

<b>Institution:</b> London School of Economics and Political Science		
<b>Unit of Assessment:</b> 18 - Law		
<b>Title of case study:</b> Reforming defamation law in multiple jurisdictions		
<b>Period when the underpinning research was undertaken:</b> 2008-2018		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b> Andrew Scott	<b>Role(s) (e.g. job title):</b> Associate Professor of Law	<b>Period(s) employed by submitting HEI:</b> 2006 to present
<b>Period when the claimed impact occurred:</b> 2014-2020		
<b>Is this case study continued from a case study submitted in 2014?</b> No		
<b>1. Summary of the impact</b> (indicative maximum 100 words)		
<p>During the REF period, Scott's research on defamation has had a direct impact on:</p> <ul style="list-style-type: none"> <li>(i) judicial decisions and discussion both in England and Wales and in Northern Ireland;</li> <li>(ii) a government Bill laid before the Scottish Parliament and draft legislation and a report published by the Scottish Law Commission;</li> <li>(iii) discussion papers, official reports, and draft Bills prepared by government and law commission bodies in Northern Ireland; and</li> <li>(iv) a report prepared by the Law Commission of Ontario, Canada.</li> </ul> <p>His research has also informed the debates over proposed reforms in the Republic of Ireland and New South Wales, Australia.</p>		
<b>2. Underpinning research</b> (indicative maximum 500 words)		
<p>Dr Andrew Scott's research on defamation law has analysed the tensions between individual and social interests in reputation and freedom of speech for the purpose of prescribing the means of accommodating these various principles in disparate aspects of defamation and privacy law.</p> <p>His research has examined in particular:</p> <ul style="list-style-type: none"> <li>(i) the nature and structure of the main defamation defences (especially fair comment/honest opinion and <i>Reynolds</i> privilege/publication on a matter of public interest);</li> <li>(ii) the rules concerning intermediary liability; and</li> <li>(iii) the common law "single meaning rule" and the potential role of "discursive remedies".</li> </ul> <p>This research has been published in academic journal articles, chapters in edited collections, chapters in the leading practitioner text on common law defamation and privacy law, and in two reports and a paper for public bodies.</p> <ul style="list-style-type: none"> <li>(i) The research on the fair comment/honest opinion defence identified deficiencies in: (a) the structure of the statutory defence introduced in the Defamation Act 2013; and (b) the approach to distinguishing "statements of fact" from "comment" adopted by some English judges. This work is reflected in [2] (ch. 12) and [5]. The research on the public interest defence, reflected in [2] (ch. 15) and [5], concerned the question of whether the statutory defence reprised its common law antecedent or amounted to a new good-faith-based standard.</li> <li>(ii) The research on intermediary liability addressed the concern that liability for persons other than the primary author, editor, or publisher of defamatory material encourages unthinking censorship irrespective of the accuracy or importance of what has been published. It argued that the expansionist reading of the concept of "publication" had been a profound misstep in the law, and one that had necessitated the introduction of a complex array of mitigating defences. It offered an alternative approach that might better balance the needs of reputation and free speech in this context. This work is reflected in [3] and [5].</li> </ul> <p>The research on the "single meaning rule" considered the justifications offered for this unheralded mainstay of the law. Contrary to standard appreciations, it argued that the rule has</p>		

been iatrogenic in effect, multiplying, rather than ameliorating, the complexity of dispute resolution and hence the opportunity for rent-seeking by litigants and lawyers. The research argued that extra- or non-legal approaches involving discursive remedies and an associated jurisdictional bar on libel claims might better address complexity and costs in defamation proceedings. This work is reflected in [1] and [4].

### 3. References to the research (indicative maximum of six references)

[1] Scott, A. (2018). "O! they have lived long on the alms-basket of words": enhancing efficacy and reducing cost by limiting the role of law and lawyers in defamation disputes. *Osgoode Hall Law Journal*, 56(1), pp. 80-111. Available at: <http://eprints.lse.ac.uk/91813/>

[2] Parkes, R., Busuttil, G., Scott, A., Speker, A., Mullis, A., and Strong, C. (2017). *Gatley on Libel and Slander* (Revised 12<sup>th</sup> edition). Sweet & Maxwell. ISBN: 9780414052635. (See chapters 1, 11, 12, 15, and 22.)

[3] Scott, A. (2016). An unwholesome layer cake: intermediary liability in English defamation and data protection law. In Mangan, D. and Gillies, L. E. (Eds.) *The Legal Challenges of Social Media* (pp. 222-246). Edward Elgar. ISBN: 9781107123649. Chapter DOI: 10.4337/9781785364518.00025.

[4] Scott, A. (2016). "Ceci n'est pas une pipe": the autopoietic inanity of the single meaning rule. In Kenyon, A. T. (Ed.) *Comparative Defamation and Privacy Law* (pp. 40-57). Cambridge University Press. ISBN: 9781107123649. Chapter DOI: 10.1017/CBO9781316402467.003.

[5] Mullis, A. and Scott, A. (2014). Tilting at windmills: the Defamation Act 2013. *Modern Law Review*, 77(1). pp. 87-109. DOI: 10.1111/1468-2230.12057.

### 4. Details of the impact (indicative maximum 750 words)

#### Reform debate in Northern Ireland

On the basis of the perceived strength of his scholarly and wider contributions to the debate on defamation reform in England and Wales, Scott was approached by and part-seconded to the Northern Ireland (NI) Law Commission to conduct its review of defamation. Alongside his research standing, this contribution saw him invited to contribute to equivalent reform initiatives in Scotland, Ontario (Canada), and the Republic of Ireland.

Scott has written two reports on reform of defamation law in Northern Ireland, one for the NI Law Commission [B] and one for the Department of Finance [A]. The first report was a discussion paper which the Commission put out for consultation. The second, authored after the closure of the Law Commission consultation, made recommendations for legislative change. The two reports cite, and in large measure reflect, Scott's broader research in this area. In that context, Scott has twice given oral evidence to the NI Assembly Finance Committee (June 2014; February 2015). He has also been consulted by Mr Justice Stevens on the civil procedure dimensions of defamation reform (June 2016) and by Lord Justice Gillen on both the civil procedure dimensions of defamation reform and on related questions concerning open justice (March 2016). The latter was in the course of Lord Justice Gillen's "Review of Civil and Family Justice in Northern Ireland".

The second Northern Irish Report [A] set out two draft Bills for consideration by the NI Assembly. The first Bill was based on the Defamation Act 2013 as applied to England and Wales, but with strengthened protections for internet publishers and a wider honest opinion defence. The second Bill is bespoke and includes, in addition, provision for repeal of the single meaning rule and the prescription of a jurisdictional bar on claims when a publisher has issued a timely discursive remedy (correction or retraction). Both draft Bills directly reflect these elements of Scott's research. The NI Minister of Finance confirmed in November 2020 that work to prepare a Bill on the basis of the second NI Report [A] is currently being undertaken by officials [C].

Scott has also served on the advisory boards of equivalent reform projects undertaken by the Scottish Law Commission and the Law Commission of Ontario, and he gave the keynote speech at a symposium on defamation reform hosted by the Irish Department of Justice and Equality

(which published his paper and has a reform bill pending – [G]). The second “Northern Irish Report” [A] has been influential in each of these contexts.

### Scottish Government Bill, Law Commission Report and Draft Bill, and Ontario Report

The Scottish Law Commission (SLCmsn) conducted a consultation on defamation, publishing a discussion paper (March 2016) and reporting its findings and proposing a draft bill for legislative change in November 2017 (Defamation and Malicious Publication (Scotland) Bill – [D]). In December 2019, the Scottish Government laid the Defamation and Malicious Publication (Scotland) Bill before the Scottish Parliament [E]; it moved on to Stage 2 consideration in late 2020. Scott submitted written evidence and gave oral evidence to the Parliament’s Justice Committee to assist its Stage 1 consideration. This evidence was liberally quoted in the Committee’s report [F], with aspects then cited in Parliamentary debate (5 November 2020).

The Law Commission of Ontario conducted a three-year study and consultation into defamation reform culminating in March 2020.

In a number of respects, the Scottish Government Bill reflects Scott’s research on defamation [E]; his research was also cited and considered frequently through both the two Law Commissions’ discussion papers and reports [D] [H] and is reflected in the Scottish Commission’s draft Bill.

#### *Fair comment*

- (1) The Scottish Government Bill affirms that the basis of comment can be “reasonable belief in the underpinning facts” ([E], s.7(8)(c)). This was previously adopted in the SLCmsn Report ([D] below, [3.43]-[3.45] and [3.51], citing Discussion Paper at paragraphs 5.13-5.19), and reflected in s.7(3) and 7(8)(c) of the SLCmsn Bill.

The SLCmsn noted at [3.55]: “we consider this extension to be an appropriate and proportionate solution, especially to addressing the position of social media commentators. This solution seems also to sit comfortably with the notion that the defence is properly regarded as existing to protect the expression of views which are honestly held” – citing 2.28-2.34 of the Northern Irish Report [A].

This contention rests on research reflected in [5].

- (2) The Scottish Government Bill ([E], s.7(8)(b)) affirms that it should be lawful to base opinions on facts published “before or at the same time” as the opinions themselves. This contention was also reflected in s.7(3) and 7(8)(b) of the SLCmsn Bill and in its Report ([D], [3.49] citing NILC 19 (2014) [B], at paragraphs 3.35-3.37, which is based on [5]).
- (3) The Scottish Government Bill makes plain that the defence is applicable to inferences of fact ([E], s.7(7)). This position was earlier reflected in the SLCmsn Report ([D], [3.36]): “in placing the defence on a statutory footing, we recommend that the opportunity be taken to clarify that the defence is available in relation to inferences of verifiable fact...we think it desirable that the draft Bill should place this matter beyond doubt” (citing NI Report, [A], at paragraphs 2.25-2.27) – and was reflected in s.7(7) of the SLCmsn Bill.

This reflects research in [2] (ch. 12) (see also “judicial consideration”, below).

#### *Intermediary liability*

- (4) The SLCmsn Report ([D], [4.8]), while recommending that a review of defences for internet intermediaries be undertaken on a UK-wide basis, considered that “an exclusion...of the bringing of proceedings against anyone who is not the author, editor or publisher of a given statement. This is based, to a large extent, on the model recommended in the Northern Irish Report [A]”. The SLCmsn discussion ([D], [4.26]-[4.33]) directly reflects the position developed in [3] and [5].

Along with an associated power to re-designate persons as a “publisher” where necessary (as proposed in Scott’s research), the aim to reduce the direct liability of intermediaries in favour of alternative approaches was reflected in s.3 of the SLCmsn Bill and is also included in the Scottish Government Bill ([E], ss.3 and 4).

Much the same argument was made in the Ontario report ([H], citing Scott's research on point (pp. 74-76)), although ultimately preferring an alternative approach.

### Judicial consideration

Scott's research on defamation has been cited regularly by the High Court in both England and Wales and Northern Ireland, by the Court of Appeal in England and Wales and in Northern Ireland, and by the Scottish Sheriff's Court. Most notably, this has included a "debate" with Mr Justice Eady on which types of inference can benefit from the honest opinion defence, judicial notice of Scott's research on Article 8 and reputation, and judicial confirmation of Scott's research conclusions regarding the nature of the public interest defence.

#### *Iteration with Mr Justice Eady on "inferences of verifiable fact"*

In [2] (ch. 12), Scott set forth the view that a defendant should be able to defend all "inferences of fact" based upon underpinning facts using the defence of fair comment/honest opinion: "if the ability of an audience to recognise words as comment is key, then it is not obvious why the verifiability or otherwise of the inference should be important". In doing so, he criticised an alternative view previously deployed by Mr Justice Eady that inferences of verifiable fact fall outside the defence and can be defended only by way of proving their truth. This matter was described as a "potentially important issue" by Mr Justice Warby in *Barron MP v Collins MEP* [2015] EWHC (High Court of Justice) 1125 (QB) at [16]-[17] [I]. In *Wasserman v Freilich* [2016] EWHC 312 (QB) at [21] [J], Eady J reiterated the alternative view, whereas in *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240 (QB) at [24]-[29] [K], having propounded the general approach set out by Scott, Nicklin J stated that "asking a question of whether the statement is 'verifiable' is perhaps a dangerous gloss on this approach". In *Butt v Secretary of State for the Home Department* [2019] EWCA (England and Wales Court of Appeal) Civ 933 at [38]-[39] [L], Sharp LJ affirmed the view set out in Scott's research. Each of the four judges expressly referred to and/or quoted Scott's research [2] in the course of their respective discussions on this point.

#### *Nature of the s.4 public interest defence*

In *Economou v de Freitas* [2016] EWHC 1853 (QB) at [237]-[239] [M], Mr Justice Warby expressly affirmed the view expressed by Scott ([2] (ch. 15) and [5]) to the effect that the s.4 public interest defence should be understood as being equivalent to the common law *Reynolds* privilege and not a good-faith based standard similar to the US *New York Times v Sullivan* rule. He stated that "there is much to be said for [this] legal analysis. It seems hard to describe a belief as reasonable if it has been arrived at without care, in the absence of any examination of relevant factors, and without engaging in appropriate enquiries". This view was expressly affirmed on appeal ([2018] EWCA Civ 2591 at [76] and [86]), and again in *Serafin v Malkiewicz* [2019] EWCA Civ 852 at [36] (a case which further cites Scott's work on related themes at [35], [66] and [95]).

It is also reflected in the structure of the new public interest defence introduced in Sch.1 to the Defamation Amendment Act 2020 in New South Wales, Australia. That defence is modelled on the English s.4 statutory defence but includes a listing of additional factors that make plain the intention to emulate a *Reynolds*-style defence.

In sum, and in disparate ways, these impacts serve to rebalance the individual and social interests in reputation and freedom of speech reflected in defamation laws. They move largely in the direction of better valorising freedom of speech to ensure that powerful interests are less able to curtail critical speech, ultimately to secure a more open public sphere.

### 5. Sources to corroborate the impact (indicative maximum of 10 references)

[A] *Reform of Defamation Law in Northern Ireland* (Belfast: Department of Finance, 2016).

[B] *Defamation Law in Northern Ireland* (NILC 19, Belfast: Northern Ireland Law Commission, 2014).

[C] *Letter from Conor Murphy, NI Minister of Finance to Mike Nesbitt MLA*, 30 November 2020.

**[D]** *Report on Defamation* (SCOT LAW COM No 248, Edinburgh: Scottish Law Commission, 2017).

**[E]** Defamation and Malicious Publication (Scotland) Bill 2020.

**[F]** Defamation and Malicious Publication (Scotland) Bill: Stage 1 Report (SP Paper 822, Scottish Parliament – Justice Committee).

**[G]** Scott, A. “Cascading effort in defamation reform: four key themes”, paper published by the Department of Justice and Equality (Republic of Ireland), November 2019.

**[H]** *Defamation Law in the Internet Age* (Toronto: Law Commission of Ontario, 2020).

**[I]** *Barron MP v Collins MEP* [2015] EWHC 1125 (QB).

**[J]** *Wasserman v Freilich* [2016] EWHC 312 (QB).

**[K]** *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240 (QB).

**[L]** *Butt v Secretary of State for the Home Department* [2019] EWCA Civ 933.

**[M]** *Economou v de Freitas* [2016] EWHC 1853 (QB).