A&L Goodbody

LITIGATION & DISPUTE RESOLUTION

Defamation Law in Northern Ireland: *2021 in Review and the Road to Reform*

As part of our annual review of defamation law in the jurisdiction, we examine two notable reported judgments from 2021 and, as the Northern Ireland Assembly's legislative programme reaches the final stages, the nature of the reforms proposed by the Defamation Bill.

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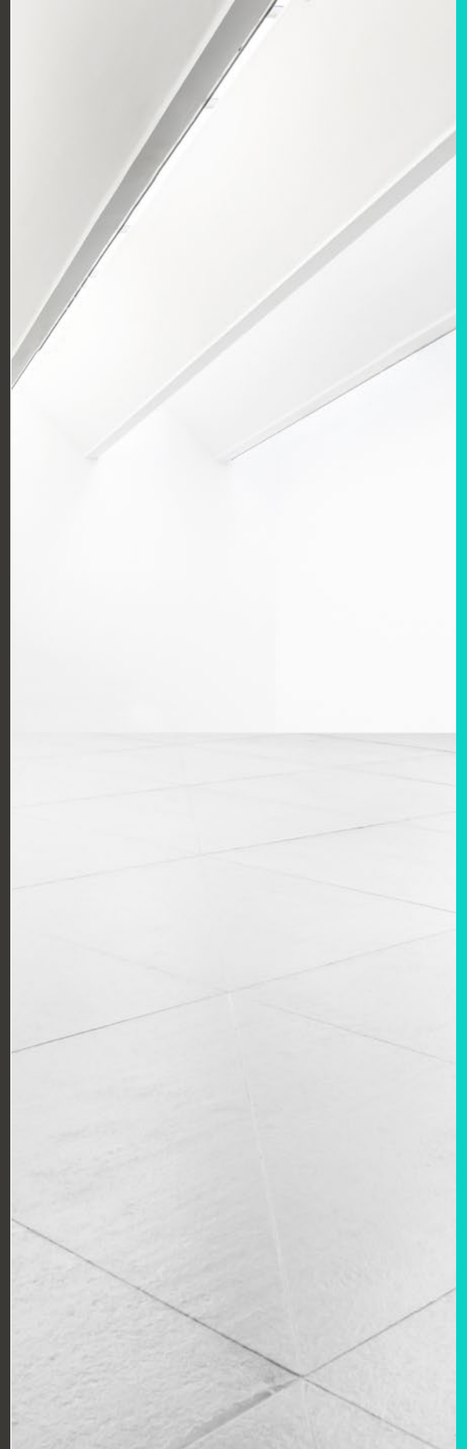


2021: MacAirt and Others v JPI Media NI and Foster v Jessen

Two reported judgments stood out in 2021. In *MacAirt and Others v JPI Media NI*, an application was brought by the defendants to strike out the plaintiffs' claims in defamation, misuse of private information, harassment, and data protection. The central aspect of the case, in defamation, was to determine the meanings capable of being borne by the words published in an article by the defendants in the Belfast News Letter, and on the paper's website, in July 2019.

The article reported that some of the proceeds from a book by Lyra McKee, the journalist killed by the New IRA in Derry/Londonderry in April 2019, would be donated to Paper Trail, a charity which, the paper observed, counted 'ex-bomber' Robert McClenaghan among its directors. While McClenaghan's history was undisputed and a matter of public record, the remaining directors complained that the article implied that they supported his past actions and were connected to violence or criminality.

The case was notable for Scoffield J's willingness to strike out multiple claims at an early stage. Of the 12 defamatory meanings alleged by the plaintiffs, 11 were considered incapable of bearing the meaning attributed to them. The remaining meaning (that the plaintiffs were members of a group directed by an ex-IRA bomber) was not defamatory (since it did not mean that they were under McClenaghan's direction or that he controlled the organisation) and was dealt with under section 8 of the Defamation Act 1996, which allows the court to dispose summarily of claims that have no realistic prospect of success. All of the meanings were struck out.

In doing so, Scoffield J relied on Order 1, rule 1A(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 (as amended), in support of 'grasping the nettle' where a 'claim rests on an unsustainable foundation.' The ongoing presumption of jury trials in Northern Ireland and the principle in *Jameel* v *Wall Street Journal* that the judge's function in considering meanings at an early stage is 'no more and no less than to pre-empt perversity' means that many similar cases have routinely proceeded to advanced stages and not fallen foul of the perversity test so soon. It remains to be seen whether Scoffield J's stance is an isolated, if sensible, decision or a sign of things to come.

The second case, *Foster* v *Jessen*, was also decided relatively quickly, though this had more to do with the defendant's non-participation in proceedings than anything else. The case centred around statements published on Twitter in December 2019 by the 'TV doctor' Christian Jessen, in which he referred to rumours that Arlene Foster, then First Minister of Northern Ireland, was conducting an extra-marital affair, and implied that she was both hypocritical and homophobic (all of which were strenuously denied).

The judgment was concerned largely with examining the evidence in support of Dr Jessen's application for leave to enter a late appearance, having ignored proceedings until the eleventh hour. McAlinden J refused the application on this basis and one particularly frank part of the judgment sums up his view of Dr Jessen's evidence:

"I am unable to place any weight upon Dr Jessen's evidence in relation to the small collection of correspondence allegedly found by him on 22 April 2020 and I am similarly unable to place any weight upon his evidence that the correspondence of 11 March 2021 and 9 April 2021 did not come to his attention. Irrespective of which lie he is telling, I am completely satisfied that Dr Jessen was aware of the date of the hearing set for the assessment of damages in this case and that he deliberately chose to take no steps to protect his interests in this matter."

Considering that the libel had caused 'considerable upset, distress, humiliation, embarrassment and hurt', in conjunction with the defendant's failure to respond to proceedings, retract and apologise for his statements, and to make any offer of compensation, McAlinden J awarded Mrs Foster £125,000 in damages plus costs. This is of course a very fact sensitive case with this award having been arrived at following no shortage of aggravating features and "nothing in the defendant's conduct in this case or indeed any other relevant consideration that could constitute a mitigating factor".

Reform: Recent Developments

Reform of defamation law in Northern Ireland has been both long awaited and a much-contested issue since the introduction, in England and Wales, of the Defamation Act 2013 (the 2013 Act). Several months later, the then Minister of Finance for the Northern Ireland Assembly declined to table the issue for debate. The subsequent proposal of a private member's bill by Mike Nesbitt, an Ulster Unionist MLA, prompted the Department of Finance to request that the Northern Ireland Law Commission produce a Consultation Paper considering whether the 2013 Act should have been introduced in the province.

The paper was published in November 2014, and the process culminated in a further report compiled by Dr Andrew Scott on behalf of the Department in August 2016. The bill was deferred pending completion of the reports, which recommended reform. Having unsuccessfully attempted to reintroduce his bill on the Assembly's recall from its three-year suspension in 2020, Nesbitt appealed for the Secretary of State's consent for Stormont to debate the issue, which was granted in May 2021. The halting progress of the bill represents the first serious opportunity for defamation law reform in Northern Ireland for some time.

However, while the bill has survived the protocol-induced collapse of the Assembly, and at the time of writing has just passed the Further Consideration stage of proceedings, it still has some way to travel before the expiry of the current mandate and the Assembly's dissolution on 28 March.

The Bill and the 2013 Act – Similar but Different

Much has been made of the opportunity for greater alignment in Northern Ireland with the law in England and Wales. Indeed, the declared intention of the bill's sponsor was to replicate the 2013 Act. Yet the notices of amendments published in February 2022 and, more strikingly, the differences in the bill as amended and published on 2 March with the bill as introduced lay this open to question.

While many of the bill's provisions do mirror the 2013 Act, some of its most significant clauses are omitted. The amended bill, for instance, excises the requirement of serious harm, the cornerstone of the English reforms and the subject of heated debate during

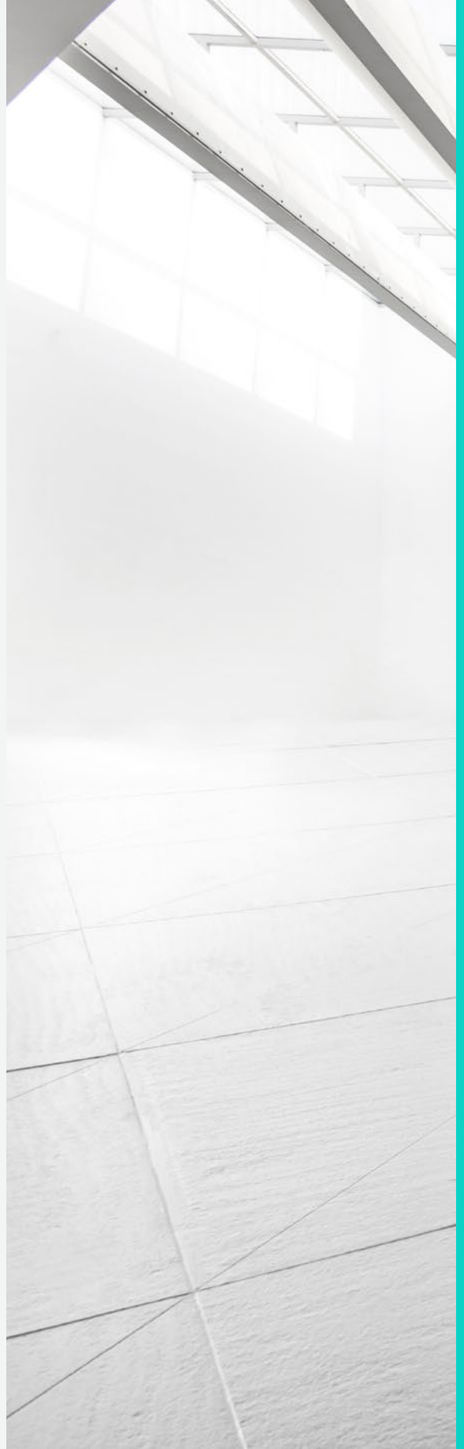
the progress of the bill. Similarly, there is no place for section 5 of the original draft, 'Operators of Websites', which would have created a new defence for the operators of sites whose users post defamatory content, though this may be a less consequential loss given the paucity of its use in England and Wales since 2013.

That said, its omission raises the question of how far the Assembly has adequately engaged with the challenges to defamation law emanating from social media. This is something which is further underlined by the removal of section 8, the single publication rule.

The bill's sole original clause, and the one likely to be of interest to advocates of wider-ranging reform, is section 11, 'Review of Defamation law'. This provides that the Department 'must keep under review all relevant developments pertaining to the law of defamation' and publish a report, along with recommendations for further reform, within two years of the bill receiving royal assent. Quite how this would be borne out remains to be seen. If nothing else, section 11 may provide the time that was lacking during the passage of the bill for more comprehensive debate and comparative evaluation of defamation law elsewhere. The haste of the process was noted by several committee members in the Official Report.

Perhaps the most important alignment with the 2013 Act is that of the defences to defamation comprised in sections 1-3. Dr Scott's submission to the committee, in October 2021, that it is 'increasingly inappropriate for Northern Irish judges to rely on English law as a guide to the operation of the common law defences retained in this jurisdiction', due to the ways in which the statutory defences had diverged from their common law antecedents, was cited in support of their wholesale adoption into the bill.

Codification of the public interest defence and the subsequent applicability of post-2013 case law on the subject may bring welcome clarity and reassure journalists and media organisations who have often found the Reynolds principles somewhat capricious in Belfast. It bears mentioning, however, that each of the statutory defences in the 2013 Act are predicated on the assumption that an action has passed the serious harm threshold. It is unclear how the uniform application of post-2013 case law on defences will interact with a Northern Irish system that operates with a lower threshold of harm.



What Next?

Whether the defamation bill becomes law will depend, in the words of the Speaker of the Assembly, on continuing cooperation, discipline, and hard work over the coming weeks. In the event of procedural frustration, the current Finance Minister's stated preference for bespoke legislation under a new mandate rather than piecemeal adoption of the 2013 Act remains a tantalising if improbable possibility, particularly given the opportunity to observe the progress of Helen McEntee's prospective reform in the Republic of Ireland.

More conservative observers may take the view that the clarity precipitated by uniform codification is a welcome development and that this, together with the section 11 obligation for further review in 2024, is sufficient incentive for the Assembly to seize the moment. One thing is certain: this being Stormont, a definitive answer is unlikely until some time around midnight on 28 March.

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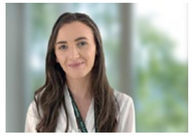

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