runs out, and then they put something completely different up about me. Can the item that was put up more than a year ago be used in that case? Do you understand what I am saying? They put something defamatory up for a period, and the year runs out on each one until, eventually, the defamation has gone on so long that you cannot stick it any longer, so your solicitor does what he or she should do. Could the previous items be taken into account in that case?

Mr Girvan: I am only going on what I have read about what the sponsor says this rule is meant to engender. There is a debate between different methods of when you start limitation and in relation to how many publications there are. My understanding of what the sponsor is saying is that, had I published an article a year ago saying that x murdered someone, and he has not sued me over that, and I publish it again later, but the defamation is substantially the same, I, as the defendant, could turn around and say "Well, you didn't sue me a year ago when I said it, so you can't sue me now". If that understanding is right, then that is pretty extraordinary. People might have all sorts of reasons for not suing someone for libel. Not least of those is the cost, but there are other factors that might be at play, such as criminal investigations and so on and so forth.

The idea that an already very short limitation period of one year — shorter than any other tort — should be closed even further by saying that, if you defame someone in the same way twice, a year apart, and they did not sue for the first defamation, then you cannot sue them a year later or a year and a day later does not seem right. Will there also then be an argument around whether it is the same publication if you do not use exactly the same words? Will there be an argument around what this thing is, of which one it is?

I do not want to get into anecdotes because I do not think that is it helpful to do that, but anyone who picks up one of our tabloid newspapers on a regular basis will notice that, more than is the case with tabloids in other jurisdictions, they run repetitive stories about the same person.

This is a rather troubling provision. I am not really sure what it is aimed at, and I do not see any evidence of there being an abuse of the publication rule or the limitation provisions as they stand. It seems to be an answer to a problem that does not exist.

Mr K Buchanan: OK, thank you. I appreciate that. That is all I have.

The Chairperson (Dr Aiken): Thank you very much indeed for your time, Peter. If we have any follow-up questions, would you mind if we get in contact with you about contributing?

Mr Girvan: Yes, of course. I am happy to help. Thank you.

The Chairperson (Dr Aiken): Thank you very much indeed.