



# The ‘chilling effect’ of defamation law in Northern Ireland? A comparison with England and Wales in relation to the presumption of jury trial, the threshold of seriousness and the public interest defence

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## ABSTRACT

This article compares defamation law in England and Wales with that of Northern Ireland and analyses whether the current law in Northern Ireland is having a ‘chilling effect’ on free speech. At the time of writing, the Northern Ireland Assembly is formally considering adopting legislation based on the Defamation Act 2013 which reformed the law in England and Wales. The article aims to contribute to that debate in Northern Ireland, but it should also be of broader interest as an analysis of the effectiveness of the Defamation Act 2013. The article focuses on three key areas of reform, in both the Defamation Act 2013 and the Northern Ireland Defamation Bill: the presumption of jury trial, the threshold of seriousness, and the public interest defence. It demonstrates that the different approach of the law in Northern Ireland in these areas did not simply occur with the enactment of the 2013 Act, but rather that it started several years before that with a divergence from developments in the common law in England and Wales. The article argues that the difference has been entrenched by the changes in the 2013 Act, and that, in relation to each of those areas, the law in Northern Ireland is now on a singular course and one that can be seen to have a definite ‘chilling effect’ on free speech.

**Keywords:** Defamation Act 2013; Northern Ireland; freedom of expression; presumption of jury trial; serious harm; public interest defence.

## INTRODUCTION

In 2013, when England and Wales (E&W) adopted the Defamation Act, Northern Ireland decided not to follow suit. In apparent representation of the Northern Ireland Executive, the Minister of Finance and Personnel at the time, Sammy Wilson, declared that there were ‘no plans to review the law on defamation’.<sup>1</sup>

The decision proved immediately controversial, both at the national and international level. The purpose of the Defamation Act 2013 (the 2013 Act) was to address concerns about the ‘chilling effect’ of the existing law in E&W on free speech and to ensure a fair balance between the rights of both parties.<sup>2</sup> Since Northern Ireland had always relied on the defamation law issuing from the busier courts in E&W,<sup>3</sup> and had now suddenly cut itself off from that source of development, many worried the Northern Irish legal system would be frozen at a point where it would continue to have a chilling effect on free speech. Northern Ireland’s denial of reform, it was argued, would ‘interfere with the fundamental rights, not only of those who seek to publish information and opinions on matters of public interest and concern, but everyone living within Northern Ireland and the rest of the UK’.<sup>4</sup>

Amidst the public outcry, a Member of the Northern Ireland Legislative Assembly, Mike Nesbitt, sought to introduce a Private Members’ Bill proposing the reform achieved in the 2013 Act. While this met similar resistance at Stormont, the move was enough to trigger the Northern Ireland Department of Finance to ask the Northern Ireland Law Commission to ‘consider the Defamation Act 2013 in E&W, and to consult on the question of whether the Act should be introduced in Northern Ireland’.<sup>5</sup> Mr Nesbitt was asked to postpone his Private Members’ Bill until after the Commission had delivered its report.

After consultation with key stakeholders and a thorough review, the Commission published its report in November 2014, with a subsequent report on the subject published in August 2016 by Dr Andrew Scott of

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1 Letter from the Minister of Finance and Personnel, Sammy Wilson, to Lord McNally, 26 June 2013.

2 Comments of the Lord Chancellor, HC Deb Tuesday 15 March 2011, vol 525, Draft Defamation Bill.

3 On the general relation, see B Dickson, *Law in Northern Ireland* (Hart 2013) at 3; and G Anthony, ‘Northern Ireland as “a legal jurisdiction”’, submission to the Commission for Justice in Wales, at [12]. This has certainly been the case in relation to defamation law, and the Northern Irish courts have made frequent reference to the jurisprudence of the EWHC, EWCA, and UKSC in this area of law.

4 Lord Lester, HL Deb Thursday 27 June 2013, volume 746, Defamation Act 2013: Northern Ireland.

5 Northern Ireland Law Commission, ‘Defamation Law in Northern Ireland, Consultation Paper (NILC 19, 2014) (hereafter NILC 2014) 1.

the London School of Economics, who had chaired the Commission's review. Both stated that 'problems do apply', that there was some chilling effect of the law in Northern Ireland on free speech, and that 'the law of defamation wrongly restricts the proper exercise of freedom of expression in Northern Ireland'.<sup>6</sup> On that basis, the report recommended reform largely reflecting the Defamation Act 2013, with some qualifications in relation to the harm test, the honest opinion defence, jurisdictional issues and the mode of trial.<sup>7</sup>

The moment for reform stalled, however, with the subsequent suspension of the Northern Ireland Assembly from 2017 to 2020. When the Assembly was restored in January 2020, some resistance to reform remained. Nonetheless, in May 2021, Mr Nesbitt's Bill received the necessary legislative consent from the Secretary of State for Northern Ireland, and, a month later, the Defamation Bill was formally introduced for debate in the Assembly.<sup>8</sup> If Northern Ireland's precarious political system does not collapse before then, the Assembly should decide within the next several months as to whether defamation law in Northern Ireland will be amended to reflect that now in E&W.

This article aims to contribute to that debate by examining the degree to which Northern Ireland's current defamation law is having a chilling effect on free speech, and whether the proposed measures of reform would be effective in addressing that. Despite Andrew Scott's conclusions and recommendations in 2016, the issue is still one which is hotly contested in Northern Ireland. The Finance Committee, which has been charged with investigating this matter on behalf of the Assembly, has been confronted with a range of different opinions from key stakeholders in this area; from seasoned lawyers, who argue that there is no chilling effect in Northern Ireland and that reform is not warranted, to a leading investigative journalist, as well as the Legal Director of the BBC warning that the law in Northern Ireland is having such an effect and that reform is essential in the interest of the people of Northern Ireland and beyond.<sup>9</sup>

Just what is the difference then between defamation law in E&W and the law in Northern Ireland today? How well has the Defamation Act 2013 performed in addressing the chilling effect? Surprisingly, the question has received little scholarly attention. The Scott Report was issued at a relatively early stage in the progress of the 2013 Act and

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6 NILC 2014 (n 5 above) x; A Scott, 'Reform of defamation law in Northern Ireland', (Northern Ireland Department of Finance 2016) (hereafter Scott Report 2016).

7 Scott Report 2016 (n 6 above) appendix 1. See also below, note 10.

8 The Bill is currently at the Committee Stage of debate, see Northern Ireland Assembly, [Defamation Bill](#).

9 See eg the oral briefings before the Finance Committee of [Paul Tweed](#), [Sam McBride](#) and [David Attfield](#).

could not know then how the different provisions of the Act would be tested by facts and developed by the courts. Certainly, there has been little empirical research on the question since. Thus, it is an important question to ask; especially at this juncture, when Northern Ireland has both the opportunity to reform and the benefit of seven years of experience of the 2013 Act in E&W.

In order to examine this issue, this article will focus on three key areas of the law, each reflected in specific provisions in both the Defamation Act 2013 and the Northern Ireland Defamation Bill. These are the reversal of the presumption of jury trials, the threshold of seriousness and the public interest defence.

There are, of course, other important areas of defamation law that the 2013 Act sought to address, and which the Northern Ireland Defamation Bill must consider. However, beyond the need to limit the field of study in the interest of empiricism, there are good reasons to focus on those three areas of the law. What we can say now with the benefit of hindsight is that in some ways the Defamation Act 2013 tried to do too much. Where it appears most problematic is arguably in relation to those issues which were difficult to gauge in 2013, and where there has been rapid technological and social development; most notably, in relation to the liability of operators of websites.<sup>10</sup>

At the same time, where the 2013 Act *can* be seen to have made a difference, and where it appears more effective, is where it codified and advanced the subtle changes that were already taking place in the common law in E&W in the several years preceding 2013. That is certainly the case in relation the presumption of jury trials, the threshold of seriousness and the public interest defence; areas from which Northern Ireland had already been diverging before E&W put them on a statutory footing in 2013. Although these areas continue to generate significant debate in Northern Ireland, analysis will show that the 2013 Act has made definite advances in those areas, and that they each now mark a clear point of divergence with Northern Ireland.<sup>11</sup>

In order to map out the difference between the two jurisdictions, the article will examine the law comprised in relevant statutes and case law and will focus in this regard on the timeframe from 2014, when the legislative reform came into force in E&W, until November 2021

10 For this reason, Andrew Scott proved prescient in avoiding the issue in his draft Bill (n 6 above). See also the Defamation and Malicious Publication (Scotland) Act 2021, which also avoids s 5 of the 2013 Act.

11 The study does not hold E&W up as ideal in terms of striking the balance between the rights involved in defamation law. That is always likely to be a work in progress, and some may argue that the Defamation Act 2013 does not go far enough to address the 'chilling effect' on free speech. However, the analysis will show that in those three areas at least, the law in E&W has made some advance in balancing the rights involved.

– although, as stated, it is necessary also to track some of the roots of those legislative developments in the case law in E&W in the years running up to the 2013 Act.

Of course, E&W typically produce a higher number of defamation cases than Northern Ireland. From 2014 to 2020 there were a total of 140 defamation claims issued in Northern Ireland, only 17 of which resulted in a judgment.<sup>12</sup> From 2014 to 2019 there were 1218 defamation claims issued in London alone,<sup>13</sup> and at least 305 judgments on defamation claims in E&W from January 2014 to May 2021.<sup>14</sup> Nonetheless, even if comparatively small, Northern Ireland does have its own vibrant practice of defamation law, and one can map out a very distinct approach in both the relatively high number of cases that are settled early there, and in those cases where judgments have been entered.

The next section will begin by examining the difference in relation to the role of jury trials in defamation cases in the two jurisdictions. The third section will examine the different approaches to the use of a harm test in each jurisdiction, and the fourth will examine the difference in relation to the public interest defence in both jurisdictions.

The comparison will show that the law in Northern Ireland is embarking upon a different path and will be seen in each respect to disproportionately advantage plaintiffs and therefore have a definite chilling effect on free speech. The article will conclude by reflecting on the normative and practical implications of Northern Ireland's singular development of defamation law in this regard.

## **JURY TRIALS**

Both section 11 of the 2013 Act and clause 11 of the Defamation Bill for Northern Ireland provide for a reversal of the presumption of jury trial in defamation claims. The provision has perhaps not received the

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12 Queen's Bench Writs and Civil Bills Disposed with a cause of action of Libel or Slander, provided by Northern Ireland Courts and Tribunal Services, 18 May 2021, FOI 023/21: 57 were 'settled terms endorsed', 21 'settled out of court', 11 'struck out', 31 'withdrawn', 3 with default judgments entered against them. As noted by the Northern Ireland Law Commission, many complaints never reach the stage of the initiation of proceedings, noting similar figures in the three years previous to its report in 2014: see NILC 2014 (n 5 above) at 2.07.

13 [Royal Courts of Justice Tables](#), published on 7 June 2020.

14 This is based on the excellent database of judgments maintained by the editor of Inform, [Table of Medial Law Cases](#).

scholarly attention it deserves,<sup>15</sup> but it should be recognised that the presumption of jury trials has a profound effect on the development of defamation law and balance of rights between the parties.

Even before the 2013 Act definitively reversed the presumption of jury trial, the law in E&W had already recognised problems with jury trials in defamation cases and had put in place mechanisms to limit their use. In the Supreme Court decision of *Joseph v Spiller*, Lord Phillips warned that 'defamation is no longer a field in which trial by jury is desirable', noting that the 'issues are often complex and jury trial simply invites expensive interlocutory battles ... which attempt to pre-empt issues from going before the jury'.<sup>16</sup> In reflection of a growing awareness of these problems, there was already by that stage widespread practice in the courts in E&W to employ, where possible, an exception to mandatory jury trial under section 69 of the Senior Courts Act 1981.<sup>17</sup> In 2013, before the Defamation Act 2013 had even come into force, the authors in *Gatley on Libel and Slander* concluded that the 'trial of defamation actions by judge and jury is already a rarity, and is about to fade away into history'.<sup>18</sup>

These developments in the common law were the basis of the proposal for a reversal of the presumption of jury trial in the 2013 Act. More than three-quarters of the respondents to the consultation supported the proposed change, and it also received support from the Joint Committee on the draft Bill. In the committee debate, the Under-Secretary of State for Justice explained the rationale for the provision:

In practice, few defamation cases actually involve juries, and a substantial majority are heard by judges alone. However, the retention of the right to jury trial creates practical difficulties and adds significantly to the length and cost of proceedings. That is because of the role that juries, if used, have to play, such as in deciding the meaning of allegedly defamatory material. It means that issues that could otherwise have been decided by a judge at an early stage cannot be resolved until trial, whether or not a jury is ultimately used. That means that proceedings take longer and cost more than they should.<sup>19</sup>

Although juries had traditionally been retained in this specific area of civil law in the hope of retaining some role for the ordinary member

15 For example, in his survey of 'Three errors in the Defamation Act 2013', Descheemaeker notes it only as 'one of several' other factors that could be mentioned: E Descheemaeker, 'Three errors in the Defamation Act 2013' (2015) 6 *Journal of European Tort Law* 24, 47.

16 [2010] UKSC 53 [116].

17 *Gatley on Libel and Slander* (12th edn, Sweet & Maxwell 2013) at 34.1.

18 Ibid 34.1, n 7: 'At the time of writing (September 2013) it is believed that only two defamation cases have been tried by jury in E&W during the last four years.'

19 Mr Jonathan Djanogly (Parliamentary Under-Secretary of State for Justice), Public Bill Committee, *Session 2012–2013*.



of the public, in E&W at least, it was clear the presumption was not having the desired effect. A provision to reverse the presumption of jury trial was adopted under section 11 of the Defamation Act 2013.<sup>20</sup>

Northern Ireland has not followed any of these developments. The presumption of jury trial remains in place in Northern Ireland, guaranteed by section 62(1) of the Judicature (Northern Ireland) Act 1978.<sup>21</sup> The party setting down the action must specify the mode of trial he or she prefers,<sup>22</sup> and plaintiffs generally opt for trial by jury – which will be explained in the next section as a matter of strategy. Defendants can attempt to thwart this and apply for a judge alone trial of course, but they have to be quick to do so, and the procedure is somewhat cumbersome.<sup>23</sup>

What is more, the Northern Ireland courts have not followed the practice that existed in E&W before the 2013 Act of limiting the use of jury trials. Beyond the use of the traditional exception in relation to public interest defence (below, page 30), the author could only find one alleged instance of such an exception being recognised in Northern Ireland since 2013.<sup>24</sup>

Northern Ireland's divergence on this matter is all the more conspicuous since the Northern Ireland Law Commission had warned in its 2014 report that the continued presumption of jury trials in defamation cases was aggravating the costs of proceedings and was enticing parties to settle.<sup>25</sup> Reflecting the concerns voiced in relation to the law in E&W some years earlier, the Northern Ireland Law Commission recognised the presumption of jury trial as the key factor in explaining why 'very few cases ever reach full trial' in Northern Ireland and noted, in this regard, that 'in recent years an increasingly high proportion of those that do [ie few] are tried by judge alone'.<sup>26</sup>

In its report, the Commission also noted that the problem weighs heaviest on defendants. 'It was clear', it said, 'that the prospect of a costly trial by judge and jury is an important factor weighing in defendant-

20 This amended s 69 of the Senior Courts Act 1981 and s 66(3) of the County Courts Act 1984 that formerly provided for trial by jury in all but a narrow range of specified circumstances.

21 The section provides that, if any party to the action so requests, an action in which a claim is made in respect of defamation shall be tried with a jury.

22 Rules of the Court of Judicature (RCJ) (Northern Ireland) 1980, order 43, r 4(1).

23 The defendant has seven days to respond to the plaintiff's choice of mode of trial: *ibid.* This is arguably not so cumbersome for those who can afford adequate legal assistance, but it is worth noting that no legal aid is available in defamation proceedings.

24 In the case of *AB Ltd and Others v Facebook Ireland Ltd*, cited to the author, but which is subject to reporting restriction and therefore cannot be confirmed.

25 NILC 2014 (n 5 above) at 2.26 and 4.03.

26 *Ibid.* Again, a problem that remains in place today: 'Queen's Bench Writs and Civil Bills Disposed with a cause of action of Libel or Slander', provided by Northern Ireland Courts and Tribunal Services, 18 May 2021, FOI 023/21.

publishers' decisions as to whether to fight cases or to settle'.<sup>27</sup> It was on that basis that the Scott Report recommended a reversal of the presumption of jury trial in Northern Ireland, with some caution about the cultural value of juries in Northern Ireland (something that will be analysed further below at page 32). However, the Commission's recommendations were never adopted, and the presumption remains in place in Northern Ireland.

Thus, the prospect of jury trial hangs over the defendant like Damocles' sword. Faced with the risks and uncertainty of a long and costly jury trial in the courts – which will be shown to remain, on the balance of things, disposed more towards the interests of plaintiffs – most defendants simply consider it a better strategy to settle early.

However, the full scale of the problem with jury trials cannot be appreciated until we also consider the issues of a threshold of seriousness and the public interest defence.

### THE THRESHOLD OF SERIOUSNESS

The first section of the 2013 Act introduced a new harm test to defamation proceedings in E&W, requiring claimants to demonstrate, where possible, actual harm to reputation. Clause 1 of the Northern Ireland Defamation Bill seeks to do the same. Damages are currently presumed in defamation proceedings in Northern Ireland, and the test applied there is substantially lower – although, as will be seen, the divergence between the two jurisdictions in this respect occurred as early as 2010, and not in 2014 when the Act came into force.

As Lord Sumption pointed out in *Lachaux*, section 1 of the 2013 Act has hardly proved 'revolutionary'.<sup>28</sup> Once again, the roots of the development can be found in the common law in E&W in the years before the 2013 Act. Nonetheless, the provision continues to generate some debate, and questions remain about its scope and effect in E&W, and indeed whether it is prudent for Northern Ireland to adopt a similar provision. The issue is therefore worth careful study.

In *Thornton v Telegraph Media Group*, Tugendhat J provides an excellent history of the creeping recognition of the need for a threshold of seriousness in determining defamatory meaning.<sup>29</sup>

The origin of the principle is traced to Lord Atkin's statement in *Sim v Stretch*:

I do not intend to ask our Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose in the

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<sup>27</sup> NILC 2014 (n 5 above).

<sup>28</sup> As per Lord Sumption, *Lachaux v Independent Print* [2019] UKSC 27 at [17].

<sup>29</sup> *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB).



present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?<sup>30</sup>

However, Lord Atkin's formulation in *Sim v Stretch* 'illustrated but did not define' the threshold.<sup>31</sup> While the standard of 'the estimation of right-thinking members of society' had always been influential, with the passing of the Human Rights Act 1998, other elements of the principle came to the fore; the incremental approach based on the facts of each case and the need to nonetheless always include a base-line harm test.<sup>32</sup>

Justice Tugendhat connected this with the Court of Appeal's decision in *Jameel v Dow Jones* (2005). In that case, the Court of Appeal did not consider the presumption of damage that had long been a principle of English law of defamation to be incompatible with article 10 of the Convention, but they did recognise that any claims involving 'minimal actual damage' should be struck out as 'an abuse of process' if they would constitute an interference with freedom of speech.<sup>33</sup> It was this principle which 'prompted a renewed interest in whether there is a *threshold of seriousness*'<sup>34</sup> – which, as will be seen, is something germane to, but ultimately different from, striking out claims with minimal publication as an 'abuse of process'.

In *Thornton*, the principle in *Jameel* was construed more broadly as a recognition 'that it was appropriate to have regard to article 10 of the Convention in deciding whether the claim should proceed at all'.<sup>35</sup> Tugendhat J was able to point to several cases in the years following *Jameel* that adopted this broad construction,<sup>36</sup> and it was stated that 'each of the three judges who are currently hearing most of the defamation cases are applying the principles of *Jameel* with some frequency, and in a number of different but related contexts in defamation actions'.<sup>37</sup>

In particular, the *Jameel* principle proved the impetus for a new 'threshold of seriousness'. In *Eccelston v Telegraph Media Group Ltd*, Sharp J held that the allegation complained of did not reach the 'level of seriousness' required to be actionable.<sup>38</sup> In *Daniels v BBC*, the allegation complained of did 'not pass the necessary threshold

30 [1936] 2 All ER 1237 at 1240.

31 *Thornton* (n 29 above) at [86].

32 In Tugendhat's judgment in *Thornton*, he emphasises the words 'formal definition', 'test', at [67].

33 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 at [40].

34 *Thornton* (n 29 above) at [61]. Emphasis added.

35 Ibid.

36 Ibid at [62], noting *Kasckhe v Osler* [2010] EWHC 1075; *Brady v Norman* [2010] EWHC 1215; and *Lonzim plc v Sprague* [2009] EWHC 2838.

37 *Thornton* (n 29 above) at [63].

38 [2009] EWHC 2779 (QB) at [20]. See also *Gatley* (n 17 above) at 2.4; *Thornton* (n 29 above) at [83].

of seriousness'.<sup>39</sup> In *Dell'Olio v Associated Newspapers*, the words complained of did 'not elevate the matter to the level of seriousness required to overcome the threshold of seriousness required'.<sup>40</sup>

Yet, it was Tugendhat J's decision in *Thornton* that entrenched these developments and set them in a definite direction:

[W]hatever definition of defamatory is adopted, it must include a qualification or 'threshold of seriousness', and that such is now required by the development of the law recognised in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 as arising from the passing of the Human Rights Act 1998: regard for article 10 and the principle of proportionality both require it.<sup>41</sup>

After careful scrutiny of the facts in the case, the judge concluded that none of the alleged meanings overcame the threshold level of seriousness.<sup>42</sup> The case firmly established the principle that a statement would only be defamatory if, on the facts, it showed a tendency to 'serious' harm.<sup>43</sup>

Admittedly, *Thornton* did not present a completely straight line to the current interpretation of section 1 of the 2013 Act. The extent to which the threshold of seriousness was phrased in terms of 'substantiality'<sup>44</sup> proved somewhat misleading and, ultimately, led to the difficulties that the Court of Appeal faced in its interpretation of section 1 in *Lachaux*.<sup>45</sup> Looking back now, though, we can see that 'substantiality' is an empty formula, much indeed as 'seriousness' is. The real advance with *Thornton* was to establish a principle that

39 [2010] EWHC 3057 (QB).

40 [2011] EWHC 3472 (QB) at [32].

41 *Thornton* (n 29 above) at [90].

42 *Ibid* at [97] to [106].

43 *Gatley* (n 17 above) at 2.1, n. 16.

44 It does not appear until para 95 of the judgment, and in ambiguous terms as the 'lowest threshold [of seriousness] that might be envisaged'.

45 *Lachaux v Independent Print* [2017] EWCA Civ 1334. The Court of Appeal read *Thornton* (n 29 above) as introducing a 'threshold of seriousness, phrased in terms of substantiality' (at [30]), and used the distinction (substantial/serious) as the basis for an interpretation of s 1, 'hardening up on the test of substantiality proposed by Tugendhat J in *Thornton*' (at [44], [52]). This allowed for little change in relation to the role of inference of harm, which of course was overruled by the Supreme Court decision in *Lachaux* (n 28 above). The Supreme Court held that s 1 'raises the threshold of seriousness above that envisaged in *Jameel (Yousef)* and *Thornton*', without detailing how exactly it did that, but (wisely) focused instead on the requirement that it is to be 'determined by reference to the actual facts about its impact and not just to the meaning of the words' (*Lachaux* [2019] n 28 above at [12]). The EWCA judgment had been labelled '*Thornton* plus', see C Sewell, 'More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013' (2020) 12 *Journal of Media Law* 47, 53. However, from the perspective of the above analysis, it was more like '*Thornton* minus'.

what is defamatory must be judged on the facts of each case, but that it must always include a threshold of seriousness so as to justify the interference with the article 10 right to freedom of expression.

Moreover, *Thornton* also established that 'a tendency or likelihood' of harm is sufficient to meet the threshold.<sup>46</sup> But the allowance for such an inference of harm should not be exaggerated. An inference of harm can hardly be excluded altogether from defamation claims, and in the judgment itself it appears subsidiary to the need for a threshold of seriousness based on the right to freedom of expression.<sup>47</sup> Moreover, if the presumption of damages was still formally adhered to, it was emptied of much of its substance in one deft judicial stroke:

If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition.<sup>48</sup>

As a corollary to this, and going hand-in-hand with the exceptional use of jury trial in E&W at the time, a 'modern practice' was evolving, whereby an 'increasing number of decisions' were engaging the threshold of seriousness at a preliminary stage in proceedings.<sup>49</sup> In *McAlpine v Bercow*, the judge (Tugendhat again!) stated that nothing less than an 'overriding objective to achieve justice' required that the harm threshold should be determined at as early a stage in the litigation as is practical.<sup>50</sup>

Reflecting these developments, the 12th edition of *Gatley on Libel and Slander*, published a year before the 2013 Act came into force, presented the general common law approach to the threshold of seriousness in the following terms:

Whether the threshold of seriousness has been met is a multi-factorial question, that must be viewed in light of the rights in art.8 and art.10, and that will require the court to consider matters such as the nature and inherent gravity of the allegation, whether the publication was oral or written, the status and number of publishees and whether the allegations were believed, the status of the publishers and whether

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46 *Thornton* (n 29 above) at [93].

47 Indeed, it receives only a brief note at *ibid* [93].

48 *Ibid* at [94].

49 *Gatley* (n 17 above) at 34.11 and 30.14. The cases cited are *British Chiropractic Association v Singh* [2010] EWCA Civ 350; *Cook v Telegraph Media Group Ltd* [2011] EWHC 1134 (QB); *Miller v Associated Newspapers Ltd* [2011] EWHC 2677 (QB); *Cammish v Hughes* [2012] EWCA Civ 1655; *Auladin v Shaikh* [2013] EWHC 157 (QB); *Waterson v Lloyd* [2013] EWCA Civ 136; *Cruddas v Calvert* [2013] EWCA Civ 748; *Bercow v Lord McAlpine (No 2)* [2013] EMLR 1342; *Fox v Butler* [2013] EWHC 1435 (QB); *Flood v Times Newspapers Ltd* [2013] EWHC 2182. See also, *Dell'Olio v Associated Newspapers Ltd* [2011] EWHC 3472 (QB) at [27].

50 *McAlpine v Bercow* [2013] EWHC 981 (QB) at [33], [37].

this makes it more likely that the allegation will be believed, and the transience of the publication.<sup>51</sup>

It is worth reflecting on those words because, while not exact, they suggest something close to the eventual interpretation of section 1 of the 2013 Act.

The aim of section 1 was to raise ‘the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation can be brought’ and to ‘build upon’ the common law approach, and particularly the substantial threshold in *Thornton*.<sup>52</sup>

The provision proved relatively straightforward in relation to section 1(2), governing claims by bodies that trade for profit – the requirement that the harm complained of has ‘caused or is likely to cause the body serious financial loss’ clearly suggested empirical demonstration, for example, through accounts, financial statements, or revenue figures.<sup>53</sup> However, the requirement for individual claimants in section 1(1) that the publication in question ‘has caused or is likely to cause serious harm to the reputation of the claimant’ proved, in Warby J’s words, ‘beguilingly simple’.<sup>54</sup> There were initial questions about the extent to which a claimant should prove actual harm under section 1. There were questions too about the continuing role, if any, for inference of harm in judging defamation claims.<sup>55</sup> Moreover, there was an ‘open-question’ as to what extent the section 1 threshold of seriousness could be applied at a preliminary stage in defamation proceedings.<sup>56</sup> Generally, these have now been resolved.

Initially, on passing of the Act, courts had recognised that determining serious harm under the Act would involve a shift away from the meaning of the words to a focus instead on the facts and the actual effect of publication on individual claimants.<sup>57</sup> Nonetheless, the

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51 *Gatley* (n 17 above) at 2.4.

52 Defamation Act 2013, Explanatory Notes, at [11]. See also *Gatley* (n 17 above) at 2.1.

53 See eg *Undre v London Borough of Harrow* [2016] EWHC 931; *Gubarev v Orbis* [2020] EWHC 2912.

54 Warby J in *Doyle v Smith* [2019] EMLR 15 at [116].

55 In *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB) at [55] it was noted that, even if courts should remain wary of inferences of harm, it was difficult in some cases for a claimant to present tangible evidence that a statement has caused serious harm to reputation.

56 As per Warby J, in *Hamilton v News Group Newspapers Ltd* [2020] EWHC 59 (QB) at [8].

57 *Theedom v Nourish Training Ltd* [2015] EWHC 3769 (QB); *Sobrinho v Imprensa Publishing SA* [2016] EWHC 66 (QB); *Economou v de Freitas* [2018] EWCA Civ 2591; *Allen v Times Newspapers* [2019] EWHC 1235 (QB); *Doyle v Smith* [2019] EMLR 15.

matter was not settled until the Supreme Court addressed the issue in *Lachaux*.<sup>58</sup> There, Lord Sumption put it thus:

... section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause' harm which is 'serious'. The reference to a situation where the statement 'has caused' serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had.<sup>59</sup>

The Supreme Court further stated that the provision 'likely to cause' referred to 'probable future harm' and should be decided on the same factual basis.<sup>60</sup> Reflecting the earlier decision in *Thornton*, the Supreme Court held that inferences of harm still had a role to play in defamation claims. That is, inferences of serious harm may still be drawn from the evidence as a whole,<sup>61</sup> and, according to the Supreme Court, 'inherent probabilities' continue to have some value in combination with the meaning of the words, the situation of the claimant, and the circumstances of publication.<sup>62</sup>

However, what is important is that the inference of harm has been definitively relegated to the background of a matrix of more objective factors and a requirement that the claimant demonstrates actual harm. This approach has been followed in subsequent cases,<sup>63</sup> and in the majority of cases the application of the new threshold of seriousness has not proved problematic.<sup>64</sup>

Moreover, the Supreme Court in *Lachaux* held that, if it were practical to do so, section 1 could be applied at preliminary stages in proceedings, and that such a practice would not conflict with the

58 At first instance in the case, Warby J held that it was 'now necessary to prove as a fact on the balance of probabilities that serious reputational harm has been caused by, or is likely to result in future from, the publication complained of: *Lachaux v Independent Print* [2015] EWHC 2242 (QB) at [45]. As stated above, the Court of Appeal overruled, allowing prominence for inference on harm: *Lachaux* [2017] (n 45 above) at [82].

59 *Lachaux* [2019] (n 28 above) at [14].

60 Ibid at [14] and [15].

61 As per Warby J in *Turley v Unite the Union* [2019] EWHC 3547 at [107].

62 *Lachaux* [2019] (n 28 above) at [14], [21].

63 *Yavuz v Tesco Stores Ltd* [2019] EWHC 1971 (QB); *Fentiman v Marsh* [2019] EWHC 2099 (QB).

64 In *Turley* (n 61 above) at [114], for example, Nicklin J demonstrated the relative ease of applying the *Lachaux* test in relation to online defamation, where social media and other visible commentary constituted clear evidence of 'tangible adverse consequences', and supported the claimant's contention that serious harm was caused by the publication in question.

different rules pertaining to specific damages in libel and slander claims.<sup>65</sup> The interpretation has not proved as problematic as some had predicted. The fear that such a practice would generate ‘expensive mini-trials’,<sup>66</sup> or place an ‘onerous burden’ at a preliminary stage,<sup>67</sup> now appears somewhat exaggerated.<sup>68</sup> On analysis, courts can be seen to be quite adept at managing the costs and complexity involved in the application of the section 1 serious harm test, and have proved reasonable in deciding on an ad hoc basis whether it is possible or necessary to apply the test at a preliminary stage.<sup>69</sup>

In his oral briefing on the Defamation Bill before the Northern Ireland Finance Committee, Andrew Scott argued that the Supreme Court decision in *Lachaux* ‘leads us to a position where evidence of actual harm has to be pled by the parties’, and ‘therefore it is the sort of thing that has been determined by the courts at the final trial, rather than at the preliminary stage’. It is not, he argued, ‘serving as a gateway provision or an early hurdle’ as it was intended. He further stated that ‘the irony here’ is that the English courts have to revert to the common-law mechanism of ‘striking out claims as an abuse of process’.<sup>70</sup>

Of course, the procedural threshold will, by its nature, always prove more suitable to a preliminary stage of proceedings. However, there have been cases where the issue of serious harm has been effectively foregrounded in proceedings, without descending into expensive

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65 *Lachaux* [2019] (n 28 above) at [19].

66 Scott Report 2016 (n 6 above) at 2.95.

67 A Mullis and A Scott, ‘Tilting at windmills: the Defamation Act 2013’ (2014) 77 *Modern Law Review* 87, 106.

68 G Phillipson, ‘The “global pariah”, the Defamation Bill and the Human Rights Act’ (2014) 63(1) *Northern Ireland Legal Quarterly* 149–186, at 169.

69 In *Hamilton* (n 56 above), Warby J said there would be cases where the court ‘can sensibly try, at the preliminary stage, the issue of whether the publication complained of satisfied the serious harm requirement under s 1 of the Defamation Act 2013’. In *Day v Chivers* [2020] EWHC 3522 (QB), after a preliminary trial on natural and ordinary meaning, in which ‘a considerable amount of witness evidence’ was already presented, the s 1 test was adjourned for later hearing. In *Ager v CDF Ltd* [2019] EWHC 2830 (QB), the parties agreed at the preliminary stage to limit the question to whether the words were ‘defamatory at common law’ (at [12]). The only case where the s 1 test can be seen to have introduced some notable complexity is *Sakho v World Anti-Doping Agency* [2020] EMLR 14, where the factual serious harm test had to be applied at a more preliminary stage in complex relationship with other issues, and was nonetheless considered a ‘live issue’ in the proceedings. But *Sakho* is an odd case, where the serious harm test had to be contemplated at the preliminary stage in order to answer the question raised about the meaning of republications which were not sued upon, but which were relied upon in support of the claim against the original publication.

70 Northern Ireland Assembly, Committee for Finance, Hansard 3 November 2021.



mini-trials. *Anna Turley v Unite the Union* is one such example;<sup>71</sup> *Nwakamma v Umeor* is another.<sup>72</sup>

It would hardly be prudent to engage a threshold of seriousness in dealing with the more basic preliminary matters. Again, the issue will come down to whether it would be practical to address the question early, rather than any formal rule about its place in proceedings.

Moreover, the procedural threshold and substantive threshold should not be conflated. The value of section 1, at whichever point it is tried, lies in assuring parties that the claim will not only be subject to scrutiny under the procedural threshold (eg in relation to limited publication, or misleading the court), but that it will also be subject at some point to a substantial threshold (eg as in whether a widely circulated publication alleging the plaintiff was a 'gold digger' in fact caused serious harm). It is the psychological impact on the parties of that added dimension of scrutiny that addresses the chilling effect on free speech in defamation law, and which will ensure a fairer balance between the parties.

There are of course some lingering questions and uncertainty about the scope of section 1, but nothing more than can be reasonably expected of any significant legal development. Admittedly, one of the enduring complexities relates to the continued role of 'inherent tendency' in the section 1 serious harm test.<sup>73</sup> However, the diffuse and obscure nature of reputation and the practical difficulties of proving serious harm in some cases may mean the principle can never be ruled out. A

71 *Turley* (n 60 above). There had been a previous hearing in that case, on an amended defence on two grounds: withdrawal of admission of breach of the Data Protection Act 2018 and application for strike out on the grounds that there had been an abuse of process by the claimant in 'misleading the court': [2019] EWHC 2997 (QB).

72 [2020] EWHC 3262 (QB). This was not the first time the courts were burdened with a 'disproportionate number of cases' issuing from the parties involved. The defendant had successfully sued the claimant for libel in 2015; something that may have entered into the decision in 2021 that the claimant had failed to meet the threshold of seriousness under s 1. See below at page 32.

73 *Lachaux* [2019] (n 28 above). See also, *Morgan v Times Newspapers Ltd* [2019] EWHC 1525 (QB) [2019] 22; *Cooke v MGN Ltd* [2014] EWHC 2831 at [43]; *Theedom* (n 57 above) at [15]. Related but different to this is a question of the relevant moment of harm. In *Lachaux* [2019] (n 28 above), Lord Sumption stated that in general the relevant moment would be at the moment of communication of the defamatory statement, but that if for some reason it does not occur at that moment, 'subsequent evidence' will be considered as evidence of harm. Obvious cases are those in which there is a percolation or 'grapevine effect' of the defamatory statement (ie where later events made the original statement more damaging), but in *Hodges v Naish* [2021] EWHC 1805, Parkes QC posed an interesting question about cases where later developments render the original statement less damaging, where an original cause satisfies s 1, 'only to vanish a moment later, like a firefly on a summer night' (at [165]).

defining principle about the proper balance between evidence of harm and inference of harm in this context will only come – if at all – as the question is refined before the courts. The development of section 1 has at least achieved some objectivity (reliance on facts), and hardly causes more ambiguity than the reliance on the more subjective principle of 'inference of substantial harm' that preceded it.

Ultimately, section 1 should be seen first and foremost as a codification of developments in the common law (principally *Thornton*), and as one that does raise the bar slightly to expedite adjudication of claims and address in some measure the chilling effect on free speech.

There are clear differences with the law in Northern Ireland in this regard.

To begin with, cases rarely reach the stage there where there is an opportunity for application of a threshold of seriousness there. With the continued presumption of the role of juries, Northern Ireland observes the Fox's Act 1792, which guarantees the constitutional importance of the jury as the trier of fact, and which therefore reserves the question of defamatory meaning to juries.<sup>74</sup> Thus, the judge's role is limited to determining whether the statement complained of is reasonably *capable* of bearing the meaning attributed to it in the complaint.<sup>75</sup> Northern Irish courts will cite in this regard the principle in *Gillick Brooks Advisory Centres* that '[t]he proper role of the judge ... is to delimit the range of meanings of which the words are reasonably capable',<sup>76</sup> and *Jameel v Wall Street Journal* (2003) where it was stated:

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74 *Parmiter v Coupland* (1840) 6 M & W. For a more recent statement, see *Jameel v Wall Street Journal* [2003] EWCA Civ 1694. See also, F A Trindade, 'When is a matter considered "defamatory" by the courts?' (1999) *Singapore Journal of Legal Studies* 1, at 5. For recent statement of the legal principle in Northern Ireland, see eg *Winters, Mackin and KRW Law v Times Newspapers* [2016] NIQB 12 at [9]; *Doherty v Telegraph Newspapers* [2000] NIJB 236: 'The judge must be careful not to pre-empt the function of the jury'; *Neeson v Belfast Telegraph* [1999] NIJB 200: 'this matter is very much one for the jury'. Regarding the general distinction between questions of fact and law, see *British Chiropractic Association v Singh* [2010] EWCA Civ 350 at [13], where a noted result of the distinction is that the meaning eventually decided upon by the jury is shielded from attack on appeal save where it has crossed the boundary of reasonableness.

75 Under RCJ Order 82, rule 3A, either party may apply at any time in the proceedings for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings. There is an incentive for both plaintiff and defendant to do so early; for the defendant, to strike out the claim, or for a claimant to strike out a defence of justification, see eg *Stokes v Sunday Newspapers Ltd* [2015] NIQB 53 at [2].

76 [2001] EWCA Civ 1263 at [7].

... it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. It is a high threshold of exclusion. ... The judge's function is no more and no less than to pre-empt perversity.<sup>77</sup>

This question is deemed 'logically anterior'<sup>78</sup> to the general question of whether the statement is defamatory, which formally includes the question about the threshold of seriousness.<sup>79</sup>

Obviously, this is a much lower threshold than a serious harm test. It is a 'high threshold of exclusion' in the opposite direction to the threshold of seriousness: it will only bar those cases where it would be perverse to consider the words complained of defamatory.

What is more striking though is that the threshold applied in judge alone cases in Northern Ireland reflects the law in E&W *before the developments in the common law there from 2010 onwards*. While the courts may cite *Thornton* as an authority, there is little appreciation for the principle in that case, or the substance of that line of jurisprudence outlined above.

There is of course recognition of the *Jameel* procedural threshold in Northern Ireland. In the 2009 case of *McDonnell v Adair*, for example, Justice McCloskey referred to the *Jameel* principle and struck out the claim on the grounds that it did not amount to a 'real and substantial tort'.<sup>80</sup> However, the case is rather limited to its facts. Like *Jameel* the issue in *McDonnell* was really one of publication.<sup>81</sup> In fact, the publication was even more limited than it was in *Jameel*, confined as

77 EWCA Civ 1694 at [14]. See eg *EC v Sunday Newspapers* [2017] NIQB 117 at [52], citing the prescription of judge's role in jury trials in *Jameel v Wall Street Journal* [2003] (n 74 above); *McAirt v JPI Media NI Ltd* [2021] NIQB 52 at [16]. A ruling under RCJ Order 82, rule 3A still provides some threshold, albeit a limited one. In *McAirt*, Scofield J held that the 'vast majority' of the plaintiff's pleaded meanings were not 'capable of being borne by the words complained of', and 'the limited remaining meanings' which could be borne by the words (ie that the plaintiffs were members of a group directed by an ex-IRA member) were dismissed under s 8 of the Defamation Act 1996 as having no prospect of success (at [28]).

78 *Gatley* (n 17 above) at 3.13.

79 One can question whether it really is so logically anterior; the issues of 'capable meaning', 'single meaning' and 'defamatory meaning' are blurred, and their distinction is something of a judicial construct. For example, the judge will still exercise 'his or her own judgment in light of the principles laid down in the authorities' (*Gillick* (n 76 above) at [7]). In practice, this includes relying on the principles used in determining the actual single meaning of the words complained of (often cited as the test in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14]; *Skuse v Granada Television Ltd* [1996] EMLR 278; *Koutsogannis v Random House Group Ltd* [2020] 4 WLR 25).

80 [2009] NIQB 93 at [16] and [28].

81 *Ibid* at [27].

it was to one other person, who had typed the letter containing the statement complained of.

Beyond this, however, there is no evidence of any proper recognition in Northern Ireland of the substantial threshold: the determined regard to freedom of expression with a 'multi-factorial' approach in relation to the threshold of seriousness that was in operation in the common law in E&W between 2010 and 2014.

In *Coulter v Sunday Newspapers Ltd*, for example, the *Thornton* 'minimum threshold of seriousness' is mentioned as one of several legal 'principles' to guide the judge 'sitting alone without a jury'.<sup>82</sup> However, it found no real application in the case. After a brief analysis of the facts, the judge in *Coulter* was satisfied with an 'overall impression on reading the article' that it referred to the claimant as 'scrooge', that one would 'expect a mean callous individual' on the basis of reading it, and considered it therefore to 'substantially affect in an adverse manner the attitude of other people towards the plaintiff'.<sup>83</sup> On appeal, there was no contest in relation to a threshold of seriousness, and the Court of Appeal makes no mention of it in reviewing and agreeing with the judge's determination of meaning at first instance.

Moreover, in distinction to the common law in E&W from 2010 to 2014, there is little evidence of the 'modern practice' of engaging the threshold of seriousness at an early stage of proceedings in Northern Ireland, or recognition of the 'overriding objective of justice' that requires that the threshold of harm should be determined as early as is practical. In *Stokes v Sunday Newspapers Ltd*, for example, the plaintiff applied both for the action be tried by judge alone and for a meaning ruling, so that the defence of justification could be struck out.<sup>84</sup> Even though Stephens J agreed the action should be tried by judge alone (because the *Reynolds* defence had been raised, see below at page 30), the judge still considered that at that 'stage of proceedings the role of the court is to delimit the range of meanings of which the words are reasonably capable of bearing' and could only go so far as to admit that, at some point in the future, 'an application for the trial of a preliminary issue as to the meaning or as to the imputation conveyed by the statement complained of, could well be appropriate'.<sup>85</sup>

Although the Northern Ireland legal system *claims* to follow the approach of the common law in E&W up until the adoption of the 2013 Act, one can find no application of such in relation to the threshold of seriousness. If there have been judicial decisions in Northern Ireland which are subject to reporting restrictions, but which can

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82 [2016] NIQB 70 at [9] [15], emphasising the word 'substantially'.

83 Ibid at [9], [21], citing *Skuse* [1996] EMLR 278 as authority.

84 *Stokes* (n 75 above).

85 Ibid at [19].

nonetheless demonstrate that Northern Ireland does in fact fully recognise those developments in the common law in E&W before 2014, the Northern Ireland Department of Justice should release them in the interests of clarity.

However, the evidence clearly suggests that Northern Ireland does not in fact recognise the developments in E&W from 2010 onwards. It is no answer, moreover, to claim that Northern Ireland recognises *Jameel* and makes provision to strike out such claims as an abuse of process. Northern Ireland would be guilty of an egregious chilling effect on free speech if it did not at least recognise as an abuse of process any claim based on procedural impropriety or minimal publication. However, that can hardly be equated with the advances made in relation to defamatory meaning and a threshold of seriousness that were realised in the common law in E&W from 2010 onwards, and which were deemed also necessary by courts there to adequately protect freedom of expression.

With the codification and advance that section 1 has made on that line of jurisprudence, Northern Ireland is now clearly set on a very different course in that regard.

## THE PUBLIC INTEREST DEFENCE

Section 4 of the 2013 Act provides for a public interest defence. Clause 4 of the Northern Ireland Defamation Bill seeks to do the same. The current law in Northern Ireland reflects the decision handed down by the House of Lords in 2001 in the case of *Reynolds v Times Newspapers Ltd*.<sup>86</sup> Once again, however, the real divergence between E&W and Northern Ireland in this regard can be seen to begin in the several years prior to the adoption of the 2013 Act.

The public interest defence in *Reynolds* constituted a significant development of the traditional qualified privilege. It recognised that there will be situations where a careful defendant may make a mistake on the facts in reporting on a matter of public interest, and that, where they have acted responsibly in doing so, they should have a viable defence in promoting such public interest speech.

Initially, however, the courts in E&W were 'reluctant' to give proper effect to the public interest defence as it was formulated by the House of Lords in *Reynolds*.<sup>87</sup> They would tend to insist upon 'strict compliance' with the requirements of responsible journalism listed by Lord Nicholls

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<sup>86</sup> [2001] 2 AC 127.

<sup>87</sup> E Barendt, 'Reynolds revived and replaced' (2017) 9 Journal of Media Law 1.

in *Reynolds* and treat that as something of a non-exhaustive 'checklist', or series of hurdles, for the defendant to overcome.<sup>88</sup>

However, from at least 2007 onwards, the appeal courts in E&W attempted to address the restrictive reading that *Reynolds* was receiving in the lower courts, and to promote a more 'sensitive' and flexible approach that would give greater weight to public interest and freedom of expression.<sup>89</sup>

In *Jameel* (2007),<sup>90</sup> the House of Lords emphasised that 'the 'Nicholl's factors' must be approached in a practical and flexible manner with due deference to editorial discretion.'<sup>91</sup> The traditional framework of the privilege in terms of duty and interest was considered 'unhelpful' in this regard,<sup>92</sup> and the House carefully distinguished *Reynolds* as 'a different jurisprudential creature from the traditional form of privilege from which it sprang',<sup>93</sup> and 'not as narrow as traditional privilege'.<sup>94</sup> Employing a more fact-sensitive approach,<sup>95</sup> they then overruled the 'narrow ground' on which the lower courts denied the defence in the case.<sup>96</sup>

In *Flood v Times Newspapers Ltd* the Supreme Court emphasised the point again that 'the creation of the *Reynolds* privilege reflected a recognition on the part of the House of Lords that the existing law of defamation did not cater adequately for the importance of the article 10 right to freedom of expression'<sup>97</sup> and stressed that 'not all the items in Lord Nicholl's list in the *Reynolds* case were intended to be requirements of responsible journalism'.<sup>98</sup> Avoiding any statement of general principle beyond this, Lord Phillips warned that '[e]ach case turns

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88 Ibid 1. See also on the 'restrictive reading' of *Reynolds*, Phillipson (n 68 above) at 161, n 97; or on how the early approach 'emptied the defence', E Descheemaeker, "A man must take care not to defame his neighbour": the origins and significance of the defence of responsible publication' (2015) 34 University of Queensland Law Journal 239, 248. Cases cited as example: *Gilbert v MGN* [2000] EMLR 680 and in *Jameel v Wall Street Journal Europe Sprl* [2004] EMLR 196. See also *Pinard v Byrne* [2015] UKPC 41 and, another Privy Council case, *Bonnick v Morris* [2003] 1 AC 300.

89 E Barendt, 'Balancing freedom of expression and the right to reputation: reflections on Reynolds and reportage' (2013) 63 Northern Ireland Legal Quarterly 59, 68.

90 *Jameel v Wall Street Journal* [2007] 1 AC.

91 *Gatley* (n 17 above) at 15.8.

92 *Jameel* [2007] (n 90 above) at [50].

93 Ibid [46]. Citing the earlier approach of the Court of Appeal in *Loutchansky v Times Newspapers Ltd* (Nos 2–5) [2002] QB 783 at [32]–[35].

94 Ibid at [35], [46], [50].

95 *Gatley* (n 17 above) at 15.13.

96 *Jameel* [2007] (n 90 above) at [35], [46], [50].

97 [2012] UKSC 11 at [46].

98 Ibid at [75].



on its own facts',<sup>99</sup> and on the facts of that case the Court of Appeal's more traditional approach was overruled and the defendant was judged to have satisfied both the 'subjective' and 'objective' requirements of responsible journalism.<sup>100</sup> Lord Phillips concluded that the journalists in question had been 'reasonably satisfied' that the allegations were true, or that there were reasonable grounds to suspect such.<sup>101</sup>

The 'high water mark'<sup>102</sup> of the development of the defence in the common law can be found in the Court of Appeal's decision in *Yeo v Times Newspapers Ltd.*<sup>103</sup> There, Warby J followed *Jameel* and *Flood* in adopting a more fact-sensitive approach that recognised editorial judgment and freedom of expression. By that stage it was considered 'not necessary to ask whether every aspect of the [journalistic] process was carried out to perfection'.<sup>104</sup> Thus, even where there was 'room for improvement' in journalistic practice, and even though the journalist in question failed to give the claimant ample opportunity to put his side of the story – something, which would, on principle, have vitiated 'responsible journalism' under the restrictive approach<sup>105</sup> – it was not enough, on the facts of that case, to deny the defendant the privilege.<sup>106</sup>

Despite these advances, however, the line between traditional privilege and *Reynolds* was still not considered to be 'sharply drawn'.<sup>107</sup> The protracted and highly complex formulation of the defence in the common

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99 Ibid. See also at [80] discussing duty to verify in relation to *Chase* levels of meaning: 'No such hard and fast principles can be applied when considering verification for the purpose of *Reynolds* privilege. They would impose too strict a fetter on freedom of expression.'

100 Ibid [80], [99].

101 Ibid [99].

102 Barendt (n 87 above) 13. The Defamation Act 2013 was already in force by the time of the decision in *Yeo*, but because the article complained of had been published some six months before the Act came into force, the cases was decided on the common law.

103 [2015] EWHC 3375. Heard by the Privy Council, the case was governed by the common law and not the 2013 statute.

104 Ibid at [134].

105 *Gatley* (n 17 above) at 15.12: 'This is perhaps the core *Reynolds* factor.'

106 In *Yeo* (n 103 above), even though the judge deemed there may have been 'room for improvement' in the journalistic process, this was not enough to render it 'an irresponsible journalistic process' for the purposes of denying the defence, at [171].

107 *Gatley* (n 17 above) at 14.3.

law was considered somewhat ambiguous and 'unpredictable'.<sup>108</sup> That indeed appears to have been the primary motivation for the codification of the defence in section 4 of the 2013 Act.<sup>109</sup>

The Act provided for a public interest defence in 'simpler and more accessible language'.<sup>110</sup> The concise legislative statement has certainly given defendants greater confidence in the defence and provided a 'powerful symbolic value' to public interest speech and its protection in law.<sup>111</sup>

Some early commentators argued that section 4 did not 'add anything new' beyond this,<sup>112</sup> or that it 'simply codified' the advances made in the common law in *E&W* before the Act.<sup>113</sup> It was deemed 'likely' that the first *Reynolds* requirement that the subject matter is one of public interest was codified in section 4(1)(a), while the further two elements of the defence ('reasonable to include the material complained of' and the standard of 'responsible journalism') were 'subsumed in the assessment of whether the publisher had a reasonable belief under s.4(1)(b)'.<sup>114</sup> That, on the face of it, seems reasonable enough, and it can be supposed also that the shift in focus in *Jameel* and *Flood* to a flexible approach that takes account of 'all circumstances', and makes adequate allowance for 'editorial judgment', came to be reflected in section 4(2) and (4) respectively.

However, three key differences between *Reynolds* and the statutory defence must be noted. First, any reference to the Nicholls factors was 'excised' from the section.<sup>115</sup> While the factors continue to have some relevance to interpretation of the provision, their formal exclusion from the law has rendered them more contingent to the defence and has obscured them further into a background of a broader horizon of circumstances that the court must now consider. Second, even if

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108 Barendt (n 89 above) 66. Barendt concludes, '*Reynolds* clearly does not remove the chilling effect of libel law', *ibid.* The common law struggled to jettison the duty-interest framework of the defence. In *Loutchansky* (n 93 above) 'at the end of the day the court has to ask itself the single question whether in all the circumstances the duty-interest test or the right to know test has been satisfied', at [23]. In *Jameel* [2007] (n 90 above), Lord Bingham states, 'I do not understand the House to have rejected the duty-interest approach', at [30]. Even with the recognition of a need for flexibility and a more sensitive application of the Nicholls list, the focus largely remained on the defendant's conduct: Descheemaeker (n 88 above) 246.

109 Explanatory Notes, para 29.

110 Phillipson (n 68 above) 170: 'some modest merit'.

111 NILC 2014 (n 5 above) at 3.53.

112 Phillipson (n 68 above).

113 Descheemaeker (n 88 above) 239. However, Descheemaeker admits the Act 'brought in two complications': the 'repudiation' of the Nicholls checklist, and 'elimination' of the focus on 'responsible' journalism (at 240) – two substantial changes, whatever way you look at it.

114 *Gatley* (n 17 above) 15.5.

115 *Ibid* 15.8.

the three elements in *Reynolds* are subsumed under section 4(1)(b), the difference would lie in the *weight* given to those elements in application of the rule. Finally, Parliament deliberately omitted any reference to 'responsibly' in section 4, replacing it instead with the word 'reasonable' – a signpost, as will be seen, to a change of some consequence.<sup>116</sup>

Together, these differences have provided a basis for definitively moving beyond the traditional focus on 'defendant's conduct' toward a new focus on the defendant's 'reasonable belief', which will be seen to achieve a more 'objective' judicial approach to the defence. The courts in E&W now appear more cautious about imposing their own judicial construction of journalistic standards, and will now refer to a broader range of factors in relation to the defence, including the press's own standards.<sup>117</sup>

One of the first cases to reach appeal on the issue of section 4 and test the provision was *Economou v De Frietas*.<sup>118</sup> The defendant was a 'citizen journalist' who had failed to incorporate the claimant's side of the story, and the key issue was whether the defendant's belief that publishing the story was in the public interest could be considered reasonable: that is, the objective limb of 4(1)(b). The claimant had argued that the *Reynolds* factors remained key to determination of reasonableness under the provision, knowing that the defendant's failure to invite comment would fall afoul of the traditional standard. However, Sharp J rejected the claimant's argument.<sup>119</sup> The *Reynolds* factors were deemed to retain some relevance,<sup>120</sup> but the judge said the weight given to those factors would vary from 'case to case', that the emphasis should now be instead on 'practicality and flexibility', and that, ultimately, 'all will depend on the facts'.<sup>121</sup>

The correct approach was summed up as 'flexibility in the requirement to have regard to the circumstances of the case'; a 'requirement to make allowance for editorial judgment'; and recognition of 'the fact that there is little scope under article 10(2) of the Convention for

116 Lord McNally to Grand Chamber, 19 December 2012.

117 This reflects broader trends and developments in international human rights jurisprudence. See eg *Selistö v Finland* [2005] EMLR 8 at [59]: 'it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists'.

118 [2018] EWCA Civ 2591. Previous cases often related to publications that occurred before the Act came into force, and were therefore to be decided under the common law defence, see eg *Sooben v Badal* [2017] EWHC 2638 (QB), which also involved the question of the standard applicable to amateurs, rather than professional journalists.

119 *Economou* (n 57 above) at [102].

120 Although it was noted that '[t]he statute could have made reference to the *Reynolds* factors in this connection, but did not do so': *ibid* at [110].

121 *Ibid* at [110]. On the 'unusual facts of this case', the defendant's conduct did not fall below the standard, see *ibid* [112].

restrictions on freedom of expression'.<sup>122</sup> Most importantly, this was framed as a judicial distinction between section 4(1) and the *Reynolds* defence:

The statutory formulation in section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the *Reynolds* defence focused on the responsibility of the publisher's conduct.<sup>123</sup>

In *Serafin v Malkiewicz*, the Supreme Court again drew out this distinction.<sup>124</sup> Delivering the judgment, Lord Wilson warned that the statutory defence cannot be 'equiparated' with those of the *Reynolds* defence.<sup>125</sup> The latter, he explained, remained rooted in a concept of qualified privilege and was thereby 'laden with baggage which, on any view, does not burden the statutory defence'.<sup>126</sup> *Reynolds* was considered to remain relevant to interpretation of the statutory defence. However, not only was a reference to a checklist deemed 'inappropriate', but the judge warned that 'acting "responsible" is now also best avoided'.<sup>127</sup>

As such, the *Reynolds* factors may remain relevant in English law, but they are now placed in a broader horizon of circumstances. With that, the focus on the 'responsibility' of the defendant's conduct has been dropped from both statute and practice, and has been replaced with a more objective standard of 'reasonableness', within which the defendant's conduct is only one of a broader range of factors.

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122 Ibid at [105].

123 Ibid at [86]. Later, in *Serafin* [2020] UKSC 23, Lord Wilson questioned whether the contrast 'is misconceived', arguing that Sharp LJ omitted reference to the requirement that the publisher's belief would have to be 'reasonable' (at [68]). However, it seems clear from the judgment as a whole that what Sharp LJ meant was that the distinction achieved by s 4 was a relaxation on the focus on the defendant's conduct and a focus on a broader range of factors.

124 *Serafin* (n 123 above).

125 Ibid at [72].

126 Ibid at [73].

127 Ibid at [75]. In *Onwude v Dyer, Godlee and BMJ Publishing Group* [2020] EWHC 3577 (QB), Parkes QC noted Lord Wilson's 'warning' in *Serafin* and distinguished the new statutory defence as focusing on the requirement of the defendant's 'reasonable belief' in public interest, against a traditional defence that was founded on the defendant's 'conduct', at [143]. In *Lachaux* [2021] EWHC 1797 (QB) at [152], Nicklin J, after careful analysis of the balance between article 8 and 10 rights, agreed with the approach in *Serafin*, and accepted that the requirement under the new statutory defence for the court to have regard to 'all the circumstances' called for a more objective standard. On the facts of that case, and reflecting developments in the law of privacy (*Sicri v Associated Newspapers Ltd* [2020] EWHC 3541), this included the value of the defendant's own code of practice, and admitted 'greater allowance to editorial judgment' if the publication is shown to be in compliance with that code, at [154].

If one compares these developments in E&W with Northern Ireland, one finds a clear difference in the approach to the public interest defence.

When the defence is asserted in Northern Ireland, which it rarely is, the courts cite *Reynolds* as a leading authority.<sup>128</sup> But it is not the *Reynolds* defence that emerged in the common law in E&W from 2007 onwards. Rather, it reflects more the restrictive reading that the defence received in the lower courts there in the years immediately following the *Reynolds* decision, and which the appeal courts in E&W tried to correct.

Indeed, the defence has been so emptied of its substance in Northern Ireland that there has been no reported instance of a successful *Reynolds* defence there.<sup>129</sup>

Of course, there was never any formal declaration of a divergence with the common law in E&W before 2014, and Northern Irish courts do recognise that the *Reynolds* factors should not be treated as a 'checklist', for example.<sup>130</sup> However, in distinction to the common law approach in E&W now, there is a discernible tendency in Northern Ireland to focus heavily on the third element of *Reynolds*, the standard of 'responsible journalism', and for the courts there to impose their own normative views on the standard, without regard for the range of circumstances, or the allowance for editorial judgment.

As late as 2014, for example, confidence in the recognition of *Reynolds* was apparently so low in Northern Ireland that in *Loughran v Century Newspapers Ltd* the defendant's failure to seek comment from the plaintiff was considered a complete bar to any potential public interest defence, and a defence was mounted instead on qualified privilege pursuant to section 15 of the Defamation Act 1996.<sup>131</sup> The issue then turned on 'malice', which was reserved for the jury, and with the prospect of protracted litigation on that basis, the defendant became nervous and settled. This was despite the fact that the publication had

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128 See, for example, *Stokes* (n 75 above) at [28].

129 The only real judicial affirmation of the *Reynolds* defence, or the potential thereof, comes in refusals to strike out the pleaded defence. In *Stokes v Sunday Newspapers Ltd* (n 75 above), for example, Stephens J refused to strike out the *Reynolds* defence on the ground that failure to seek comment vitiated responsible journalism. The judge noted that, on the facts of the case, it could be determined on evidence at trial that to do so may have endangered a third person. The case was settled before any such determination could be made, however.

130 Ibid at [31].

131 [2014] NICA 26.

shades of reportage,<sup>132</sup> despite the fact that the journalist in question was very much acting as a 'watchdog barking' to wake the public up to an important public interest story,<sup>133</sup> and despite the fact that the journalist had shown some responsibility and care to try and ensure the veracity of the allegation.<sup>134</sup>

In *Coulter v Sunday Newspapers Ltd*, the *Reynolds* defence was raised, and the court agreed that the publication complained of was in the public interest.<sup>135</sup> However, the court approached the second element of *Reynolds* (the question of whether it was reasonable to include the particular matter complained of) as if it was subsidiary to the third element of 'responsible journalism'.<sup>136</sup> Having loaded so much on this question of responsible journalism, there was none of the careful analysis of a broad range of circumstances that courts in E&W would now engage in that regard. After only a brief analysis, which focused mainly on 'the degree of stress and harm to the plaintiff' and the 'seriousness of the allegation', it was concluded that the defendant's failure to verify 'did not amount to responsible journalism'.<sup>137</sup> Furthermore, without any reference to editorial judgment, the defendant's failure to meet the court's standard of responsible journalism was automatically taken to mean that they had not established that it was reasonable to include the particular matter complained of in the article.<sup>138</sup>

When the defendant appealed, arguing that the trial judge had erred in the application of the *Reynolds* defence, the Northern Ireland Court of Appeal admitted that the judge had 'failed to fully address the

132 The defendant's journalist had relied on a Northern Ireland Audit Office report, which on page 70 contained an implication of the plaintiff's involvement in a project that was subject to issues of mismanagement and potential fraud. The journalist cross-referenced this with other official notices to confirm the involvement of the plaintiff in the relevant project at the relevant time; not altogether erroneously as it turned out, but erroneous as to the degree of the plaintiff's involvement in any mismanagement or fraud. The journalist did not seek comment from the plaintiff, which may have revealed the mistake. It was not perhaps a 'true reportage' case, however, there is some authority to suggest that in such a case with 'strong similarities with reportage', the duty to verify the implications will be attenuated: see Lord Philips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273 at [43].

133 As distinction of the *Reynolds* defence as per Ward LJ in *Charman v Orion Publishing Ltd* [2007] EWCA Civ 972 at [49].

134 As n 132 above. Perhaps not enough, on the facts, but it is likely that the same factual pattern in E&W, occurring even in the year before the 2013 Act, would have at least led to an assertion of a *Reynolds* defence.

135 [2016] NIQB 70.

136 Ibid [82]–[83]: 'The answer to this issue may be informed by the question as to whether the publisher has met the standards of responsible journalism. I will address that issue before returning to the second issue.'

137 Ibid [84]–[86].

138 Ibid at [94].



issue as to whether it was reasonable to include the particular material complained of and to consider the important concept of editorial judgment'.<sup>139</sup> However, somewhat paradoxically, the Court of Appeal then immediately concluded that:

... given the forthright criticism that [the trial judge] visited upon the article as a whole in the course of his judgment, we consider that we could have implied from the judgment that had he given distinct and separate consideration to this second issue either before or after turning to responsible journalism, he would undoubtedly have concluded that it was unreasonable to contain the full extent of the particular material complained of.<sup>140</sup>

Thus, the Northern Ireland Court of Appeal saw no issue in the restrictive application of the *Reynolds* test of 'responsible journalism'. There was no further analysis of facts or circumstances extraneous to the narrow focus of the judgment at first instance, and the court was willing to imply from that brief analysis that the defendant had fallen afoul of the latter two elements of the *Reynolds* defence. The appeal on the public interest defence issue was denied.

In *EC v Sunday Newspapers Ltd* the 'problem for the defendant' again lay in the standard of responsible journalism under *Reynolds*.<sup>141</sup> Admittedly, the defendant in the case, a weekly tabloid, is not known for the highest standards of journalism, and the publication in question may arguably not have passed even the reformed defence under section 4 of the 2013 Act. However, what is noteworthy is the court's approach of relying heavily on the Nicholl's factors in dismissal of the defence.<sup>142</sup> In that respect the court focused on the 'serious attack on the reputation of the plaintiff' and concluded that the defendant's failure to invite comment from the plaintiff vitiated the standard of responsible journalism and excluded the defence.<sup>143</sup>

As a point of interest, the court appeared more willing to recognise the importance of public interest speech under the heading of privacy law. While Colton J omitted any reference to editorial discretion in relation to the *Reynolds* defence, the judge was more definite in finding that 'there was a "public interest" story to be written in the context of this case'<sup>144</sup> and made greater acknowledgment in relation to the article 8 claim that 'the court is not a newspaper editor', and that the court 'should not unduly restrict the discretion vested in editors as to

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139 *Coulter v Sunday Newspapers Ltd* [2017] NICA 10 at [48].

140 *Ibid.*

141 *EC v Sunday Newspapers* (n 77 above) at [74].

142 *Ibid* at [73].

143 *Ibid* at [74].

144 *Ibid* at [131].

how they present their stories'.<sup>145</sup> The judge even cited in this regard Strasbourg jurisprudence that addressed national defamation law in relation to article 10,<sup>146</sup> as well as Lord Brown's statement about allowance for editorial judgment in *Flood*.<sup>147</sup> Yet, none of this was mentioned in relation to the *Reynolds* defence, which, in comparison, was curtly disposed of.<sup>148</sup>

The cases also reveal a subtle yet important relationship between the threshold of harm and the application of the public interest defence in Northern Ireland. In both cases, the courts emphasised the serious nature of the allegations in question ('the degree of stress and harm to the plaintiff' and the 'serious attack on the reputation of the plaintiff') in addressing the question of whether the defendant had met the standard of responsible journalism. In *Reynolds* itself, of course, the seriousness of allegations was one of the 10 factors listed as relevant by Lord Nicholls, stating that the 'more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true'.<sup>149</sup>

Yet, the true significance of this relationship lies in the way in which the continued presumption of damages in defamation actions impacts upon the application of the *Reynolds* defence. Even if section 4 itself already codified the developments in the common law in E&W in the run-up to the Act to shift the focus away from the defendant's conduct towards a more objective standard, the abolition of the presumption of damages through section 1 of the Act also makes a necessary contribution to a more fact-sensitive and objective approach in determining the standard of 'reasonableness' under section 4(1)(b).

The continued presumption of harm in Northern Ireland, on the other hand, causes some problems in relation to the judicial concept of responsible journalism for the *Reynolds* defence. In short, if the threshold of seriousness is only based on judicial inference and

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145 Ibid at [133].

146 Citing at [133] the statement about editorial judgment in *Selistö v Finland* [2005] EMLR 8 at [59].

147 *EC v Sunday Newspapers* (n 77 above) [133] and [134].

148 Privacy law, in general, has received a more robust development in Northern Ireland in recent years, perhaps more in line with the development of that branch of law in E&W. However, this bold development of privacy law in Northern Ireland may be motivated by the very concern for the dignitary interests of plaintiffs that underpins the comparatively stunted development of defamation law there. On distinction between misuse of private information and defamation in Northern Ireland, see *McAirt* (n 77 above) at [39].

149 *Reynolds* (n 88 above) 205. However, it was also recognised, in the English common law at least, that 'investigative journalism tends to result in serious allegations', and that the 'seriousness of the allegation may also support the journalist's contention that there is a public interest in the making of the allegation': *Flood v Times Newspapers* [2009] EWHC 2375 at [149].

cannot be tested on facts, then reliance on the 'seriousness of the allegation' in relation to the *Reynolds* defence must also be based on judicial inference. That clearly eschews the more fact-sensitive and circumstantial approach to the defence that is favoured in E&W.<sup>150</sup>

There is, finally, another important dynamic at play here, between the continued presumption in favour of a jury trial and the operation of the public interest defence in Northern Ireland. There is no clear rule about the respective role of judge and jury in relation to the *Reynolds* defence. However, it is well recognised that the defence raises complex factual issues that may leave juries 'mystified', that it is therefore unsuitable for trial by jury, and should, as far as possible, be tried by judge alone.<sup>151</sup> In *Jameel* (2005), for example, Lord Phillips MR pointed out that:

The division between the role of judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such cases.<sup>152</sup>

The principle is well-recognised in Northern Ireland. In *Stokes v Sunday Newspapers Ltd* the judge cited the principle as stated in *Jameel* and *Flood* before ruling that the 'complicated factual issues' and 'consideration of meanings' engaged by the *Reynolds* defence necessitated a trial by judge alone.<sup>153</sup>

Nonetheless, difficult questions about the role of judge and jury in relation to the *Reynolds* defence remain. There is no doubt that the complex factual questions engaged by the *Reynolds* defence would prove difficult for juries. But if juries are to be valued as ordinary, right-thinking members of the community, then their exclusion from cases involving a *Reynolds* defence should require judges to adopt a more objective and fact-sensitive approach to the defence (just as they have now in E&W).

If there is to be a sudden blurring of the traditional distinction between judge and jury – while it is retained, for example, in relation to defamatory meaning – it would seem to place greater responsibility

150 Of course, the relationship between meaning and *Reynolds* is reasonably well established (*Bonnick* (n 88 above) at [25]; *Flood* [2012] (n 97 above) at [50]). Yet, in relation to the specific issue of serious harm and the public interest defence, serious harm is somewhat 'logically anterior' to the general issue of meaning. Here, we are talking about the role of harm in the milieu of factors considered by the court in deciding whether the requisite standard of responsible journalism has been met, or whether the journalist has reasonably believed the publication to be in the public interest. This is still a relatively grey area, allowing for a different approach in Northern Ireland.

151 *Gatley* (n 17 above) at 15.22.

152 *Jameel* (No 2) [2005] 2 WLR 1577, at [70]. See also *Flood* [2012] (n 97 above) at [49].

153 *Stokes* (n 75 above) at [42]–[53].

on the judge to consider a broad range of circumstances and to be more cautious in imposing a judicial construction of the defence. The limited case law on the *Reynolds* defence in Northern Ireland does not, however, demonstrate any judicial reflection on this. Even when the unsuitability of the trial of *Reynolds* by jury is addressed in *Stokes*, for example, the defence is still framed in terms of a need for a focus on the 'seriousness of the allegation' and reliance on the Nicholls factors.<sup>154</sup>

Of course, as the authors in *Gatley on Libel and Slander* point out, these difficult issues about the role of judge and jury in relation to the public interest defence are 'substantially reduced in importance in the context of the general move toward trial by judge alone in the Defamation Act 2013'.<sup>155</sup>

In summary, the public interest defence constitutes another important point of divergence in the law between E&W and Northern Ireland. In E&W, the common law prior to 2014 and the adoption of section 4 of the 2013 Act have firmly established a more objective standard of reasonableness in relation to the defence, which clearly bolsters the defence and addresses the chilling effect on this important type of speech. In Northern Ireland, the courts adopt the restrictive reading of the *Reynolds* defence, focusing primarily on the question of 'responsible journalism', measuring such in more limited criteria of presumed harm and the defendant's conduct, and with less reflection on the risks of imposing a judicial construction in this regard. Once again, the difference will be compounded as the two jurisdictions evolve along their distinct paths.

## CONCLUSION

In conclusion, comparing the law in E&W with the law in Northern Ireland in these three key areas reveals a clear divergence between the jurisdictions, and a definite chilling effect of the law on free speech in Northern Ireland. The presumption of jury trials in Northern Ireland is causing defamation cases to settle and, thus, undermining the intended purpose of juries. There appears little appreciation of the substantial threshold of seriousness, and now a clear divergence from the serious harm test. The courts in Northern Ireland adopt a restrictive reading of *Reynolds*, to such a degree that the defence has been emptied of its substance.

In each area, the divergence did not start simply with the enactment of the Defamation Act 2013 but, instead, can be seen to have started several years before that Act came into force.

154 Ibid [44] to [53]. The Nicholls factors are particularly prominent in this regard at [52].

155 *Gatley* (n 17 above) at 15.22.

The growing difference between the jurisdictions, and the chilling effect in these areas, can be solved with legislative action. It is recommended that the Northern Ireland Assembly adopts reform in relation to each of the areas addressed above, in reflection of the relevant provisions under the 2013 Act.

Based on the analysis above, it is recommended that Northern Ireland modernises its rules on the mode of trial in defamation claims and reverses the presumption of jury trials. The problem with juries is not simply that their promise is hardly realised; it is that the mere prospect of a jury trial postpones the vital threshold of seriousness and threatens the prospect of protracted costs and litigation.

That clearly has an effect on causing defendants to settle early on unfavourable terms. The presumption of jury trial has the paradoxical effect in this regard of limiting the role of juries. That is why the courts in E&W considered it sensible to limit the use of juries in the run up to the 2013 Act, and why section 11 of the Act definitively reversed the presumption.

It is recognised, however, that the reversal of the presumption of jury trials is a sensitive issue. Juries were traditionally valued in defamation law for providing 'the perspective of the ordinary, right-thinking member of the community'.<sup>156</sup> In *theory*, they do promise some potential democratic value in the high-flying and moneyed environs of defamation courts. In Northern Ireland in particular, juries hold a special place in the national psyche. In his report on the Northern Ireland Law Commission's consultation on libel law reform in Northern Ireland, Andrew Scott hints at the 'historical and constitutional importance of the jury trial in the Northern Irish context'.<sup>157</sup> Obviously, this refers in part at least to Northern Ireland's troubled past. One may think of the dark reputation of the 'Diplock courts' that were introduced under the Northern Ireland (Emergency Provisions) Act 1973, and the perception that the practice allowed for the expedition of criminal trials of suspected terrorist without the right to jury trial or much of the due process we would now expect under current standards of criminal justice or human rights jurisprudence.<sup>158</sup>

However, one must question the continued presumption of jury trials in *defamation* cases in Northern Ireland. Even if provision is made for them, juries will rarely be employed in practice, their prospect will cause cases to settle early, and the presumption can be gamed by

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156 NILC 2014 (n 5 above) at 4.07

157 Scott Report 2016 (n 6 above) at 2.121

158 See Carol Daugherty Rasnic, 'Northern Ireland's criminal trials without jury: the Diplock experiment' (1999) 5 Annual Survey of International and Comparative Law 1, 239. The use of Diplock courts has been abolished by the Justice and Security (Northern Ireland) Act 2007.

plaintiffs to postpone any application of a threshold test. Despite the provision for juries in defamation claims in Northern Ireland, it is already judges who decide the majority of factual issues in defamation claims, and the presumption mostly operates now as a fig leaf for that uncomfortable truth.

It is recommended also that the Northern Ireland Assembly should adopt a threshold of seriousness, much like that reflected in section 1 of the 2013 Act.

Judging by the discussions in the Northern Ireland Assembly, there is some anxiety about adopting a threshold of seriousness in defamation law. On analysis, though, such anxiety seems unnecessary. Such a fact-sensitive approach to the threshold of seriousness will not suddenly deny plaintiffs justice and leave reputation unprotected in Northern Ireland. It will not suddenly allow people to get away with publishing 'lies' about others. It has been tested all the way up to the Supreme Court, and it is now clear what it involves to a large extent; it raises the threshold to claims slightly and, in doing so, undoubtedly strikes a fairer balance between the parties in defamation claims.

If one looks at the very recent libel case of *Foster v Jessen*,<sup>159</sup> for example, one can test out the modest effect that a section 1 type threshold of seriousness would have in Northern Ireland. In that case, if the harm could not have been inferred from the facts, the test would likely have been easily satisfied by the evidence that was already presented in the plaintiff's application for summary judgment.<sup>160</sup>

Perhaps the only case that has been knocked out on section 1 in E&W since 2014, which might have been allowed to proceed in Northern Ireland, is the case of *Nwakamma v Umeyor*.<sup>161</sup> In Northern Ireland, the meaning of the words complained of there may, arguably, have been judged enough to have an inherent tendency to cause harm to reputation, but the court's careful analysis of facts under section 1 revealed the statement was published only to a very small number of people, that it appeared no one believed the allegations, and the claimant's accounts on examination were found to be unconvincing and exaggerated.<sup>162</sup>

Arguably, one of the only cases that has *succeeded* in Northern Ireland since 2014, which might have been knocked out by section 1

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159 [2021] NIQB 56. See also, M P Hanna, 'Foster v Jessen: a comment on law and online defamation in Northern Ireland' (2021) 72 Northern Ireland Legal Quarterly 115.

160 In the case, the plaintiff herself attended court to give evidence of the harm suffered.

161 *Nwakamma* (n 72 above).

162 *Ibid* [79]. Indeed, that is also what should happen under a proper *Thornton* reading.



in *E&W*, is *Coulter*. But even there it is not clear, as the plaintiff could (possibly?) have proved as a proposition of fact that the allegation that he was a 'scrooge' did constitute a serious harm to his reputation.

Even if the effect of a section 1 serious harm test is relatively modest, and even if it only filters out a slim band of cases, it is nonetheless necessary to strike a more precise and equal balance between the parties to a defamation action and to express a public commitment in that regard to equal protection of the right to reputation and the right to freedom of expression.

Finally, in relation to the public interest defence, it seems imperative for the Northern Ireland Assembly to take action to protect this important type of speech and to signal to the people of Northern Ireland that it considers this type of speech to be of utmost importance.

The chilling effect on public interest speech should be of particular concern to the people there. The political structures that were established as part of the peace process there mean that its citizens must rely heavily on the conduct of government and public administration. Moreover, the long shadow of the conflict also necessitates robust protection of public interest speech. Peace was only secured by power-sharing between two extremes of sectarian division, and the political system is still prone to the factious, guarded and hidden arrangements on that basis. As a consociationalist democracy in a post-conflict society, public interest speech and the involvement of ordinary citizens in governance is vital to the peace and prosperity of Northern Ireland.

There are also logistical issues of the media in Northern Ireland that must be considered. Much of the broadcast and print media in the province is owned by parent companies located in Dublin, London, or other parts of the United Kingdom. Somewhat remote from the Northern Irish public, they may not feel so invested in a public interest there that they would risk their money, and take their chances, in a Northern Irish legal system that still adopts a restrictive approach to the public interest defence.

It also worth considering that providing a bolder public interest defence, indeed providing for any viable public interest defence, may be a way of encouraging publishers to act more reasonably in how they investigate and communicate news. For example, it was demonstrated above how section 4 of the Defamation Act 2013 has been interpreted by courts in *E&W* as necessitating a more objective approach to determining journalistic standards, and the courts have made more use of press codes in adjudicating whether the standard of reasonableness has been met under section 4.<sup>163</sup>

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163 See n 127 above, recognising, of course, that press codes are not fully dispositive of the range of factors that must be considered.

In Northern Ireland there are newspapers that refuse to subscribe to a recognised press code. The Northern Ireland Assembly could use this opportunity to develop a public interest defence that would include a provision stating that, so long as the defendant was not a citizen-journalist, and they did not subscribe to a recognised press code, that a recognised press code would be relevant to determining what is 'reasonable' conduct under the defence. Such a provision would not constitute a chilling effect on free speech and is in line with the judicial interpretation of section 4 of the 2013 Act, in so far as it wishes to recognise reasonable editorial judgment and move away from judicial inference of journalistic standards.

At any rate, there are opportunities now for Northern Ireland to learn from the experience of reform in E&W and to even make advances upon it. What is clear, however, is that, in relation to the areas analysed above, the current law in Northern Ireland is contributing to a chilling effect on free speech, and should therefore at least enact legislative reform to address those issues.

If the proposed legislative reform is rejected by the Northern Ireland Assembly, then the common law in Northern Ireland should address the issue by properly recognising the developments in relation to each of the three areas that was achieved in the common law in E&W before the 2013 Act came into force.

If the courts in Northern Ireland decline to do that, then they should declare divergence from that body of law in E&W in the interest of clarity.

There do not appear to be any sensible alternatives to those three options.