

# The Centre for Law, Justice and Journalism

The Centre for Law, Justice and Journalism is the first major interdisciplinary centre in the UK to develop a broad, yet focused, interface between law, justice and journalism in society.

The centre aims to harness and maximise opportunities for research collaboration, knowledge transfer and teaching to become an international centre of excellence and brings together expertise in the disciplines of Law, Criminology and Journalism at City University London.

## CLJJ Working Papers

Reframing Libel is the first set of working papers in a series from the Centre for Law Justice and Journalism at City University London. The papers on Reframing Libel contain articles by leading lawyers, academics and journalists in the field who presented at the symposium organised by the Centre in November 2010 at City University. The papers are edited by Connie St Louis who was instrumental in organizing the symposium.

## Leadership and Expertise

The Centre for Law, Justice and Journalism (CLJJ) is directed by three of City University London's leading academics, as well as being supported by a number of specialists from the university.

**Professor  
Howard Tumber,  
CLJJ Director  
(Journalism)**

Howard Tumber, Professor of Journalism and Communication within the Graduate School of Journalism, City University London, has published widely in the field of the sociology of news and journalism. His recent research is concerned with the role of journalists and the reporting of international conflict throughout the world and across media channels.

**Professor  
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CLJJ Director  
(Law)**

Associate Dean of Research at The City Law School, City University London, Lorna Woods has research interests in broadcasting law and policy, regulation of the media and the related issues of freedom of expression and privacy. She is also known for her work in EU Law as well as the protection of human rights Europe.

**Professor  
Eugene McLaughlin,  
CLJJ Director  
(Justice)**

Eugene McLaughlin, Professor of Criminology at the School of Social Sciences, City University London, has written extensively on policing, criminal justice and public policy and criminological theory. His current research concentrates on the theory and practice of policing and public safety in multi-pluralist societies, the news-media, crime and criminal justice and the politics of law and order.



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## Introduction

Connie St Louis, Senior Lecturer and Director of the MA in Science Journalism, City University London.

The Reframing Libel Symposium convened at City University, London on 4 November 2010 examined the question of how libel law might be reframed in order to address issues such as costs, procedure, and reform of the substantive law to enhance freedom of speech. It also considered the effects of the law on scientific and medical research, as well as the increasing challenges facing bloggers.

The Symposium followed an earlier debate on Libel which was entitled 'Science Fact or Science Fiction?'

My motivation for organising this debate was to try to understand how science had become an unwitting actor who has been given the lead role in a major theatrical performance without a script. The lingering sense of bewilderment after the debate amongst the large group of leading science journalists was tangible.

The gloom was triggered by a judgement made against Dr Simon Singh by Lord Justice Eady. They expressed their resignation that the 'chilling effect' that the law was having on their work, would continue. Throughout that evening, there were various iterations of the question 'How could this be happening to Science? With its major tenet of 'the scientific method' and a doctrine of evidence and reproducibility, this is all underpinned with assiduous peer review, debate and discussion.

Broadcaster and science writer Simon Singh was sued by the British Chiropractic Association (BCA) for a piece he wrote in the Guardian comment pages. He criticised the BCA for defending chiropractors who use treatments, for which there is little evidence of efficacy, on children with conditions such as colic and asthma. Essentially Singh was following the regular worn path of evidence based medicine, a practice described by the British Medical Journal as '.... integrating individual clinical expertise with the best available external clinical evidence from systematic research.' He was simply asking for the research to back up the clinical practice.

The BCA Singh case became the cause celebre and the catalyst for demands for a fundamental change to the law. Campaigners, academics, scientists, lawyers even celebrities lined up to offer their support and denounce the English Libel law.

As a fellow science journalist I watched with bemusement as my colleague Simon Singh became financially drained and emotionally exhausted as the costly two year process took its toll. When I first heard the case my first reaction was, 'There by the grace of God .... I too had been threatened with a Libel action; I knew the terror and panic of facing financial ruin. However for me that process was short lived because my employer the BBC behaved like the mother hen and opened up its wings and gathered me under them, to allow me to nestle fearlessly. 'They must sue us [the BBC] first!' came the resounding battle cry from the then controller when he heard of the action. In my time years in the BBC I had spent many hours debating and interpreting words with lawyers. I knew all too well that sometimes it's a very fine balance that of truth telling and avoiding libel.

April 2010 saw the sudden end of the case when the British Chiropractic Association dropped its libel action against Simon Singh. There was a huge collective sigh of relief, Justice had prevailed but at what cost? Even in victory there was for him the ignominious sting of being out of pocket. It seems libel costs, whether you win or lose.



Lord Anthony Lester QC's Defamation Bill brought clarity into the libel fog. The political will to reform was gathering and in a stroke of perfect timing, he introduced his Private Members Defamation Bill only pausing when all parties had promised to revisit it as part of their election manifestos. Consequently, I decided that it would be helpful to examine this Bill with a group of experts at the symposium.

With Simon Singh's case settled, I invited Dr Peter Wilmshurst a consultant cardiologist at the Royal Shrewsbury Hospital to speak. Amidst the legal minutiae it was important to return to the people who suffer at the hands of the Libel Law. His is a heart rending tale, the familiar one of David against a corporate Goliath. Shortly after the 'Reframing libel' symposium he received further documentation advising him that the libel action was to be extended to include an interview he made on national radio.

The papers presented here by the contributors are the first in a series of working papers for the Centre for Law, Justice and Journalism at City University London. This publication entitled 'Reframing Libel' aims to influence the debate and add to consultation process that the Coalition government is now undertaking since it published its Draft Defamation Bill on 15 March 2011.

Since the publication of the Draft Defamation Bill there has been an initial consultation process and so far the situation seems positive. The Coalition Government is listening and is consulting widely. I offer this set of papers as part of the consultation process. I, with others from the scientific community have subsequently been invited to two Ministerial discussions. However, after the initial excitement at the launch of the Draft Bill, I realised that there was still some distance to go. Under the new bill Simon Singh would now have a defence against the libel action that was brought against him. Unfortunately, this Draft Defamation Bill would not prevent the action against Dr Peter Wilmshurst. There is still a great deal of work to be done to ensure that this situation does not prevail.

### **Connie St Louis**

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May 2011





## Reframing Libel

### Lord Anthony Lester QC

In the 1960s, when I began to practise law, there was no positive right to free speech in English law. Free speech was a strong British political value, but as a matter of English law it was merely the space left by the criminal and civil law – official secrecy, fair trials, contract confidentiality, copyright, defamation and the rest.

A number of landmark judgments of the House of Lords and the Strasbourg Court have since ensured that freedom of speech has come to be recognized as a positive right – subject to exceptions that have to be interpreted with a sense of proportion. I have had the privilege of acting as advocate in some of these cases, whose outcome has shaped the way Parliament, Government and the courts weigh the competing claims to free speech and other aspects of the public interest.

However, no government or parliament has conducted a full review of the law of libel since the report by the Porter Commission in 1948, which was ignored by the Attlee and Churchill Governments.

Our libel laws originated in the medieval ecclesiastical courts and were subsequently developed by the Star Chamber and the common law courts. Robust protection is given to reputation at the expense of freedom of speech. Its “chilling effect” on what people are prepared to publish has been aggravated by legal uncertainty about whether defenses can be relied upon, and by conditional fee agreements that permit claimants’ lawyers to be unjustly enriched at the expense of writers and publishers. Claimants have been able to pursue defamation claims where the publication has caused them no substantial harm, and large corporations have brought libel actions against NGOs and newspapers without having to prove financial loss.

Recent calls for libel law reform have come from the Culture, Media and Sport Select Committee Report *Press Standards, Privacy and Libel*, from the Ministry of Justice Working Group on Libel, and from the Libel Reform Campaign led by a coalition of charities, which has attracted the support of over 52,000 people.

These reports, along with public outrage about high profile cases brought against Dr Wilmshurst, Simon Singh and others have made all three of the main parties determined at last to ensure that the law strikes a better balance between the protection of free speech and the protection of a good reputation.

My Defamation Bill, prepared with help from expert colleagues, sets out stronger and clearer defences and strikes a fairer balance between private reputation and public information. It is not a charter for irresponsible journalism, nor is it a rigid code. It contains a simple framework of principles and factors to be taken into account, so that libel law is applied with a sense of proportion.

It reflects a world much changed since the Duke of Brunswick sent his valet to obtain a 17 year old publication of the Weekly Dispatch (in order then to sue it for defamation). Now we have search engines doing the same thing thousands of times per day. The Bill sets out the circumstances in which an ISP or forum host should not be liable for defamatory material and time limits on suing.

The Bill also removes more activity from the scope of libel laws, extending Parliamentary privilege and giving much greater protection to fair and accurate reporting of many kinds of official proceedings.

The Bill does not deal with the serious problem of excessive costs in libel cases because there are existing powers to tackle this. I hope the Government will exercise those powers as a matter of urgency.

Nor does it address the issues of alternative dispute resolution (ADR) or an alternative forum for hearing libel claims. A working group chaired by Sir Charles Gray is due to produce a paper imminently on procedures to enable the early resolution of meaning, including ADR, in order to allow the speedy resolution of libel claims and a reduction in costs. The Government should give careful consideration to these proposals, as well as the possibility of making specially designated county courts rather than the High Court the normal forum.



Until now, libel law has remained the preserve of specialist lawyers skilled in its complex rules and procedures. Judges have been left to fashion the law, in concert with the piecemeal statutory reform in the 1950s and 1990s.

The Coalition Government is committed to reviewing libel law to protect freedom of speech. The Government has published a draft Bill. There will be pre-legislative scrutiny before the actual Bill is published in 2012. The best form of public scrutiny would be by means of a Joint Committee of both Houses of Parliament, able to take evidence and report next year.

Libel law raises important constitutional issues. Free speech is the lifeblood of democracy and it is right that Parliament should decide issues of public policy, setting out a framework within which the courts interpret and apply this important area of law.

I hope that this book will contribute constructively to the current debate on libel reform and help to ensure that the Defamation Bill we end up with is the best that it can be.





## Reframing the Cost of Libel

Razi Mireskandari, Partner, Simons, Muirhead & Burton

Libel practitioners are increasingly partisan. Most firms are now seen, and market themselves, as either “Claimant” or “Publisher/Defendant” firms. Our libel work at Simons Muirhead & Burton is split almost down the middle.

We believe that our clients’ best interests are served by the experience we have gained in acting for both sides. We have no generic interest in exclusively promoting the interest of one side over the other.

Although I appreciate that this Symposium focuses on libel, a libel claim is a form of personal injury which is a civil claim. So the costs regime that applies to civil claims applies to libel claims. The costs of libel proceedings can therefore only be properly understood in the context of costs in civil actions generally.

### The Historical Context

In England costs are usually paid by the losing party to the winning party. The level of those costs, if they are not agreed, is assessed by costs judges who are specialists in the field. Costs are assessed according to what the court determines was reasonably incurred. The two most important elements of base costs are the hourly rate and the time spent. The former depends on the experience of the fee earner, whether the case involves a specialist area of work, urgency etc. The latter needs to be evidenced by appropriate records.

Civil Legal Aid used to ensure access to justice to those who could not otherwise afford it. To be granted Legal Aid, a means and merits test had to be satisfied.

Provided your claim had a reasonable prospect of success and you passed the means test the state would pay your legal fees and would recover whatever monies were paid to your lawyer from the proceeds of the action.

Furthermore, no costs order against a legally aided party was enforceable without the leave of the court. This in practice meant that a litigant could not recover any costs from a legally aided opponent unless it could show e.g. that they had just won the lottery (or its equivalent - the pools - in those days), so there was no danger of a legally aided party losing their home because they lost their case.

Crucially Legal Aid, for reasons that today appear archaic, was not available for libel cases.

Many felt this was wrong (why cannot a person of modest means protect their good name?) and some lawyers were prepared to bend the rules in order to sustain an action by pretending they were going to charge their client, when in fact there was no prospect of the client being able to afford their fees. This charade was necessary because lawyers cannot recover from another costs in excess of what their client is obliged to pay them (this is known as the “indemnity principle”).

Civil Legal Aid is now only available for very limited types of cases.

To afford access to justice, Legal Aid has been replaced by Conditional Fee Agreements (“CFAs”) commonly known as “no-win, no-fee” agreements and After the Event Insurance (“ATE”). It is important to bear in mind that the CFA/ATE regime replaced the legal aid; it operates in all areas of civil litigation be it personal injury, professional negligence, breach of contract or other.

The indemnity principle has been effectively waived to allow CFAs and ATEs to operate.

CFAs allow lawyers to act for any client and only recover their reasonable costs plus a success fee of up to 100% if their client is successful. Where a lawyer acts under CFA the success fee is also recoverable from the losing party.



ATE insures a client against adverse costs orders, the premium for which is recoverable from the losing party even if the insured has not paid any premium.

### **The Problem**

Publishers, who are almost invariably defendants in libel cases, are increasingly finding themselves having to defend actions instigated by claimants on a CFA with ATE. If they lose, their costs liability is thereby doubled and on top of that they are having to pay the ATE premium which can be hefty indeed.

The exposure to costs is, under the current regime, so great that it has undoubtedly had a chilling effect on free speech. Publishers are much more concerned about the risk attached to what they publish and are more likely to settle claims to avoid the massive costs liabilities which would be incurred, especially if the case were to go to trial.

Salt is rubbed into publishers' wounds by the fact that Legal Aid was not even available for defamation cases in the past, whereas now CFAs and ATEs are available to anyone, irrespective of means, even very wealthy individuals, who can (and do) get the benefit of them.

Undoubtedly the present system is untenable. Reform is needed. But the trick is to ensure that access to justice is not denied. A libel claim is often the only means of curbing the excesses of the rampant (and often entirely unprincipled) tabloid press in this country. No one today would suggest that a libel action should only be available to the rich.

### **Reality**

Libel law is complex. Libel actions should be conducted by specialist practitioners. Libel actions can be simplified (and sensible attempts to do so should be encouraged) but its complexities cannot be eradicated.

The Legal Aid Board, I understand, had a department of about 200 people which means tested Legal Aid applicants. Any reform which involves means testing, is not practically feasible.

It is impossible to know for certain but I would be very surprised if most libel complaints, whether pursued to trial or not, were not against the tabloid press. The lawyers acting for these publishers are very experienced. Anyone who has been involved in litigation against the tabloids will tell you they will leave no stone unturned to pursue their interests – sometimes at whatever cost. But libel defendants, increasingly in today's world, come in many shapes and sizes; many have nowhere near the resources available to the tabloid press.

The maximum payment for general damages in libel is about £225K. That sort of sum is only very rarely awarded – it would only be appropriate for a false allegation of terrorism, murder, paedophilia or the like which was fought all the way to trial. The vast majority of claims are settled at well below £100K - most for far less than that.

If a case goes to trial, the trial judge, after judgment, exercises his jurisdiction as to liability for costs. But the assessment of the amount of costs actually payable, if it cannot be agreed, is carried out some months later by specialist costs judges. Costs in a heavily contested libel claim that goes to trial before a jury could easily exceed £350K (excluding CFA success fee, ATE premium and VAT).

Attempts to date to regulate costs by judges exercising case management control more robustly whilst the action is progressing, or by costs judges applying concepts such as proportionality when assessing costs, have largely failed to limit costs, certainly to a level that publishers or their insurers would find acceptable.

### **The Solution**

In December 2009, Lord Justice Jackson published his comprehensive review of civil litigation costs. In essence he recommended:

- that CFA success fees and ATE insurance premiums should cease to be recoverable from the losing party;
- raising the general level of damages in defamation and breach of privacy proceedings by 10%; and



- introducing a regime of qualified one-way costs shifting (whereby the Defendant/publisher does not recover its costs even if it succeeds in defending the claim, thereby negating the need for ATE insurance).
- If this recommendation is accepted, it is suggested that procedural rules will need to be amended to provide:

“Costs ordered against the claimant in any claim for defamation or breach of privacy shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate.”

I suggest that if the above proposals were implemented access would be denied to the vast majority of those wishing to bring a claim in libel because (adopting the same numbering):

1. Damages in the vast majority of cases are insufficient to cover CFA success fees and ATE premiums. Without these, lawyers would only be prepared to take on cases that would be very likely to succeed and claimants (unless very wealthy or with nothing to lose) would not be prepared to complain because they would risk losing their home/being made bankrupt;

2. I have difficulty envisaging how this would be implemented especially where the award is made by a jury. Would the judge simply add 10%? In any event 10% on what is often a relatively modest damages award does not address the problem at 1 above;

3. Again, I have difficulty envisaging how this would be implemented in practice, means testing is simply too expensive to put into practice.

However, Lord Justice Jackson does leave the door at least slightly ajar as to alternatives where he says in his report:

“If, contrary to my recommendations, additional liabilities continue to be recoverable and the costs shifting regime remains as now, then my fallback recommendations are as in chapters 9 and 10 above. In other words there should be fixed and staged success fees, staged ATE insurance premiums and so forth.”

In my view this is a far more solid basis for reform; it addresses the unfairness of the present costs regime by sensibly “reframing” it rather than imposing radical change.

My proposal for a costs regime that would work well in practice, strike the right balance and give clarity as to costs to all parties is as follows:-

There be an automatic costs cap in place of £350,000 in respect of base recoverable costs. Costs above this figure to be disallowed unless the Court allows a higher figure upon application by the relevant party.

Hourly rates for fee earners to be agreed across the board at no more than £375 for an experienced senior libel expert with appropriate hourly rates for other fee earners.

The CFA success fee, which would be recoverable inter parties, to be a maximum of 50% of base costs, only recoverable if the case settles within 60 days of the beginning of the trial.

Of that 50%:-

- 80% would be recoverable if the case settles earlier than 60 days before trial;
- 60% would be recoverable if the case settles earlier than the first date for disclosure;
- 40% would be recoverable once the claim is issued;



(iv) 20% would be recoverable if the claim settles pre-action.

4. No success fee recoverable for costs assessments. The same staged fees to apply to Counsel's fees.

5. ATE insurance premiums recoverable but initially limited to £500. Thereafter, the level of premium recoverable should be staged as in 3 above. With increased competition in the ATE market the cost of ATE insurance should reduce over time (there are signs that this is already happening).

6. Publisher exposure to ATE premium limited to £500 before notification. To avoid any higher premiums it can then elect whether to undertake not to enforce a costs order (in which case it would be unreasonable to charge any further ATE premium).

Lord Justice Jackson also recognised that sensible reform of present procedures could lead to significant costs savings, for instance:

"Early resolution procedure. The Libel CLAF Working Group has put forward an interesting proposal for an early resolution procedure. In my view, the working group's proposal and the issue of early resolution generally merit consideration by specialist practitioners and judges. I commend these matters to them for further analysis".

I here disclose an interest; I am a member of that Working Group which is now chaired by Sir Charles Gray (former specialist defamation High Court Judge).

Our current main focus is to propose a procedure that will allow the court to determine the meaning of the words complained of so that the litigants can focus their efforts on that meaning throughout the litigation. One of the unique difficulties of defamation claims at present is that the parties must prepare for trial without knowing which of the pleaded meanings will find favour with the jury/trial judge.

It is like trying to hit a moving target and significantly increases costs. I feel confident that we will be able to make proposals which will help to reduce the costs of libel trials.

There is more that could be done procedurally but I have in mind my remit and am concerned not to stray from my brief.

### **Conclusion**

Change is needed, and desperately. But there is a danger of overcompensating for the unfairness of the present regime. This is particularly so when the parties on one side of the debate are far better placed to promote their own self interest through the press.

In today's world it would be wholly unacceptable for anyone, however poor, to be denied access to justice in libel. A change in the cost regime of the type indicated above would restore proper balance.

The tabloid press, particularly, has been so vehement in its opposition to CFA & ATE's that it wants them abolished for media cases (including privacy claims). Their committed lobbying will have its desired effect if Lord Jackson's proposals are implemented. Our law says that a proper balance must be struck between freedom of speech and the right to reputation and a private life.

The balance is often very fact sensitive so each case needs to be considered on its merits. It is vital that we have a costs regime that allows this to happen.

One final note; it is often overlooked that CFA's and ATE's are also available to defendants (including publishers). I suspect they have rarely been used to date because of philosophical rather than practical concerns.

Having said that, I understand that The Telegraph has been represented several times on a CFA. I believe they will be increasingly used in the future if a regime such as the one I suggest is implemented.





## Reframing Libel - Changing the experience of being sued and the impact on science and medical research

Dr Peter Wilmshurst, Consultant cardiologist at the Royal Shrewsbury Hospital and Honorary Senior Lecturer in Medicine, University of Keele

NMT Medical Inc is an American company, which makes the STARFlex© device for closing holes in the heart. It is suing me for both libel and slander in the High Court in London after I spoke in October 2007 at the Transcatheter Cardiovascular Therapeutics (TCT) conference in Washington DC. TCT is the World's biggest interventional cardiology conference with over 10,000 delegates. My comments to a Canadian journalist were put on an American website. The website and the journalist are not being sued. I am not being sued in the USA.

I was the co-principal investigator and principal cardiologist in the MIST (Migraine Intervention with STARFlex© Technology) Trial. It was a multicentre UK trial sponsored by NMT to investigate whether closing a type of hole in the heart (called a PFO) using a STARFlex device would cure migraine with aura. The trial was based on a number of research reports by different groups of doctors that: 1. Migraine is much more frequent in people with a PFO than in the general population and 2. When a PFO was closed for other medical reasons, the majority of patients who had migraine before the procedure reported that their migraine was improved or ceased.

The West Midlands Multicentre Research Ethics Committee (MREC) approved the MIST Trial. MRECs are regional committees under the auspices of Regional Strategic Health Authorities and the National Research Ethics Service / National Patient Safety Agency. Their remit is to decide whether large multicentre trials can have ethics approval: a requirement before starting research. I had been invited to speak at TCT 2007 about PFO closure. Naturally my lecture included comments about the MIST Trial, which had ended in early 2006 and some data had been presented at scientific meetings, but the results were awaiting journal publication.

The other co-principal investigator in the MIST Trial was Dr Andrew Dowson, who is a headache specialist. Dr Dowson actually came into the MIST Trial relatively late in August 2004, when the original principal headache specialist withdrew from the research. Dr Dowson joined the trial one month before he and I took the trial to MREC for ethics approval. What I did not know until after the trial ended, because Dr Dowson did not tell me, was that 5 months before he joined the MIST Trial, he had been the principal investigator in another multicentre migraine trial. The Northern and Yorkshire MREC closed that trial down and reported Dr Dowson to the General Medical Council

(GMC) because of research misconduct by Dr Dowson. As a result, during the MIST Trial, Dr Dowson was under investigation by the GMC. At a hearing, two weeks after we present the MIST Trial primary endpoint data at the American College of Cardiology (ACC) meeting in March 2006, the charges against Dr Dowson were found proved by a Fitness to Practise Panel of the GMC. (This is a link to the adjudication of the Panel <http://webcache.gmc-uk.org/minutesfiles/2063.html> ). For Dr Dowson to be under investigation by the GMC was a clear breach of the Clinical Trial Agreement.

The MIST Trial steering committee consisted of 5 UK doctors and 2 NMT employees. During the trial we discovered that Dr Dowson and one other doctor on the steering committee had bought shares in NMT. Therefore out of the steering committee of seven, four people had a financial interest in the trial outcome. The company's share price increased from about \$5 before the trial started to over \$25 during the trial. The share price is now down to about \$0.20 following the negative results of two of NMT's subsequent clinical research trials.

When I arrived at TCT in October 2007, I discovered that Dr Dowson was also speaking at the meeting about the MIST Trial. This was contrary to the agreement that I would present MIST data at cardiac meetings and that Dr Dowson would present at headache meetings.



Shelley Wood, a journalist for the online cardiology magazine called Heartwire, heard both presentations and realised that there were disparities between the two presentations. She spoke separately to Dr Dowson and to me about these disparities. She also spoke to executives of NMT and she spoke to cardiologists unconnected with the trial and wrote an article. I made it clear that I believed that information being presented about the trial was both inaccurate and incomplete. Shelley Wood wrote an article pointing out my concerns. She also discussed the comments of Dr Dowson and

NMT executives. The article was put on line a day after TCT finished. In it she mentioned comments made by Dr Dowson and NMT that were clearly inaccurate, such as a claim by Dr Dowson that he is a neurologist, and she pointed out that he is not on the specialist register, which he would be if he were a neurologist. She also mentioned the GMC findings against Dr Dowson.

On my return to the UK after TCT, I found that Dr Dowson had sent me a copy of a paper about the trial, which he said had been accepted for "Circulation". Circulation is the cardiology journal with the highest Impact Factor (a scientific rating) and is the main journal of the American Heart Association. I wrote back to Dr Dowson saying that I was not prepared to be an author because I could not vouch for the integrity of the article because NMT had refused to allow the steering committee to see all the data, but that even without all the data it was clear that the article contained errors.

I also officially informed the independent Clinical Research Organisation (CRO) and the National Research Ethics Service that I intended to ask the GMC to investigate the conduct of Dr Dowson. One other doctor on the steering committee (Dr Simon Nightingale) also emailed back refusing to be a co-author of the paper for the same reasons.

The next day, NMT's lawyers wrote threatening legal action, enclosing copies of the email correspondence I had had the previous day with the CRO. In the course of the proceedings it became clear that they were alleging that I was in effect the author of virtually the entire article by Shelley Wood. They accused me of being the author of some comments that Shelley Wood attributed to others and not just the 79 words in the article that she attributed to me in quotes.

I believe that most people would find the quotes about me that Shelley Wood attributed in the article to NMT to be more defamatory about me than what I had said about them. For example they told Shelley Wood that I had never been a co-principal investigator in the trial. She put that in her article, but she also pointed out that she had found numerous press releases on NMT's website in which they said that I was a co-principal investigator.

Obviously this called into question the accuracy of what they had told her. In her article Shelley Wood stated that NMT executives had said that I had been removed from the trial because I had committed protocol violations. She also wrote that NMT had refused to tell her what the violations were. In fact, I have never been notified of protocol violations that NMT apparently alleges against me. If I had committed any protocol violations the CRO should have officially informed me of them.

The MIST paper was published in the journal Circulation in March 2008. I immediately contacted the editor about the inaccuracies and omissions in the paper. I supplied hundreds of pages of documents. 18 months later, in September 2009, Circulation published a 700 word correction, a 4 page data supplement and new version of the paper.

Despite that vindication of my view that the paper was inaccurate and incomplete, NMT has not withdrawn its action. Indeed, in October 2010 they sent me a further letter before action threatening a new writ for comments that I made on the BBC Radio 4 Today Programme in November 2009 when I spoke about NMT's libel action against me. That threat was made against me not the BBC. When my solicitor asked NMT's solicitor if a third case had been started against me, he refused to answer. That deliberate refusal just adds to the pressure on me.

The libel case has cost me a lot of money and an enormous amount of time. NMT's bullying has made life difficult for my family and me.



As an example a letter was emailed to me with a Claim Form sealed by the Court “by way of notice rather than service”. It was sent to me as a non-lawyer without explanation. It was sent at 17.09 on the last working day before Christmas 2007. I was unable to get legal advice from my professional body for 2 weeks. For two weeks, I had no idea that it had no legal standing until served. That did not retrospectively improve my or my wife’s Christmas. In fact NMT had 4 months to serve it. They served it at the last possible moment in April 2008. Nearly 4 months of worrying from Christmas to Easter. How did issuing a Claim Form but not serving it help NMT’s reputation?

Since then the case has dragged on and on very slowly, but it has involved an enormous amount of paper work. For example, my Defence to NMT’s Claim is 95 pages. NMT’s Reply is 55 pages. Sorting out the thousands of pages of documents has consumed every weekend and nearly every day of annual leave in the last three years. For example, I had to take two weeks annual leave just to recheck the 95 pages of my Defence. The latest hearing is for “security for costs”, to ensure that NMT pay money into the court so my costs can be paid when I win (as I am sure I should). Otherwise, I might find that I win and have difficulty getting the company, whose share price is now around \$0.20, to pay my costs.

The case also cost me £100,000 before my solicitor (Mark Lewis) and barrister (Alastair Wilson QC) kindly agreed to take my case on a Conditional Fee Agreement (no win, no fee). Since then the costs have escalated to over £250,000. The independent estimate is that should this go to court, my costs are likely to exceed £3.5 million. There is no guarantee that they will get paid even if I win.

It is said that English defamation laws are weighted in favour of the Claimant, and some lawyers act for Claimants in a libel case on a CFA, getting up to double the costs. For lawyers to act for a Defendant in a libel case on a CFA is very rare, because of the high risk of losing and ending up with no money after a lot of work. I am therefore very grateful to Mark Lewis and Alastair Wilson, who are acting for me because they consider the issues here so important for medicine and science. If they had not agreed to act on a CFA, I risked being bankrupted or fighting the case on my own as a litigant in person. Reading cases rather than treating patients.

I have no option but to continue to fight the case, because there is a moral imperative that medical researchers ensure that the data is accurately and fully published. The reasons are: 1. The ethical agreement between doctors and patients who are subjects in the research involves an assurance that the data would be accurately reported. 2. If there is inaccurate or incomplete reporting, patients entering future trials based on our reported findings may be put at risk. The GMC has clear guidance on what a doctor should do in this situation. My Defences to NMT’s case are justification (that what I said is true) and qualified privilege (that what I said was to an audience of people who were entitled to know).

In addition to fighting the libel case, I have had to spend a considerable amount of time getting the journal, *Circulation*, to publish a major correction and data supplement. Also, the GMC is investigating the conduct of the doctors who acted as the guarantors of the paper in *Circulation*, because it would seem that they published an article that they knew or should have known was false, because another member of the steering committee and I told them it was false and the subsequent correction proves that it was false. I therefore face a costly libel action for fulfilling my ethical responsibilities to ensure that published research is accurate.

From my experience I believe that scientists and doctors are under threat of a gagging libel action whenever they question the messages that device and drug manufacturers want put across. Medical and scientific advances will be delayed and the public and patients will be put at risk while the defamation laws are used to stop scientists speaking out. Doctors and scientists need the protection of a cheap and easy “public interest defence” so they do not have to make the choice between their wealth and their patients’ health.





## What Needs to Happen from the Media's Perspective?

Professor Roy Greenslade, The Guardian & City University London

When I was asked to make this contribution I tried to recall exactly when I first railed against the British law of libel and realised it was way back in 1964, not too long after the beginning of my career.

I wrote something very rude about Alderman Ted Ball, Mayor of Barking, who has since departed this earth. He was a nice enough man, but he was thin-skinned and, to be frank, rather pompous. At a heated meeting in the town hall, attended by his wife, Maud, also an alderman, my editor and myself, he demanded that I apologise to him in the following week's paper.

I refused. He said he would sue. My editor asked if we could retire for a moment and, in the corridor, he told me that we had no option but to give in. The Barking Advertiser's parent company, the Chelmsford-based Essex Weekly News, could not afford to defend an action.

There was, incidentally, no question of us taking legal advice (because that would cost money too). He said: we must avoid getting involved with The Law, so we spent the next half hour haggling with Ted and Maud over a form of words for the embarrassing apology. It was an early lesson in the chilling effect of libel law.

It was not, of course, my last. As a reporter, sub-editor, editor, commentator, blogger and trial witness, I have had regular reminders in the past 46 years of the legal curb on free speech in Britain. Like all journalists, I have found it necessary to compromise, to add caveats and to deal in euphemisms. To paraphrase Queen Mary: "When I am dead and opened, you will find 'alleged' inscribed on my heart."

Along the way, however, the compromises, caveats and euphemisms have sometimes failed me. I have made so-called 'mistakes' that have led to the payment of damages, on occasion for wholly trivial reasons. In one notorious instance, at the Sunday Times, I witnessed the paper being forced to give up a possibly winnable case because of insurance problems, a clear indication of one iniquitous feature of the libel law, its absurd expense. Money, not truth and justice, dictated the outcome before judge or jury could decide on the case's merits or otherwise.

I have never quite come to terms with the publishers of my biography of Robert Maxwell – himself, the supreme serial abuser of libel laws – having to pay a politician £10,000 because, in illustrating the fact that he had been unfairly treated by Maxwell, and one of Maxwell's papers, I repeated the libel and he dared to sue. "Sorry, Roy," he said when we next met. "I know you were sympathetic. But..." He left that 'but' hanging, but I knew what he meant. There was money to be made and it was too good an opportunity to pass up.

Before I get carried away with personal anecdotes, I must get down to the business in hand... though I must add one precursor – I do believe that people have a right to protect their good name. It is wrong to defame people and it can be terrible to be defamed. It can affect your status within society, it can threaten your business, it can ruin your job prospects.

Now, although I have taken a pledge never to sue for libel, I concede that there might be situations that could lead to my reneging on my promise. A couple of hypothetical examples: if someone called me a rapist, or called me an anti-Semite, and went on doing so until other people started doing the same – thereby leading to hosts of people thinking that my failure to sue was proof of my guilt – then I cannot see how I wouldn't call in the lawyers.

So it is not the case in what I'm about to propose that I wish to deprive people of the right to protect their reputations. It is, as always with the law, a matter of proportion and a matter of balance. I think the law, and judicial interpretation of the law, has allowed the pendulum to swing too far against freedom of expression and freedom of the press.



In sum, before I get to the detail, what I want to see is a law that recognises the existence of public interest, and that defines it sensibly; a law that allows for fair comment and defines that sensibly too; a law that does not grant organisations and corporations the same rights as individuals; a law that does not mean that the defendant is assumed to be guilty until innocence is proven; and, even more idealistic, a law that recognises there are better ways to solve disputes than to go to trial.

So I'm deep now into reframing territory. This is not a legal opinion, of course. I leave that to lawyers. I am merely expressing a desire from the standpoint of a journalist, a journalist who believes in the need for, and power of, genuinely responsible journalism. At heart, it's about the enhancement of press freedom, a freedom to act in the public interest, for the public good, in order to promote and defend democracy.

But I am happy to concede that my aims do coincide with those of non-journalists who need to be freed from constraints on their freedom too. So I want to underline that I have common cause with scientists and academics like Simon Singh and Peter Wilmschurst – and even novelists, such as my friend Jake Arnott – because they suffer in similar fashion to journalists.

And my reframing of the libel law – my shopping list of reforms if you like – is probably very like theirs. So here goes... Imagine me pushing a shopping trolley through the Ministry of Justice in Petty France and reading from a list of wants. Like all such lists, they're in no particular order, but together there are the

1. End the disgraceful incentive of profiteering from a law that rewards people who sue for libel more favourably than those who lose a limb. That can be achieved by placing a cap on damages.
2. Do everything possible to save on the enormous costs of going to trial. That can be achieved by enacting legislation that forces the parties into a tribunal-style negotiation as speedily as possible after the initial complaint has been made.
3. Sticking with the subject of money, do everything possible to minimise legal expenses. That can be achieved by capping costs. And on the related, and controversial, matter of contingency fee arrangements, turn off the tap by curbing success fees.

The money business is very, very important. Local and regional newspapers are still hugely important

#### **Now for the law itself...**

4. Reverse the burden of proof that currently turns the defendant into the guilty party. It should be the claimant's responsibility to prove that there has been genuine hurt, that there has been falsity, that there has been unfairness. I accept that this may well prove the hardest item to get to the checkout.
5. Strengthen the defence of public interest. I accept that judges struggle with the interpretation of what constitutes public interest. But newspaper editors have managed to come up with a workable definition. It is time to enshrine some kind of definition in law with coherent criteria that can be administered, dare I say it, with common sense.
6. Strengthen the defence of fair comment. I remember being appalled at a judgement some years ago against a Daily Mail sports writer who had taken a public figure to task for a supposed failure to invest in a football team. It was tough stuff. But it didn't deserve the payment of £100,000 in damages. Fair comment should mean the right to be rude and aggressive.
7. Stop this business of libel tourism at a stroke. This can be achieved by preventing anyone suing unless they can show that a reasonable number of people within the British jurisdiction have been able to read the publication.
8. Don't treat companies like individuals. I accept that corporate bodies have reputations and therefore that they can suffer when those reputations are trashed. Indeed, the suffering is usually very obvious because it can affect deals and share prices. But we journalists must have a right to hold big business to account and there must be some latitude. Unless it can be shown that the reporting was malicious, the right for large companies to sue should be curtailed.



Oh yes, one final item. I nearly missed it because it was buried at the back of the trolley under the obligatory journalistic case of wine. Please, please, let's remove the need to ever mention the Duke of Brunswick in polite society again. That rule about multiple publication is so plainly out-dated and iniquitous, it should have been excised years ago.

But saying that reminds me why, despite the apparent wish by the last government to enact reforms and the supposed desire of this government to do the same, I have so little faith in any of these sensible measures actually coming to fruition. I have been saying the same thing for at least 20 years. Indeed, I said it soon after that meeting in Barking town hall with Ted and Maud Ball in 1964, which may well have been fitting.

After all, I thought the law was barking mad then. Or perhaps I said it was balls!

Whatever the case, there is still an urgent need to do something radical with a law that is out of step with those in most civilised countries and much too close to laws that exist in very uncivilised countries indeed.





## Time for a Bigger Frame?

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The renewed debate about libel law is healthy and timely, but this paper will argue that the focus of reform is too narrow. Defences to libel have developed a great deal in the last decade or so.

This is particularly true of the responsible journalism and public interest defences of qualified privilege, and its two offshoots, the Reynolds 'responsible journalism' defence and reportage.

Fair comment is also on the move, as seen in the Simon Singh case. Lord Lester's Bill and the forthcoming White Paper have the potential to adapt and codify the common law defences to libel, with potential advantages for the media and the public. There would also be advantages for libel claimants, since uncertain laws tend only to help lawyers. But I would argue that it is time to step back from the current focus and look with fresh eyes at the whole of media law.

Rather than focusing upon how libel law should be reformed or reframed, it is time to assess whether defences based on responsible journalism, freedom of expression, public interest and the public right to know could apply across much, if not all, of media law. Lord Lester's proposed defences of responsible publication on a matter of public interest, and of honest opinion, could potentially have wider implication; the debate should take into account the entire breadth of media law, since there are many other situations in which the media may claim to be acting responsibly in the public interest.

Thus there are some key questions for consideration:

- Do we need a general defence of responsible journalism or public interest publication throughout media law?
- Is the current debate about libel law too narrow?
- Does defamation law need to be placed in a wider human rights perspective?
- Has the rapid development of domestic and European human rights law changed the nature of media law?

### The case for reform

Media law has been undergoing rapid change since the Human Rights Act 1998 came into force just over ten years ago. It has metamorphosed, from a collection of law based in tort, equity, criminal law and assorted statutes, into a sophisticated human rights battleground.

If we look at each of the main fields within media law, public interest and the public right to know may allow (in differing ways) defences or exceptions from freestanding privacy claims, both private and public breach of confidence, contempt of court, defamation, obscenity, as long as the media stay within responsible practices and boundaries. But some fields still lack any such defence, such as the Official Secrets Acts, with clear human rights implications for the public right to know.

'Public good' defences are also prevalent, but more limited in effect. A general defence would create a clearer and more streamlined position than at present, enhancing Art 10 enforcement, but the counter-arguments (including privacy and the need for state secrecy) should also be examined.



As a very brief and partial overview<sup>1</sup>, which will be examined in far greater depth in the later version of this paper, public interest and responsible journalism defences are available to differing extents in the following fields of media law:

**Defamation:** the relevant defences include qualified privilege, fair comment, Reynolds and reportage. Each of these has been examined in great detail elsewhere, and would be a defence under Lord Lester's Bill. A qualified privilege defence only applies if statement is made without malice. Any communication has qualified privilege if it is made to a person who has a legal, social or moral duty to receive and act upon it. The criteria of responsible journalism listed by Lord Nicholls in Reynolds are the basis of Lord Lester's proposed defence of acting responsibly on a matter of public interest. A new defence of reportage is emerging in recent cases, starting with Reynolds v Times Newspapers<sup>2</sup> and protects responsible journalism. It protects "the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other kind of dispute". Since Jameel v Wall Street Journal Europe<sup>3</sup>, publication of information which the public 'has a right to know' has qualified privilege even if the information may turn out to be false, as long as it is made in good faith and without malice, after appropriate checking, and is part of a discussion of matters of serious public concern. The Flood v Times case (see below) has added confusion to this category of defences, and certainly has not aided clarity or consistency in the media's position in law. Fair comment is also based on public interest concerns, since it protects honest expressions of opinion, based on facts, and made on matters of public concern: "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment."<sup>4</sup>

**Breach of confidence/privacy:** such matters as public interest and responsible conduct are an important part of the balancing test between free speech and reasonable expectation of privacy, plus public interest eg whistle-blowing, and when the information is already in the public domain. There is an implicit responsible journalism defence as seen in the John Terry case<sup>5</sup> and in Barclays Bank Plc v Guardian News and Media Ltd, which demonstrates that domestic cases are starting to use the language of responsible journalism even when the issue is not libel/defamation: '...Freedom of speech is a precious value in a democratic society that the courts must strive to protect and promote.<sup>3</sup> However, that does not mean that journalists should have complete freedom to publish in full confidential documents leaked in breach of a fiduciary duty, pursuant to the exercise of the right to freedom of expression. Responsible journalists must themselves consider whether publication of personal details that they may be in possession of, even about the affairs of corporations not alleged to have done any wrongdoing in the sense of violation of the laws, is appropriate. The more that is sought to be published, the more sensitive or confidential the data is, the self-direction of a responsible journalist is to consider whether the justification of full verbatim quotation as part of the exercise of freedom of expression is made out with particularity to the form of publication that is intended.'<sup>6</sup>

**Contempt of court:** this category of offences has limited defences based on public interest (incidental discussion in publication on matter of public concern; or fair and accurate contemporaneous reporting)

**Reporting restrictions:** the public interest in fair and accurate court reporting is part of the balancing act, as seen in Gray v UVW<sup>7</sup>

**Copyright:** there are some relevant defences based on public interest, permitted acts, and fair dealing/use.

**Official secrecy:** a defence based on the public interest is very topical (for example see Nick Clegg's January speech re restoring the whistle-blowing defence to official secrecy cases); there is also a public

<sup>1</sup> With limitations based on time and space available, as well as relevance to the current argument

<sup>2</sup> 2001] 2 AC 127

<sup>3</sup> [2006] UKHL 44

<sup>4</sup> Lord Denning in London Artistes v Littler [1969] QB 375

<sup>5</sup> [2010] EWHC 119 (QB)

<sup>6</sup> [2009] EWHC 591 (QB) at 29-30

<sup>7</sup> 2010] EWHC 2367 (QB)



interest basis to the necessity defence, but that defence is weak and rare (as seen in the Shayler case). It is a particularly opportune time for reconsideration of the scope of defences to official secrecy, since it appears from cases such as *Tarsasag v Hungary*<sup>8</sup> that there is an emerging ECHR right of access to government information, in contrast to previous rulings of the Court<sup>9</sup>. The *Tarsasag* case contains statements which are very supportive of free speech and the public right to know, as long as the media are acting responsibly. English cases have also shown some movement in the field of access to information<sup>10</sup>. Such developments make the case for consistency-checking even stronger.

**Obscenity:** public good defence.

**Anonymity of sources:** this area of law has a public interest basis, and human rights cases as the driving force, as seen in *Financial Times v UK*<sup>11</sup> and *Goodwin v UK* (above).

As a further complication, the 'separate' fields of media law have, in some situations, begun to converge or overlap. For example, the emergence of 'false' privacy claims, where the 'private' information which has been published is untrue, has created an overlap between defamation and privacy law.

Again, this adds weight to call for going back to first principles in assessing which defences the media should have, and the scope of such defences throughout media law. As seen in the Privy Council case of *Seaga v Harper*<sup>12</sup>, a responsible publication defence could apply throughout defamation law when the defendant has made an untrue allegation, regardless of the identity of the defendant.

Logically, it should therefore also apply with breach of confidence where the defendant has made the same allegation but it turns out to be true.

### The case for rights for responsible media

The case law from the European Court of Human Rights in Strasbourg has long held that the media have a relatively clear bundle of rights, carved out of their position as logical defender of the public right to receive information and ideas. These rights rarely depend on whether it is a defamation action which is under discussion; the battle between free speech and private life, with the latter including reputation, depends on the interpretation of Articles 10 and 8, not on the form of action brought in the domestic courts.

Human rights law does not necessarily see libel as separate from other privacy-related Art 8 cases: for example the European Court of Human Rights judgment in *Petrenco v Moldova*<sup>13</sup> refers interchangeably to cases on the right to reputation and to those on reasonable expectation of privacy, such as *Von Hannover v Germany* (no.1)<sup>14</sup>. English law regards those as separate issues, with separate defences at present.

The same core values of responsible journalism have been repeated in countless cases in the European Court of Human Rights. The following are examples drawn from some of the classic cases, but each statement has since been remade dozens of times.

Although the media must not overstep the boundaries which the court has drawn to protect the rights and reputations of others, when information and ideas are of public interest 'not only does the press have the task of imparting such information and ideas; the public also has the right to receive them.'<sup>15</sup>

The media acts as a public watchdog, and it is primarily for them, not the courts, to decide which reporting techniques are appropriate to that task<sup>16</sup>.

<sup>9</sup> based on the restrictive view taken in *Leander v Sweden* [1987] 9 EHRR 433, that "The Court observes that the right of freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to them. Article 10 does not, in the circumstances such as those of the present case, confer on an individual a right of access to a register containing information about his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

<sup>10</sup> Eg *Re Guardian News and Media Limited* [2010] 2 WLR 325

<sup>11</sup> [2010] E.M.L.R. 21

<sup>12</sup> [2008] UKPC 9

<sup>13</sup> [2010] 30<sup>th</sup> March

<sup>14</sup> [2004] 40 EHRR 1

<sup>15</sup> *Jersild v Denmark* [1994] 19 EHRR 1



Freedom of expression extends to words which may shock, offend, disturb or disgust<sup>17</sup>.

Politicians, by definition, are open to greater justifiable scrutiny and criticism by the media and the public, and there is some leeway for exaggeration<sup>18</sup>; '[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance'<sup>19</sup>.

Interferences with free speech, such as forcing journalists to name their sources, will be subjected to close examination to check whether they are disproportionate to their aims<sup>20</sup>.

Mere dissemination of the ideas or words of others, without adopting them, will rarely be unjustified<sup>21</sup>.

Article 10 of the European Convention on Human Rights protects: good faith reporting of matters of public interest, based on accurate/verified factual information<sup>22</sup> and neutral reporting;

Restraining fair reporting and discussion of matters of serious public concern will normally violate Article 10<sup>23</sup>.

However, the European Court of Human Rights now clearly recognises that the right to reputation is protected by Article 8<sup>24</sup>, and hence a delicate balance must be maintained. '[A] person's status as a politician or other public figure does not remove the need for a sufficient factual basis for statements which damage his reputation, even where such statements are considered to be value judgments, and not statements of fact'<sup>25</sup>

It is submitted that it is time to consider the impact of this bundle of rights and the competing reputation and privacy claims throughout media law, not merely in the context of defamation.

### **Contrasts and a summary of argument**

The responsible journalism defences to defamation are already well-developed and have been considered in some detail by the courts. However there are notable gaps in both the existence of such defences and the human rights argument in some other fields of media law, such as official secrecy. The lack of a public interest or responsible journalism defence may well be justified in some situations, but there should at least be a principled and reasoned evaluation of where, when and why.

It is time for a broader review of media law with a human rights imperative: rethinking media rights and defences, which should at least investigate whether and to what extent there should be consistency of approach. A longer version of this paper will look at the possible content of responsible journalism and the range of approaches to balancing human rights in the relevant UK and Strasbourg case law. It will be available shortly.

If a journalist has acted responsibly, with neutral reporting and any appropriate fact checking, on any public interest issue, then arguably it should not matter which area of media law the facts happen to engage.

As an example, if a scientist works on a research report and wants to publish it then, depending on factors such as whether his employer is the State or a private company, the size and venue of the publication, and on whether the employer sees the threat as a true but confidential allegation, a false allegation, or a breach of intellectual property rights, different law and therefore different defences apply.

<sup>16</sup> *ibid*

<sup>17</sup> *Oberschlick v Austria* [1995] 21 EHRR 1

<sup>18</sup> *ibid*

<sup>19</sup> *Lingens v Austria* [1986] 8 EHRR 407

<sup>20</sup> *Goodwin v UK* [1996] 22 EHRR 123

<sup>21</sup> *Jersild*, above

<sup>22</sup> *Polanco Torres v Spain* [2010] 21<sup>st</sup> September, appears to lessen the checking requirements within responsible journalism, just at the same time as the Court of Appeal in *Flood v Times* [2010] EWCA Civ 804, appears to restrict the Reynolds responsible journalism defence and narrow the scope of reportage. Again, countervailing court tendencies call for a thorough review of media defences under English law.

<sup>23</sup> *Thorgeir Thorgeirson v Iceland* [1992] 14 EHRR 843

<sup>24</sup> *eg Lindon v France* [2007] ECHR 21279/02, 36448/02 (22 October 2007), *Petrenco v Moldova*, 30<sup>th</sup> March 2010

<sup>25</sup> *ibid*



It is submitted that it is time to de-clutter the law; time for a rational re-evaluation of the legal position of the media, with consideration of how best to support the public right to know and the media as a public watchdog. I have argued elsewhere<sup>26</sup> for consistency of approach where the same legal issue crops up in related fields of law, and the longer version of the current paper will examine critically the force of such arguments in media law.

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<sup>26</sup> 'The case for a rational reconstruction of consent in criminal law', *The Modern Law Review* Volume 70, Issue 2, pages 225–249, March 2007, with Catherine Elliott





## Reframing the Time it takes to get to Trial

Dominic Crossley, Partner, Collyer Bristow

Libel law has endured quite an assault over the last 18 months. Enormous academic, media and political resources have been occupied in illustrating its perceived weakness and dangers. So far, nothing much has changed, which is a relief to those who by their practicing of libel law could see the folly and self interest in much of the criticism and knee-jerk counter-measures. But the debate presents opportunities as well as challenges and there is no doubt in my mind that aspects of libel litigation would benefit by some reform.

Most of the energy in the libel reform debate has naturally centred on the substantive law, most significantly in Lord Lester's draft defamation bill. The procedural rules by which libel actions are resolved would struggle to attract the interest of a Sunday Times editorial or a witty sound-bite from comedian Dara O'Briain, but it is perhaps the area in which sensible reform could have the most positive impact and, dare I say, the least resistance.

The Civil Procedure Rules ("CPR") exist to govern the progress of libel, and all other type of civil litigation from the day the claim is issued to trial. The CPR opens with its laudable "overriding objectives" one of which is (CPR 1.1 (2) d) "ensuring that it [the case] is dealt with expeditiously and fairly". Other objectives include proportionality and saving expense.

Are these objectives met in the case of libel actions or is for example the objective of fairness given such weight that expeditiousness is of little consideration? In my view it is a serious consideration. The CPR is subject to Article 6 of the European Convention on Human Rights which states "In the determination of his civil rights and objections or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time".

For all the good intentions of the CPR (and Article 6) the perception is that litigation remains

blighted by excessive and disproportionate expense and delay. It is a process, whether your complaint is libel or any other, that most would do well to avoid. Of the "twin evils" of litigation procedure in libel actions it is the cost aspect (being considered in another paper) that attracts the greatest attention. Certainly, fighting a libel action to trial is an oppressively expensive process and the existence of conditional fees and insurance policies have added spice to that particular debate. But the time it takes for a libel action to come to trial also warrants careful consideration and is more amenable to reform. My instinct is that libel litigation moves unnecessarily slowly and would lend itself to a shorter process to the benefit of both sides of the case.

In this paper I will attempt to address the issue of reframing the time it takes to get to a libel trial by reference to the following questions:

- How long do libel actions currently take?
- Is this too long? What are the risks and benefits of speeding the process up?
- In what ways could the time be cut?

In answer to the first question (and with thanks to Annsley Ward of Collyer Bristow LLP) I attach to this paper a table of libel cases which were concluded by judgment at trial, summary judgment/summary disposal (CPR Part 24/Section 8 of the 1996 Defamation Act) or strike out in 2008, 2009 and 2010 (thus far). I must stress that this table is a work in progress and I would encourage practitioners to assist to enable us to fill in some of the gaps, given the difficulty of obtaining this information from the Court.



Whilst my brief from City University concerns trials only, the broader point concerns the speed in which libel actions can be determined and it would be wrong to neglect the fact that the process does allow for earlier determination than trial where one side considers their case is sufficiently strong to overcome the stricter test of a pre-trial application for summary determination. Moreover it is the date of the judgment that is critical, which can be a significant period after the hearing, rather than the date of the hearing itself.

Section 8 of the 1996 Act was introduced at the instigation of Lord Hoffmann specifically to provide for faster determination of less serious cases. To apply under section 8 the claimant has to limit his/her claim to £10,000 and be confident of overcoming the hurdle of showing that the Defence has no realistic prospect of success. It is also possible for a Judge to decide that section 8 should apply even when no application is made by the claimant. In practice a section 8 application is rarely an attractive route for a claimant who is naturally likely to be reluctant to impose a cap on what he/she can recover whilst facing a hefty costs order if he/she fails in the application even if successful later at trial. The existence of CPR Part 24 provides for the benefit of a summary judgment application, applying a similar test, but allowing a claimant to recover the same level of damages he/she would be entitled to a trial. It is easy to see why Part 24 would be the more attractive route. But a Part 24 application will not usually result in a damages award. If the application is successful damages will normally be determined at a later hearing.

Whatever the route; the time period of most interest to this paper is the time between the date the claim was issued and the date that the case is finally decided by the Court. This is the period in which the dispute comes within the Court's case management grasp and this is the figure that can be given to parties when they ask their lawyers (as they always do) how long a case is likely to take – should it not settle. Whilst there remains some gaps to be filled, according to the information currently within the table the average time for cases to get to a final determination, where the judgment was within the years 2008 – 2010 (inclusive) is just over 17 months – almost a year and a half.

As would be expected, the summary judgment/strike out applications provide for cases that are resolved sooner than those cases that are resolved by full trial. But the time it takes for a case to reach this stage varies substantially from 3 months (*Ali v Associated Newspapers* 2010 EWHC 100 (QB)) to 28 months (*Kaschke v Gray* 2010 EWHC 1907 (QB)) and it may well be that in many of the judgments in favour of the claimant, quantum remains in issue. Although this may not bear out from the analysis of these two cases, the correct time for a strike-out or summary judgment application can vary substantially from case to case. In some cases it may be that a party will wait for the exchange of witness statements and evidential documents before he or she is confident of making this application, in others it may be clear from the opposition's first pleadings. In any event it is difficult to understand how the case of *Kaschke* (which concerned political blogs and was one of two libel actions brought by this claimant) could have run for 28 months before this application was made.

There are of course very few full libel trials. The three most recent full trials are *Hughes v Risbridger* (2010 EWHC 491 (QB)) *Berezovsky v Russian Television* (10 March 2010 EWHC 476 (QB)) and *Gary Flood v Times Newspapers* (16 October 2009 EWHC 2375 (QB)). The time these cases took to be completed (at first instance) is 16, 34 months and 29 months respectively. Of course Flood was appealed and the Court of Appeal decided in the Claimant's favour in July of this year, over 4 years after the date of publication. I understand that the parties will hear shortly whether the Times' application for permission to appeal to the Supreme Court will be granted. Detective Flood must wonder what he got himself into. In any event, dealing with the trials alone (therefore removing those determined by earlier applications) the average time of those cases which appear on our table from issue to judgment is 19 months.

Another time period of interest in the cases listed in the table is the time it took for the claim to be issued from the date of publication. The limitation period for defamation is 12 months (s5 Defamation Act 1998 amending s4A of the Limitation Act 1980) from the date of publication. Many cases, cases against newspapers for example, involve publications where there will be simultaneous publication on the internet so (as it stands) the limitation period will continue to be extended by 12 months for as long as the material remains published. Notwithstanding that the limitation period no longer always exerts time pressure it is notable how few of the cases in the table were issued within 6 months of publication (9 out of 24). This may be due to the application of the Pre Action Protocols and the procedure applicable to cases with "after the event" insurance policies but whatever the reason, assuming that the claimant was aware of the piece at the time of publication or shortly afterwards, he or she should be well prepared by the time the claim is issued.



Pre-Action Protocols provide a framework for the conduct of the parties before the claim is issued. A specific pre-action protocol applies to defamation claims. The protocol's aim includes "setting a timetable for the exchange of information relevant to the dispute" but the language relating to the time periods give it very little bite and this seems to be borne out in the nine months the cases on our table take to be issued. A better analysis of the time it takes claimants to issue proceedings would require an assessment of all libel claim forms issued, not just those which proceed to a final hearing. Those included in the table, because they eventually required judicial determination, are likely to represent the more difficult of cases.

Also of associated interest is the length of time of the hearings themselves. It is a libel trial that holds the record for the longest trial in UK legal history at 313 days (*McDonalds Corp v Steel*

[2000] 1 WLR 618). No trials appear from our study appear to have taken longer than 10 days to complete and many of them not nearly as long with three two-day trials in 2008. Even though the case of *Flood* took 29 months of litigation it took only 4 days to be tried by Mr Justice Tugendhat. Once the parties and the cases are physically in court, the time taken to decide them appears to be relatively short. This may be because more trials are being heard without juries, allowing the advocate to spend less time explaining his or her client's case and the substantive law than they would with an expert judge. The Court of Appeal decision in *Fiddes* has made the existence of a Jury in a libel case even less likely, thus quicker trials and quicker and easier listing arrangements should be the norm.

Moving on to address the second of the questions I posed at the outset, why are these timescales important and what do they tell us? Clearly the most recent cases have taken an extremely long time to get to trial and even the average, taking into account the cases determined at an earlier hearing, suggests cases are moving ponderously through the litigation process. One of the key introductions of the CPR was for the Court to actively case manage so as to establish and police the steps up to trial. In reality the Court rarely intervenes without the prompt of an aggrieved party and the timetables become increasingly fluid. But the timetable is not necessarily a complex one. It is worth reminding ourselves that after the pre-action process there are only 5 primary phases in the litigation to enable the parties to prepare for trial:

- Claim form and Particulars of Claim (sets out the claim and gets the case started)
- Defence (should follow within 28 days, but more often takes twice that time)
- Reply (not a compulsory step but usual in libel)
- Exchange of documents (often a battleground between solicitors)
- Exchange of witness statements (not all of which may necessarily be used at trial)

As is borne out by the length of the libel trials, libel cases are not usually particularly document heavy (compared to most High Court commercial litigation for example) nor are there usually a very large number of witnesses so stages 4 and 5 above should not be unusually onerous for the parties and their solicitors. How can this process take 34 months? Are such time frames compliant with Article 6 and Article 8 of the Convention?

The primary reason for the longer cases may lie in the number and length of interim hearings that can take place in libel actions. An analysis of the number and type of interim applications that take place in libel actions would require a further study. It may however be instructive to have a brief look at a recent case that may be demonstrative of how extensive and hard-fought the process can become. The case of *Fiddes v Channel 4* was due to be tried on 14 June this year. The case was settled very shortly before trial and shortly after the Court of Appeal's refusal to overturn Mr Justice Tugendhat's decision that the case could be heard by a Judge without a Jury. Although I am unaware of the terms of the settlement it is notable that it was reported in the legal press (*The Lawyer* 11 October 2010) that Mr Fiddes' solicitors were suing him for the £1.3 million in fees that he had incurred in this case.



The Court of Appeal in commenting on the Judge's familiarity with the case referred to the 4 previous judgments (therefore in addition to the judgment that was the subject of the appeal) he had given on contested interlocutory issues before his judgment on the mode of trial. These contested applications, which were presumably in addition to the usual case management hearings, must have been a significant part of the staggering costs of this case, with Channel 4's costs being reportedly even higher than its opposition at £1.7 million. So even with five basic steps to trial, each step can become the subject of bitterly fought, expensive and onerous applications to the Court.

It is perhaps the relationship between the length of time a case is in progress and its cost that make the examination of the procedure (and its potential reform) most relevant. Whilst it is too simplistic to state that shorter cases are always cheaper, there is an inevitable logic that the less time parties are instructing their lawyers, the lesser the bill at the end. All lawyers will recognise that delays between one procedural step and another become absorbed with correspondence of doubtful relevance to the substantive case but are deemed justified in an effort to gain a strategic advantage.

Whether by exchange of inflammatory correspondence or interim applications, there is some inevitability that libel actions are going to be more hard fought and emotive than other types of litigation more concerned with the financial outcome. Whilst this may be inevitable it is not necessarily beneficial for the court to provide for this conduct. I will touch on suggestions for improvements to the procedure later in this paper but in doing so it must be recognised that for libel actions to remain fair and effective an early analysis by way of interim hearings for rulings on issues such as the meaning of the words complained of (CPR PD 53 paragraph 4 (1)) can be of huge benefit. The vast number of libel claims issued settle and it is often only after these early battles that one or other of the parties recognises the benefits of a negotiated resolution.

Putting aside the cost and associated inconvenience of libel litigation, what makes it particularly appropriate for quicker resolution? In the introduction to the pre-action protocol for defamation it states the following: "There are important features which distinguish defamation claims from other areas of civil litigation... In particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only 1 year, and almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation." It is described in David Price, Korieh Duodu and Nicola Cain's "Defamation, Law, Procedure and Practice as follows: "Delay can be particularly damaging in defamation because a satisfactory outcome for a claimant can undo at least part of the harm caused by a defamatory publication. It is therefore all the more important that a defamation claim is determined swiftly." I would go further than this; that delay can render many cases pointless. An apology or correction that follows shortly after the publication of the libel is usually a far better outcome for a claimant than a judgment years later even if that judgment includes a substantial sum in damages. Likewise a claimant may want his/her day in court whilst the sting of the allegation is fresh, but often his/her original motivation can wane as the case trundles on and the focus turns to the need to recover the costs of the case he or she started. Given that a claimant should want a swift outcome, surely a defendant can have no objection if it means a swifter and less expensive case. A confident Defendant should also want to demonstrate the truth or lawfulness of the challenged publication at the earliest opportunity.

The much criticised PCC (established by newspapers as a preferred alternative to defending libel actions) state that they aim to deal with complaints in an average of 35 working days, promising to "explain any delays" in the process. The court too has recognised the benefit of speed in libel actions. One of the reasons a claimant's damages are discounted when they choose to make an offer of amends rather than defend a case is because of the benefit to a claimant of a quick resolution. Eady J in *Jimmy Nail v News Group Newspapers et al* (2004 EWHC 647 (QB)): "Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will be significantly reduced".

But if libel actions are to be made quicker would justice and fairness be sacrificed in cases which can often relate to hugely significant allegations? Aside from the seriousness of the allegations and the importance of the issues of the parties there are also some very complex and uncertain legal issues to grapple with; the defences of fair comment and Reynolds qualified privilege are constantly evolving and involve ethereal issues such as public interest. For cases to be dealt with fairly the parties must be able to apply to the court to ensure proper disclosure of documents (an issue that often causes additional acrimony).



But would these arguments suffer if made within a shorter timeframe? Recent cases such as Flood and BCA v Singh (2010 EWCA Civ 350) show that even when given detailed argument by expert silks and specialist judges given unlimited time the outcome at trial on these issues can be found wanting when examined again by the Lord Justices of Appeal.

Slower cases may not guarantee more secure outcomes but are there other benefits? Playing the devil's advocate against my argument for speedier trials; perhaps the sheer enormity of libel litigation is actually of its own warped merit. There were 9 trials (and 14 final hearings) in 2009 of the 298 libel claims issued (figures courtesy of Reynolds Porter Chamberlain) that year. So far there have been only 2 trials this year. Such is the motive to settle. Is it conceivable that an expedited trial would actually make the parties less likely to settle? I would hope not. An early trial date should concentrate the minds towards earlier settlements.

Assuming that we do want cases to proceed more quickly to trial (and it is my view that the benefits of lower costs and an earlier opportunity for vindication are persuasive) how would we go about it? It seems a reasonable objective to me to expect all but the extreme cases to be listed for a trial to take place within 12 months of the date of the claim form, and I would have thought that many cases would benefit a trial being listed for within 9 months.

Although the five primary tasks to be completed before trial as set out above should all be capable of being completed in that time (given that the parties should be addressing most of the issues during the pre-action exchanges in any event) there are other factors that may stand in the way of reform. One issue is whether the Court could accommodate this increased speed. A trial date is first considered following receipt of the parties' Allocation Questionnaires, sent out to the parties upon receipt of the Defence. As the Defence may only be completed 2 months after the claim form is issued (and sometimes later) this would not give the listing department at the High Court long to find the space for a trial and an available judge. The three full-time specialist Queen's Bench Judges for media litigation (not just libel) are Victoria Sharpe, Michael Tugendhat and David Eady supported by Richard Parkes, and Charles Gray make availability for trials at shortened notice limited. Speaking to Tim Green (the guru of the Queen's Bench list) I understand that a 5 day libel trial could currently be listed in about 6 months time.

The Allocation Questionnaire also requests the parties' timetables for the directions applicable to the case (principally the last two of the five steps described above). If the parties cannot agree on

the timetable they are set at a case management conference before a Queen's Bench Master usually providing for a listing appointment to take place some time after that. Why can't this process be more prescriptive? At the risk of trying to re-write the rule book in a hastily prepared paper; a simple suggestion may be for the Reply to follow within 21 days of the Defence and the exchange of documents to follow within 28 days of the Reply. The listing appointment to fix the trial date could take place in the days following the service of the Defence. At the same time as listing a trial the parties could list a hearing date (no more than a day and with strict time limits upon advocates' submissions) before the trial judge to deal with all interim issues. My suggestion is that this hearing should take place shortly after the exchange of documents, allowing the judge to make any necessary ruling on issues meaning and deal with disclosure problems that may have arisen and other case management issues so as to ensure that the parties stay on track for trial. The only remaining step between this hearing and trial would be for the exchange of witness statements. All other interim applications (with the possible exception of summary judgment) could be dealt with on the first day of trial. Another benefit of the scarcity of jury trials is that the trial judge can deal with such matters without having to be sensitive to the awaiting jury.

With an expedited procedure as suggested and proper judicial case management, High Court libel litigation should be well capable of being resolved within 9 months. Lord Justice May observed 10 years ago in GKR Karate UK Ltd v Yorkshire Post Newspapers Ltd (No. 1) 2 All ER 951 : "Libel cases generally have historically been notoriously long drawn out and expensive and are especially amenable to the culture of the new procedure code. They need novel and imaginative case management to achieve what has hitherto often not been achieved". Other types of litigation have bespoke rules and active case management to get the process moving quickly. I understand that the position in the Technology and Construction Court is that a case management hearing is listed for within 14 days of filing the acknowledgement of service (which is 14 days after the service of the claim form). One of the issues discussed at this hearing, which is likely to take place before even the defence is served, is the trial date. A similar provision could apply to libel cases.



Perhaps the reforms suggested above are insufficiently imaginative and we should be thinking about different outcomes as well as processes. Lord Alexander Weeden, speaking in the House of Lords debate prior to the 1996 Act, and commenting on the introduction of Lord Hoffmann's Section 8 made the following observation: "In some ways I should have liked to see the Bill

achieve a slightly less modest result than that so clearly described by the noble and learned Lord, Lord Hoffmann. I remember the end of one hot July at the conclusion of a libel case which I had found exacting and which, I think, even my normally ebullient client found exhausting, I wrote an

article for the Independent expressing my view that there should be an opportunity for a plaintiff to go before a judge at an early stage and ask that an apology be ordered by the court. The judge could then call for immediate material from the newspaper and form an impression of whether a correction was required and, if so, in what terms. While the plaintiff would be entitled to ask for costs, the price for that fast-track procedure should be that he could be required to forgo his claim for damages as a term of obtaining an apology. I believe that I then envisaged that a judge would be able to form not only a view of whether a claim was unarguable or certain to succeed, but also a robust prima facie view on a case and seek a commonsense solution" (Hansard HL Deb 08 March 1996 vol 570 cc 576 – 610) . All practitioners of all levels are likely to have a view on what they would like changed based upon bitter experiences, but my view is that claimants ought not to have to sacrifice a remedy for an early determination. It may well be a consequence of earlier trials that damages are lower because vindication is more effective in an earlier judgment, but damages should remain available where appropriate.

Others, including Lord Lester and Tracey Brown of Sense About Science, argue that libel actions should be heard in the County Courts rather than the High Court. I don't know when either Lord Lester or Ms Brown last experienced County Court litigation but my experience of County Courts is that they are the ideal forum if delay is your objective. Whilst I have some sympathy with what Tracey Brown says about the concentration of expensive specialist libel lawyers in London, it is likely that you would find a competent litigator in any UK city to conduct a libel action from their office. They need only attend the High Court for a hearing. It is the expertise of the Judges that would be the biggest loss of moving a case to the County Court. Why not use the expertise we have in the High Court (which is not just in London) to create a better system?

Aside from the Court, there already exists a speedier alternative to court in the form of the PCC. But the PCC is not a viable alternative tribunal to the courts nor could it be the forum for a specialist libel tribunal that others have called for. This is not the place for a wish list of what would be required for such a tribunal but obvious requirements such as independence from the press and proper enforceable remedies would be starting point. Even in the event of such a tribunal, the PCC may still have a role in mediating and communicating with the press which it currently undertakes with some success.

My hope is that High Court litigation is capable of delivering the requirements of resolving cases faster and if so, would remain my preferred forum for a claim. A change in the rules would require further thought and consultation but given the need for simplicity it needn't be a difficult exercise. I look forward to discussing it at the forthcoming symposium. It may be that changing the procedure is simple but the mind-set of protagonists may be more difficult to reframe.





## Reframing Libel – The online perspective

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In most ways, the online media suffers from (or, more neutrally, “experiences”) the same libel laws as the print or broadcast media. The high costs, the reverse burden of proof, and the convoluted laws affect the blogger or online editor just as much as the standard Fleet Street writer. Obviously, however, specific features of online media mean that certain aspects of libel law are more of a threat than they are to those who publish in other media.

The specific problems faced by online publishers include (but are not limited to):

- Vulnerability to forum shopping;
- Liability for “stale” postings under the multiple publication rule;
- Lack of control over posters/contributors; and
- Style (especially in blogging) and meaning.

In addition to this, it is important to consider the purpose of the law of defamation, and what an ideal law of defamation would do. An ideal law of defamation is usually stated as balancing the legitimate, but competing, interests of protection of reputation and freedom of expression. To this might be added a further feature—that it carries out this balancing act in a way manner proportionate to the ends to be achieved.

### Forum Shopping

Willie Sutton, an infamous American bank robber, is said to have responded to a question from a journalist asking him why he robbed banks with the bemused answer “because that’s where the money is”. In a similar way, claimants often look to sue in England because it is generally seen as a respected but claimant-friendly jurisdiction.

Forum shopping has been a feature of English libel litigation for some time. The exact extent of this has become a subject of some controversy but few practitioners will deny that forum shopping does exist. If a foreign newspaper or book has any circulation (albeit minor) in the jurisdiction, the claimant is allowed to sue in respect of the damage caused to their reputation in this jurisdiction by that publication. When deciding whether to allow a claim to proceed in the English courts, the test is whether a “substantial tort” has been committed within the jurisdiction. This is assessed solely with regard to the publication in England rather than assessing whether there is a “substantial” circulation in England in the light of the worldwide publication of the material in question (see *Berezovsky v Michaels* (No 1) [2000] 1 WLR 1004).

Most major newspapers and books published anywhere in the world may well have some sort of a circulation in England – at least in respect of a few copies or hits on a website. This potentially brings them within the reach of the English courts. This risk is amplified for online publications. The internet is of course accessible to people from all around the world. English law does not recognise a presumption of publication for material published on a website (*Al-Amoudi v Brisard* [2007] 1 WLR 113) but publication can often be proved. If the material in question is available in a commercial website with subscribers in the jurisdiction publication will often be inferred, as in *Mardas v New York Times Co & Anor* [2008] EWHC 3135 (QB).

The worst examples of forum shopping can often be dealt with by the application of the decision of the Court of Appeal in *Jameel (Yousef) v Dow Jones* [2005] QB 946. This can be summarised as requiring the court to strike out a claim if the costs and court time required to resolve a case are likely to be out of all proportion to what is at stake in the litigation. Applying this rule, in several cases involving very small scale publication in this jurisdiction, defendants have successfully argued that “the game is not worth the candle” and cases have accordingly been struck out.



Recent decisions have emphasised that this should not involve a simple “numbers game”, as publication of very serious allegations to even a small number of readers might be exceptionally damaging. Instead, the courts have emphasised that issue ought to be looked at in the round in the light of the number of readers of the material in question, the seriousness of the allegation made, and the vindication available to the claimant in the light of the allegations made and defences pleaded. In any event, it does not protect a defendant who has attracted an actionable number of hits in this jurisdiction but where the “centre of gravity” of the publication is clearly elsewhere.

Clause 13 of the current Defamation Bill tackles this point explicitly by providing that where the words complained of have also been published outside of the jurisdiction, an action can only be brought in this jurisdiction if the publication within the jurisdiction can be seen as causing harm, having regard to the extent of publication elsewhere. It is to be hoped that this or similar provisions will be enacted into law.

It should also be said that in these circumstances, the perspective of the online publisher is generally similar to that of traditional publishers. Whilst online publishers are more exposed to forum shoppers than are the print media, the same solution should suit both equally.

### **Multiple Publication Rule**

It is trite law that each publication of defamatory material is a separate tort. Accordingly, each publication – each sale of a newspaper, downloading of a website, or reading of a chapter in a book - is actionable. Whilst the limitation period for libel is 1 year, each republication carries its own 1 year limitation period.

The very nature of internet publication means that this is more of a danger for the online publisher than the publisher of print materials or television programmes. Today’s newspaper is likely to be tomorrow’s wrapping paper, and television shows cannot attract liability unless repeated. Books of course can remain in libraries and shops for years, but can be recalled and pulped. A publisher of traditional material can generally breathe easily if a year has passed since the material was published and proceedings have not been issued.

The online publisher lives in a different world. Material can remain online, in some form, indefinitely unless specific precautions are taken. The online archives of blogs and newspapers may therefore found a claim some time after the article in question was written. Worse still, circumstances might change. An article which is perfectly proper and defensible when written and originally published might become indefensible in the future.

A very real indication of the dangers faced by this was shown in *Flood v Times Newspapers Ltd* [2009] EWHC 2375 (Tugendhat J) and [2010] EWCA 804 (CA).

Flood concerned a report of allegations of corruption against a police sergeant. The report was published in the hard copy and online edition of *The Times* in June 2006, and remained available on *The Times*’ website. This report by *The Times* led the police to convene an internal investigation which fully exonerated the claimant. The results of this investigation were made known to *The Times* in September 2007.

At first instance, Tugendhat J held that the allegations against Sergeant Flood were covered by Reynolds privilege when first published. However, he held that the continued online publication after *The Times* became aware of the claimant’s exoneration did not attract Reynolds privilege.

Both parties appealed Tugendhat J’s decision. The result was a severe defeat for *The Times*. The Court of Appeal held that the article did not attract Reynolds privilege when originally made. Whilst this meant they did not need to consider the effect of the claimant’s exoneration, they nevertheless commented unfavourably upon the defendant’s failure to remove or amend their online article in the light of changing circumstances. They held at [78] that:

“If the original publication of the allegations made against DS Flood in the article on the website had been, as the Judge thought, responsible journalism, once the Report’s conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification.”

This situation must be considered by every publisher of online material. It is standard practice for both blogs and the mainstream media to post archive material online as well as the latest postings, and such archives seem to be kept regardless of whether circumstances change.



Any publisher of archives is well advised to monitor it if possible, or at least to make such material available only with clear disclaimers that circumstances may have changed.

Situations such as this do pose serious problems for any rethinking of the law of defamation. The existing multiple publication rule is highly unattractive in amounting to a de facto removal of the certainty offered by the Limitation Act. However, the effect of outdated material should not be overlooked. Forgotten blog postings and archived articles can be linked to and suddenly attract a mass of traffic years after they were originally published.

It is of course worth emphasising that just because a publisher would be liable for ongoing publication of material does not mean that publication of such material would actually be presumed. As mentioned above, there is no presumption that material available on the internet has actually been published within the jurisdiction. This issue does seem to be missed by some practitioners who simply assert (or accept) that because material has been published, and is available online, publication continues as long as the material is posted.

The importance of this is shown by the decision of Eady J in *Kaschke v Osler* [2010] EWHC 1075 (QB). In this case the claimant sued over an article originally posted on the defendant's blog on 7 April 2007. However, she did not issue the claim form until 28 April 2008—over a year after the initial posting. The defendant accepted that the article in question, being published on a blog with around 2,000 daily readers and having attracted numerous comments, was published on and just after the day it was posted. However, a week later this posting was not on the blog's front page, and 3 weeks later it was only accessible via the blog's archive. The defendant argued that as the claim form was not issued until 1 year and 3 weeks after the words complained of were originally posted, publication could not be inferred and the claimant must prove actual publication. As she had failed to provide any evidence of publication (at least to the extent that it overcame the Jameel principle) the defendant's argument succeeded. At [30] Eady J held that:

“It would be for Ms Kaschke to demonstrate that Mr Osler was responsible for some repeated or

continued publication during the relevant 12 month period. She cannot rely on any presumption to that effect. His evidence (which I see no reason to reject) is that the posting was by 28 April 2007 off the front page and only accessible to an active searcher looking for it in the archive. Furthermore, as he put it, the article was “unpublished” by the time of the reply on 26 May 2007. In those circumstances, it seems to be clear that the law would require Ms Kaschke to identify any specific examples of publication: see e.g. *Al Amoudi v Brisard* [2007] 1 WLR 113. Mr Dougans submits that there was only one comment on the post subsequent to 28 April 2007 (by someone using the name 'Alex'), and this in itself does not demonstrate that the person concerned actually dug out the original posting after that date. It is at least possible, for example, that he relied on memory or, alternatively, was making a comment on earlier comments.”

Such arguments may only occasionally succeed—in *Flood*, for example, there was clear evidence that the material had actually been downloaded after *The Times* knew of *Flood*'s exoneration. Nevertheless, the argument is well worth considering in cases involving archived internet material.

Clause 10 of the Defamation Bill does specifically address the multiple publication rule and provides that the first date upon which material was made available to the public is to be treated as the date of publication of republication of that material, if published by the same person and in the same format. This has to be commended in allowing online publishers a degree of certainty, and removing the need for them to expend scarce resources policing their back catalogue.

Such reforms would, however, leave a claimant such as *Sergeant Flood* in a difficult position. Outdated material would remain online in the archives of reputable news organisations, immune from legal challenge but possibly attracting a vast readership. A claimant might take action against any writer who linked to and re-publicised such outdated material, but this would not change the fact that such material remained online. Were the Defamation Bill to become law in its current form, it is not difficult to imagine such a claimant mounting a challenge to Clause 10 under the Human Rights Act, arguing that their reputation (protected under Article 8 of the ECHR) had been infringed with no remedy being offered to them.



### **Liability for Publications of Others**

The question of liability for others' publications is of course not unique to the online media.

A "publisher" at common law includes not only the actual writer or printer of material, but those involved in its distribution so, for example, a person printing or selling a newspaper but who had no influence over its contents would be a "publisher" of the material. Newsagents and booksellers have often found themselves sued in respect of materials they have sold. The late Sir James Goldsmith and Robert Maxwell exploited this to the full, realising it was an effective way to suppress hostile media coverage.

The online world similarly contains levels of publication. An Internet Service Providers ("ISP") is of course liable at common law for the material they publish. Equally, many online news sites allow the posting of comments by readers, and such facilities are essentially routine on the many blogs and discussion boards which continue to grow in numbers and popularity.

The common law position is moderated by section 1 of the Defamation Act 1996, which provides a defence to anyone who is not the "author, editor or publisher" of the material complained of. The use of the word "publisher" in this Act is rather confusing, but the effect of this statute provides a defence to a simple bookseller or to an internet service provider providing bandwidth to a website operated by an independent person. This defence is subject to that person taking "reasonable care" in relation to publication of such material and not knowing, and having no reason to believe that what they did caused or contributed to the publication of a defamatory statement.

The effect of this was discussed in the well-known case of *Godfrey v Demon Internet* [2001] QB 201. In that case, the claimant complained to an ISP about postings on a usenet group hosted by that ISP. Nothing was done by the ISP. The court agreed with the claimant that the defendant ISP was liable in respect of publications taking place after the complaint was received, as by that time the defendant was not taking reasonable care, and had a reason to believe that hosting that usenet group caused or contributed to the publication of a defamatory statement.

Since this decision, a letter from a claimant's lawyer to the leading chains of bookstores has become an effective way of removing printed material from the shelves until the matter is examined in more detail. In the online world the position is more complicated. Internet service providers based in England are usually unwilling to incur the costs of a libel action, and will often remove material when faced with a credible threat. Those based in the United States are of course essentially immune from any English libel decision and will usually ignore a threat.

As well as the Defamation Act 1996, protection for online publishers is provided by the EC Directive 2000/31/EC (the so-called "E-Commerce Directive"). This provides a protection from legal liability for those involved in being a mere conduit, caching or hosting material online. This defence can be set aside if the claimant puts the defendant on notice of the unlawful activity-in this case, the publication of defamatory material.

The defences under the E-Commerce Directive and section 1 of the Defamation Act 1996 were especially intended to assist internet service providers and the like. However, the explosion of the internet as a medium for discussion has led to many news sites and most blogs allowing readers to post comments.

The extent to which a website operator can be liable for such comments has been the subject of much discussion but rather little caselaw, although the consensus amongst practitioners is to hold that comments which are able to be posted automatically would be covered by these defences, whilst comments which are moderated by the host would not attract these defences. It would appear that the law of libel is creating a perverse incentive, as the sheer inconvenience of being sued must lead many bloggers and similar to remove comment moderation, although such moderation should prevent defamatory and otherwise unpleasant material from being published to begin with.

All this being said, there is no authority making such a clear-cut distinction and given the tendency of some writers to monitor and join in the debate in the comment section of their own blogs, the exercise of "reasonable care" may require some sort of ongoing monitoring of the comments section.



Another claim brought by the prolific litigant Johanna Kaschke led to a hearing which did bring some clarity to this area.

The decision of Stadlen J in *Kaschke v Gray & Anor* [2010] EWHC 690 (citing the decision of Eady J in *Imran Karim v Newsquest Media Group Limited* [2009] EWHC 3205) dealt with postings made upon the website "Labourhome". This site was operated by a single person (Mr Hilton) who allowed numerous registered writers (one of whom was Mr. Gray) to post material. Mr. Hilton denied exercising editorial control, but did admit to occasional tidying up of postings and deletion of offensive material. The claimant refused to accept that his role was so limited.

Stadlen J refused summary judgment under the E-Commerce Directive and/or the Defamation Act 1996, holding that the operator's exact function would need to be investigated at trial. However, he was clear that occasional editing of comments would not prevent a host of a website from relying upon these defences. Trial might have provided clarity on exactly where the line is to be drawn, but the claim was struck out on other grounds and this aspect was accordingly never investigated.

Mr Hilton's function as an operator of a site who generally allows unmoderated comments but occasionally intervenes to delete offensive or badly written comments can hardly be unusual. However, it does suggest that bloggers and online news services may find it hard to rely upon the available defences if they operate in what is surely a reasonable manner, and will therefore have to incur the costs of further proceedings.

Clause 9 of the Defamation Bill does contain a sensible approach to resolve this issue, borrowing (or mirroring) the notice provisions of the E-Commerce Directive. However, the blogger or news editor who moderates comments, or regularly edits them, can still find themselves unable to rely upon such a defence.

### **Nature of Online Writing**

It is frequently, and surely correctly, remarked that online publication can often resemble the spoken word more than the written word.

Obviously, the online versions of newspapers and the online presence of various news organisations ought to be written in a sensible fashion and be of a similar quality to material which is published in conventional form. However, message boards, blog posts and the social media can be written without a moment's thought in a casual manner, yet be broadcast to the world at large in a form which cannot be removed.

The courts have begun to understand this concept. A good example can be found in the decision of Richard Parkes QC (sitting as a judge of the High Court) in *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB) where he described a great deal of what is found in internet chatrooms and such as jokes plainly unlikely to be taken seriously, or as "saloon bar moanings", rather than interpreting them in the same way one would consider broadsheet articles. A further example of this sensible trend can be found in the instructive decision of Eady J in *Smith v ADVFN Plc* [2008] EWHC 1797 where he held that in email communications and postings on bulletin boards:

"it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment".

These decisions do point to the conclusion that does suggest that such material would be considered as slander and accordingly be subject to the more lenient rules of that aspect of the tort.

Lastly, all of the above seem somehow to beg a proportionality argument, in that a small-scale publication, written in a moment, can drag those involved into High Court litigation.

In the mass media age, libel was subject to legitimate complaints that it was a "rich man's game", but the use of specialist lawyers and High Court judges to decide matters involving articles in the national press or television seemed somehow reasonable.

Today, few online media ventures seem to make too much of a profit; many are explicitly run by amateurs as a hobby. They thus find themselves unable to afford to mount a vigorous defence, but are also unattractive targets for a claimant who is likely to incur significant costs they will have to hope to recover.



Lastly, online media ventures may have a small readership (at least by the standards of the national media). The extent to which these justify an action in the High Court is questionable. Put bluntly, current libel procedure seems to require the use of a sledgehammer to crack a nut.

The increasing use of so-called Jameel strikeouts to dismiss claims where the damages are likely to be out of all proportion to the expense and effort incurred shows that the judiciary are well aware of this problem, and have creditably responded. The exact scope of the court's powers in this area is still a developing area of law. However, the some sort of ECHR challenge to the Jameel decision seems possible.

The reasoning behind the decisions is that as libel proceedings require a High Court trial, the legal costs and court time required to resolve the dispute mean that what is effectively a small claim should not proceed in the High Court. As far as this goes this is a coherent argument, but the absence of any small claims or fast track procedure for libel may be in the future be taken to be denying claimants access to a court. Some form of simplified procedure for smaller claims is urgently needed, and should accordingly be seen as benefiting claimants and defendants equally.





## The Proposed Restriction on Corporate Bodies to Sue for Defamation

Magnus Boyd, Partner, Carter Ruck

Clause 11 of the Defamation Bill entitled 'Action for defamation brought by body corporate' states that, "A body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate."

The current law provides that a corporation can sue for defamation and recover damages without having to show that the publication caused, or is likely to cause, substantial financial loss. A corporate body has to show that the publication has a tendency to damage it in the way of its business<sup>27</sup> - An inclusive principle that can include loss of good will<sup>28</sup> (as it is commonly understood) and is broad enough to capture the variety of ways in which the reputation of a corporate body may be damaged.

A company cannot be injured in its feelings in the way that individuals can and as a consequence awards of damages in most corporate libel claims are substantially lower than in claims concerning individuals. The highest sum in recent times for a sole corporate claimant has been £50,000, whereas the highest damages award for an individual is capped at around £220,000. It would be a mistake to interpret the relatively low sums paid out as any reflection of the seriousness of the libels in many corporate claims and the harm that they cause. In fact, the high gearing between the likely damages and the cost of litigating to obtain those damages tends to deter corporate claimants 'only in it for the money' to the extent that any such parties exist in the first place. It is likely that the corporate claimant will recover 70-80% of its costs from its opponent and therefore, because damages are low, it will be left out of pocket. The vast majority of corporate claimants bring proceedings to correct or clarify a false claim or allegation and pay a heavy price for doing so.

Reports suggest that in recent years the number of libel claims brought by corporate claimants has grown. The increase in global trade and competition has led reputation to become the currency against which all other commercial assets are pegged. Consumers place increasing reliance and trust in 'the brand' or trading reputation of a business. As a consequence the protection of reputation has become a dominant concern for all commercial organisations whether it's Amazon or the sole trader dependent on his Ebay rating.

Increasingly, the value of reputation is being measured in the cost of repair. It is only when determining the cost of restoring goodwill or a credit rating, rebuilding the trust of lenders and customers or regaining and retaining staff that the true cost and therefore the true value of a reputation can be calculated.

Against this backdrop, growing access to the Internet, the rise of anti-corporate campaigns and long-term changes in publishing and the media have provided an environment in which corporate reputations are under greater attack and those reputations are more vulnerable to damage than ever before. In the current climate corporations need all the tools at their disposal, including legal safeguards in some circumstances, to protect their reputations. Every little helps.

### Reasons for Reform - The Chilling Effect

One justification for the proposed reform is referred to at paragraph 126 of the Bill's explanatory notes which relies upon and cites one of the conclusions to the House of Commons' Culture, Media and Sport Committee's Report on 'Press Standards, Privacy and Libel' (the 'CMSC Report') that, 'the mismatch in resources between large corporations and many defendants has already led to a stifling effect on freedom of expression'.

<sup>27</sup> "the authorities clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business" *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 17 per Lord Bingham.

<sup>28</sup> "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured" *Lewis v Daily Telegraph* [1964] AC 234 at para 262 per Lord Reid.



The CMSC Report's conclusion is not an adequate basis on which to propose such a far reaching reform as Clause 11. The conclusion appears to have been drawn from only two cases over the last eleven years: The McLibel case of 1999 where McDonald's Restaurants sued the environmental protestors Helen Steel and David Morris and the 2008 proceedings brought by Tesco against the Guardian. Tesco's claim against the Guardian was not an example that supports the concern over the mismatch of resources in any event as it was between a well resourced corporation and a well resourced Newspaper Group. To any extent that there was evidence of there being such a mismatch in resources this proposed reform is inherently unfair in that the small minority of cases in which that might be the case are being used to shut out the overwhelming majority of corporations for whom taking on the resources of Associated Newspapers Limited<sup>29</sup> or News Group Newspapers Limited, for example, is a formidable and daunting prospect in which they will almost certainly be out-resourced.

The supposed 'chilling' effect on freedom of speech that some large corporate bodies are apparently exercising, due to the fact that no financial loss needs to be proved as a precondition to being able to sue, is exaggerated. Furthermore, the resources of many NGOs and Newspaper Groups should not be underestimated. The web has reduced the costs of campaigning and provided efficient ways of raising revenue. As a result many NGOs are increasingly well resourced and willing to flex their financial muscle in campaigns to turn public and media sentiment against targeted companies. In terms of money and influence, the balance of power has shifted from the days (if they ever existed) of NGO Davids and corporate Goliaths.

Further, whilst throughout the CMSC Report there is the implication that the McLibel case is somehow indicative or representative of a state of affairs, no other evidence was provided. Yet the proposal that springs forth from such limited evidence will have damaging consequences for every corporate body in this jurisdiction regardless of their size or resources. References abound to 'large' or 'wealthy' corporations as being a cause of concern and yet the current proposal makes no allowance for those corporations that are neither 'large' nor 'wealthy'. Since 1999 it has become abundantly clear that the McLibel case was atypical and it is not appropriate to draw broader conclusions from it or to use it as the basis for restricting the rights of the full range of corporate bodies in the way proposed by the draft Bill. If the purpose of the proposed reform is to challenge the abuse of resources by large scale corporations why are smaller corporations being equally discriminated?

The CMSC Report's conclusion that there is a 'stifling effect on freedom of expression' characterises the dispute between Tesco and the Guardian in prejudicial terms. For example, Tesco were reported to have provided the Guardian with 'limited' written responses before publication. The Report's conclusions omit any reference to Tesco's written submission to the CMSC recording the fact of it, 'having explicitly told the Guardian five times prior to publication that these allegations were untrue'. The Report's conclusions also fail to address the fact that, having been provided with a clear denial before publication (together with evidence), the Guardian still published the allegations. It is therefore difficult to see this case as indicative of a chilling effect. It is also worth noting that the Guardian's initial apology was an inadequate, single-paragraph 'correction', in terms that were not agreed in advance with Tesco, as is normal practice in libel litigation, and in disregard to Tesco's solicitors' request that it should be agreed. The correction was buried on page 38, in the Guardian's 'corrections and clarifications' column, in stark contrast to the prominence of the original articles published on the front page and in plain breach of the PCC's Code of Practice. To make matters worse, it expressly invited readers' attention to misleading and self-serving coverage about Tesco published elsewhere in that issue. It was only after a hard-fought battle that Tesco got the vindication it sought and deserved: a front page apology. Had corporations not been able to sue without proof of substantial financial loss, then despite the Guardian accepting that the allegations it published were false and defamatory, there would have been no mechanism for Tesco to force the paper to apologise, or to seek a Court Judgment in its favour.

### **Limited Injury**

A second justification for the proposed reform appears to rest on the principle that a corporation can only be injured in its pocket and the assumption that financial loss will be immediately apparent and directly quantifiable.

<sup>29</sup> Daily Mail and General Trust plc's Annual Report for 2009 lists Associated Newspaper's annual revenue as £876 million and its operating profit as £62 million: <http://www.dmgtreports.com/2009/#bottom>



Paragraph 124 of the Explanatory Notes provides that the proposed reform, 'would reflect the reality that "a company can only be injured in its pocket, and that its reputation can be injured by a defamation only when the injury sounds in money." This view is overly restrictive and confuses damages for defamation with the damage caused to the corporation's reputation. It fails to acknowledge the variety of ways in which a corporation can be injured or the myriad consequences of such injury.

There is a fundamental misconception in seeking to draw a direct line between a corporation being defamed and some form of quantifiable financial loss and, as a corollary, that the absence of proof of such loss implies the absence of injury. We do not make the same assumption about individuals who have been defamed and are willing to recognise that, in reality, the damage caused by a libel is insidious and unseen<sup>30</sup>. The same risk applies equally to corporate bodies as it does to individuals, as Lord Bingham noted in *Jameel*, 'First, the good name of a company, as that of an individual, is a thing of value<sup>31</sup>.' (emphasis added).

Lord Bingham went on to outline precisely why the restrictive view of damage to corporate bodies is inappropriate, 'A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value that the law should protect<sup>32</sup>.'

This justification for reform ignores the place that corporations, large and small, hold in society. It underestimates the real value in corporate reputations. It devalues the fact that damage to a corporate reputation has an impact on the lives of individuals.

### **Corporate Individuals can sue instead**

Paragraph 126 of the Explanatory Notes cites another of the conclusions of the CMSC Report as further justification for the proposed reform, namely that, 'individuals at companies who consider themselves defamed can also sue, funded by their employers'. In other words, corporate reputations can still be protected by an individual director suing over the damage caused to his individual reputation and supported by the company.

There are significant problems with using individuals as a vehicle for confronting attacks against the corporate body: Most importantly, there will be cases where it is solely the reputation of the body corporate on the line and there will be no duality with the reputations of any of the directors or other individuals connected with the company or product. The fundamental misconception underling this justification is a conflation between the reputations of individuals and a corporate reputation. There will always be examples where the two are entwined such as Freddy Laker, Victor Kiam, Richard Branson, Stelios Haji-Ioannou and Lord Alan Sugar but they are the very limited exceptions to the rule<sup>33</sup>.

The suggestion that individuals within an organisation should set themselves up as proxies for their corporations also puts such claims at an immediate disadvantage in light of the principle that the limits of acceptable criticism are wider with regard to corporate figureheads<sup>34</sup>.

To suggest that the CEO of a pharmaceutical company should bring libel proceedings over the allegation that a moisturiser made by the company is carcinogenic, for example, may be to add an unnecessary layer of artificiality to a claim where the damage is clearly against the brand and the corporate reputation. If such claims are really envisaged by this Bill why does anyone think the proposed reform will restrain the large corporate bodies from funding such claims and maintaining the supposedly icy blast on freedom of speech?

<sup>30</sup> 'Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs'. *Slipper v BBC* [1991] CA per Bingham LJ (as he then was).

<sup>31</sup> *Jameel & Othrs v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

<sup>32</sup> *Jameel & Othrs v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

<sup>33</sup> "The leading figures in such corporations may be understood to be personally implicated, but not, in my opinion, necessarily so" *Jameel & Othrs v Wall Street Journal Europe* [2006] UKHL 44 at para 25 per Lord Bingham.

<sup>34</sup> "As to enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals... Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest" *Fayed v UK* [1994] 18 EHRR 393 at para 75



The dichotomy is exposed at paragraph 175 of the CMSC Report which draws specific attention to the risk of such supposed claims, 'Global Witness noted that it had experience of situations where repressive state authorities which were unable to sue made use of an individual as a 'front person' to act for them in defamation litigation. Clearly corporations wishing to exploit libel laws to stifle criticism could use the same technique'

### **Extra-Legal Alternatives**

Paragraph 126 of the Explanatory Notes also cites the CMSC Report's conclusion that, 'companies have means not available to individuals to counter falsehoods and unfounded criticism through publicity campaigns' as further justification for the proposed reform.

Whilst larger corporations may have extra-legal means available such as public relations, lobbying and advertising to respond to inaccurate claims none of these are able to provide the same set of objectives as Court proceedings. There will be circumstances where alternative, extra-legal solutions are no substitute for the processes involved in litigation – disclosure of evidence (or the lack thereof), verified witness statements, the provision of independent expert evidence, the opportunity for cross-examination and the scrutiny of a jury. Nor is it possible for extra-legal processes to achieve a judgment and definitive finding of fact from the independent authority of a Court. Neither are they likely to achieve publication of an apology by the defendant in which the defendant accepts that what has been published is false.

Behind this particular justification for reform appears to lie the 'marketplace of ideas<sup>35</sup>' metaphor associated with First Amendment rights in the US - That ultimately, what emerges from debate is the truth. However, extra-legal means of counteracting inaccuracies can sometimes run the risk of merely perpetuating the debate and obfuscating the facts. For instance, if an NGO or newspaper publishes a serious allegation about a company which, in turn, puts out a press release denying the allegation, it runs the risk that the public will adopt Mandy Rice-Davies' view that, 'well they would, wouldn't they'. More seriously, the public doesn't know what is right and who to believe. In *Jameel Lord Bingham* anticipated such drawbacks to the use of extra-legal methods of dealing with defamatory allegations; 'Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury<sup>36</sup>'.

Again the proposed reform draws its justification from the supposed resources of larger corporates without consideration being given to the resources of small to medium sized corporations that may well not be able to call on such resources and yet their rights are to be equally restricted.

### **Other common law jurisdictions**

Paragraph 122 of the Bill's explanatory notes asserts that, 'under current law, trading companies with reputations in the jurisdiction may sue for defamation and recover general damages. This contrasts with the position in several other common law jurisdictions, such as the USA, Australia and New Zealand.'

In fact, it is only those three common law jurisdictions that differ from the English model and the USA is not homogenous. Some States allow corporate entities to bring libel actions without requiring proof of special damages.

In Australia the restriction on the corporate ability to sue is not distinguished by loss but by size so that it is only not for profit or companies with less than 10 employees that can sue at all in defamation. There is no requirement to prove special damages for such companies.

Save for the Bill's inclusion of the requirement to prove 'substantial' financial loss, it is the New Zealand model that most closely resembles the proposed reform: A jurisdiction without perhaps the same socio-economic pressures on corporate reputation as England.

<sup>35</sup> 'The best test of truth is the power of the thought to get itself accepted in the competition of the market' *Abrams v United States* [1919] per Justice Oliver Wendell Holmes cited in 'Speech Overview' by Rodney Smolla; Dean of University of Richmond School of Law; [http://www.firstamendmentcenter.org/speech/overview.aspx?topic=speech\\_overview&SearchString=smolla](http://www.firstamendmentcenter.org/speech/overview.aspx?topic=speech_overview&SearchString=smolla)

<sup>36</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.



Other common law jurisdictions such as Canada, South Africa, India and Ireland share the approach of the English courts as do other 'civil' or 'code' jurisdictions such as France and Italy in that Corporates can sue in defamation without proof of financial loss.

Furthermore, it is revealing that a statute as recent as the Irish Defamation Act of 2009 specifically refers to the fact that a company can sue, "... in respect of a statement concerning it that it claims is defamatory whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement" (emphasis added).

### **Problems of Definition**

Aside from the unease regarding the need and justification for reform, there are three significant problems of definition in the proposed wording that raise concerns about its efficacy.

First, the term 'body corporate' requires delineation. Could it, and should it, include Partnerships (limited liability or otherwise) for example, or Trusts, Charities or NGOs? The term may well have been left deliberately ambiguous for the moment to let the current debate and further investigation set the boundary. If that is the case the question simply shifts to what terms should be used to define the body corporate. In light of the restriction being set in financial terms the only equitable basis to define a body corporate for these purposes would be by readily quantifiable and accessible financial terms rather than by the number of employees or some other arbitrary measure. If the way in which the business was structured was used it might enable companies to restructure as a way of avoiding the restriction and thus defeat the purpose of the Bill.

Second, the inclusion of the word 'likely' will make the exercise of the restriction extremely problematic. It is a quite different hurdle from the present requirement to show that the libel has a 'tendency'. Whether a defamatory allegation is "likely" to cause "substantial" financial loss will inevitably form the basis for significant and expensive interlocutory applications which will increase the costs of the litigation and delay the passage of the claim. If the corporate claimant was successful in such proceedings the additional costs would be sought from the defendant. All that will have been achieved is an increase in the litigation risk for both parties which, in fact, is the true source of the chilling effect of libel litigation.

The third problem of definition arises from the inclusion of the word, 'substantial'. Such brightly relative language simply attracts more legal moths and will lead to further applications from both sides to determine whether the loss is, or is not, substantial. Does it mean, for example, a significant loss in purely monetary terms or is it supposed to be proportional in some way to the overall value of the company and how would value be measured in such circumstances?

The requirement to prove that any financial loss has been 'substantial' also exposes a tension between the proposed reform and the culture of litigation fostered by the Civil Procedure Rules. Clause 1.4 of the Introduction to the Pre-Action Protocol for Defamation states, 'There are important features which distinguish defamation claims from other areas of civil litigation, and these must be borne in mind when both applying, and reviewing the application of, the Pre-Action Protocol. In particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only 1 year, and almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.' However, the requirement of the proposed reform to, 'show that the publication has caused, or is likely to cause, substantial financial loss' could lead potential claimants unsure about being able to prove their loss in financial terms to delay bringing proceedings whilst the quantifiable financial loss increases. Alternatively, the corporation that has been libelled will act as quickly as it can to mitigate the damage done by issuing proceedings in the absence of a satisfactory apology and, in so doing, reduce the likelihood of 'substantial' financial loss and so prejudice its chances of success. Again, such circumstances were anticipated by Lord Bingham in *Jameel* in which he stated, 'I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that a financial loss will actually accrue.'<sup>37</sup>

<sup>37</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.



## Conclusion

As a society we need to acknowledge the value of reputation and recognise its equal status to freedom of expression. As Lord Nicholls stated in *Reynolds v Times Newspapers*, 'Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good.<sup>38</sup> Whilst Lord Nicholls' comments concerned the reputation of individuals they are equally applicable to the reputation of corporations. If we are to allow a corporation to be sued for defamation it should have the same right to protect its reputation. If corporations are denied the possibility of suing to protect their reputations we are denying them the right to protect jobs and assets and a value that may have taken many years to accumulate. The consequences are far reaching as the Lord Chancellor told the CMSC, 'Bodies corporate do have reputations and on their reputations depend the livelihoods of, in large corporations, thousands of people and their share price, in which your pension fund or mine might be invested'. Reducing the ability of corporate bodies to sue will devalue their reputation, their brand and, over time, their ability to do business.

Napoleon dismissed the English as a nation of shopkeepers. Today those shopkeepers, together with their companies and brands, play a significant and active role in society and many have reputations of substantial value. The risk of damage to those reputations is increasing as are the repercussions of such damage to the jobs and savings of a growing section of the population. As the number of stakeholders with a direct interest in upholding the right of corporate bodies to protect their reputations increases it would not be just or appropriate to restrict that right to the extent currently proposed without significant further investigation and consultation.

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<sup>38</sup> *Reynolds v Times Newspapers Limited* [1999] [2001] 2 AC 127





## Science and Libel

Andrew Stephenson, Senior partner, Carter Ruck

A number of well-publicised defamation cases within the past twelve months (Simon Singh, Peter Wilmshurst, Henrik Thomsen) have led to expressions of concern that current English laws have the effect of stifling academic debate in the field of science.

The advancement of science depends on the exchange of theories and the sharing of research; theories which may not be capable of objective proof, research which is never complete.

The problem for the courts, of course, is not new. The case of *Upjohn v BBC* concerned allegations broadcast in 1992 that the company which marketed the sleeping pill Halcion (triazolam) (which in 1991 had sales of \$237million) had concealed knowledge of serious adverse side effects. In giving judgment for the claimant, after a trial involving an estimated 36,000 sheets of paper and lasting 62 court days (a record for defamation cases at the time) Sir Anthony May, who heard the case without a jury, said in June 1994:

“It is important to state at the very outset of this judgment that the question whether triazolam is or is not a safe and effective hypnotic does not arise for decision in this case. This judgment does not address that question. Any representation that any part of this judgment may be taken as a decision or expression of view which favours one side or other of the medical and scientific debate would be false and, if I may use the expression, misleading.”

“Happily the question which of these opposing views about triazolam or what balance between them is to be preferred is not an issue in this case. It would be most unfortunate if it were. There are numerous authorities and bodies throughout the world whose function it is to consider these matters and who are medically and scientifically competent to do so. I can conceive circumstances in which it may be necessary for a court to adjudicate such matters. But at least in the wide ranging context of the debate which lies behind the issues which do arise in this case, the proposition that a single lawyer (let alone with a lay jury), untrained in medicine or science, should be expected to decide matters which have been the professional concern of medical and scientific Professors, Doctors, Pharmacologists, Statisticians and Other Experts worldwide during their entire professional careers – matters which have been the subject of years of research and generated literally hundreds of reports, papers and articles in learned journals – is little short of absurd.”

Nor can it be said that the court either can or should always leave such issues to be decided by other competent authorities and bodies. New theories, new information may come to light which may lead critics legitimately to challenge the consensus of established practice or to question findings and decisions of the relevant authorities; the opinions of experts may differ. This was one of the issues which arose in the Henrik Thomsen case, in that European agencies had taken a different stance from the US Food and Drug Administration in relation to the classification of risk associated with a particular product.

### General principles

The English law of defamation, consistent with the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1976) aims to strike a balance between freedom of expression and the right of reputation. Only in the First Amendment to the US Constitution (1791) is the right of freedom of expression couched in absolute terms “Congress shall make no law...abridging the freedom of speech, or of the press”.



Lord Nicholls in *Reynolds v Times Newspapers* [1999] 3 W.L.R.1010 said:

“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is

conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.”

The pharmaceutical business is a multi-billion dollar industry. Vast sums of money are invested in the research, development and marketing of drugs and medical devices. Likewise (although it may not involve the same cost of production) there is a huge demand for alternative medicine and for homeopathic remedies. Success for the manufacturers of products and suppliers of services depends on consumer confidence, which, particularly where issues of health are concerned, may be undermined by rumours and allegations. And it is not just the profitability of companies and the financial interests of their shareholders which may be injured. The public may suffer if, as a result of false rumours and unsubstantiated allegations, people decline treatments and remedies from which they may otherwise have benefitted. The controversy which surrounded the MMR vaccination provides a dramatic example where a health scare may risk leading to a real public health issue.

The question arises whether in practice English law causes an undue inhibition of expression in the field of science and academia generally and, if so, how it should be addressed. Regrettably, despite the involvement of scientists in the debate for libel reform, there appears to be very little research data available to aid an understanding of the extent of the perceived problem. For his helpful article “A Chilling Effect?” published in *Science Magazine* (vol 328, 11 June 2010) the author, Tim Wogan, asked a number of leading scientific and medical journals whether Britain's libel laws were having a “chilling” effect. Acknowledging that the responses “varied widely”, the article states:

“So far, there's little evidence that scientific publishers have been seriously affected: None of 22 journals or journal publishers contacted by *Science* has rejected a research paper solely because of libel concerns, for example”

and it reports that one publisher had noted :

“We know that on occasion academics may make assertions they can't then support; the legal advice we obtain often helps to clarify their thinking and so we end up with a better paper, as well as one that should stand up in court”.

### **Current Law**

So far as the law of defamation is concerned, a cause of action only arises where the material published is defamatory of the claimant. I would doubt whether in practice this would be a frequent problem with scientific or academic papers; but of course, it may occur where, for example, the safety of a company's product, the effectiveness of a particular treatment, or where the integrity of a scientist or academic is called into question.

Traditionally under English common law proof of the truth of a defamatory assertion of fact affords a complete defence to a claim. The defence of “Fair Comment” applies to the expression of opinions or “value judgments” which are based on established facts; this is a complete defence to a claim, unless the publisher is proven to have been “actuated by malice”, which in effect requires a claimant to prove dishonesty on the part of the publisher. In each case the test is on “the balance of probabilities.”



If defamatory material is published, in the event of a claim the onus is on the defendant to prove that what they have published as fact is more probably true than untrue and, if what they have published is opinion, it is for the claimant to prove that it is more probably dishonest than honest. If the “chilling” effect of English defamation law is to discourage the publication of defamatory allegations where the publishers are not confident that they have evidence to prove them to be true, it is by no means clear why this should be regarded a bad thing. Lord Hobhouse made the point in the Reynolds case:

“The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.”

The English common law has long recognised that there are occasions where people in certain relationships should be able to communicate information about others, without having to prove that defamatory statements are in fact true. Examples of this are where an employer is asked to provide a reference, or where an individual honestly believes he has cause to make a complaint to the police or the appropriate authorities. The decided cases fall into two main categories:

- where there is a legal, social or moral duty on the part of the publisher to communicate the information to a person who has a corresponding legitimate interest in receiving the information (“duty/interest”)
- where the publisher and recipient have a common legitimate interest in communicating the information between each other (“common interest”).

In these situations (amongst others) the defence of qualified privilege applies, and a defendant will only be held liable if he is proven to have been actuated by malice, which in effect requires proof that he had no honest belief that what he published was true. The Court of Appeal in *Blackshaw v Lord* in 1984 indicated that this line of defence would only be available to the mass media in extreme cases, such as (per Stephenson LJ) where “the urgency of communicating a warning is so great, or the source of the information is so reliable, that publication of suspicion or speculation is justified; for example where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs.” This is because it would have to be shown that there was a duty on the media to publish the information to the public at large, “and a section of the public is not enough”.

In 1999, the House of Lords in the case of *Reynolds v Times Newspapers* laid down much widened circumstances in which the publication of a defamatory allegation to the public at large would be defensible, even though the allegation might be false. Lord Nicholls set out a non-exhaustive list of factors which the court would take into account, as follows:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.



5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

### **Lord Lester's Bill**

Although Lord Lester's Defamation Bill has been welcomed by campaigners for reform it is not immediately apparent how it would benefit scientists and academics. At a Policy Exchange debate in Westminster on 25 July 2010, Lord Lester indicated that he envisaged that clause 1 of the Bill would operate as a form of "public interest" defence, which he thought would assist.

Clause 1, which is headed "Responsible publication on matters of public interest" would establish a new statutory defence, largely based on Reynolds principles. It would apply to matters published "for the purposes of, or otherwise in connection with, the discussion of a matter of public interest." The Bill, however, leaves out from the ten factors identified in Reynolds (a) the source of information, (b) the status of information, (c) whether the claimant's side of the story is included and (d) the tone.

It is not, however, clear whether these proposed omissions make or are intended to make any difference to the law as it stands, bearing in mind the Bill proposes that the court "must have regard to all the circumstances of the case". As with Reynolds privilege, the defence would apply to the publication of matters to the public generally, rather than to a specialist readership. (It is, I suppose, possible that the nature of the readership might become a new factor which the court could take into account in "all the circumstances of the case" but there is no indication that this is the intent of the clause).

Both with Reynolds privilege and the proposed new statutory defence, one of the factors to be taken into account is whether comment was sought in advance from the claimant. With Reynolds, a factor, to which importance has been attached in a number of decided cases, is whether the published article gave the claimant's side of the story; this, as noted above, is omitted from clause 1 of Lord Lester's Bill (though it seems illogical that significance should be attached to whether advance comment was sought from the claimant, unless significance is also to be attached to whether the article fairly reflects the claimant's comments).

With most news stories, it will generally be regarded as a basic principle of responsible journalism to allow the claimant a reasonable opportunity to respond to allegations which are to be published, and to ensure that, if the allegations are then published, the article fairly reflects what the claimant has to say.

This principle, however, does not necessarily sit comfortably with the publication of scientific and academic papers. Where a scientist, having carried out research, concludes that an adverse side effect may be



associated with a particular product, should there be a requirement that, before publication the paper should be sent to the manufacturer for comment? To allow the manufacturer a reasonable opportunity to respond may involve considerable delay and lengthy debate where the validity of the conclusions or the methodology of the research is questioned by the manufacturer's own (and other) scientists from its own (and other) research papers. For example, as arose in the Henrik Thomsen case, to what extent with a particular product do results obtained from research carried out on rats inform of possible effects on humans? Would other research carried out on dogs or monkeys reveal more relevant information? The possibilities for argument are endless.

There is in my view a clear distinction which the law does and should make between publication of papers within the scientific and academic community and publication to the public at large. The

public will want and has a right to know whether there is in fact a risk with a particular product and, if so, the extent of that risk; this requires a careful analysis of all the available information, which should include the manufacturer's own comments based on its research and data. Scientists and academics, on the other hand, by experience, training and with specialist knowledge will be better equipped to understand and to put into context the significance or otherwise of published research papers. The 1998 publication in the *Lancet* of the (subsequently withdrawn) paper "Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children" by Andrew Wakefield and twelve others, although reported in some national newspapers, did not at the time lead to any major controversy; it was later, in 2001 and 2002, that the media coverage took on a new momentum, with the consequent public concerns regarding the safety of the MMR vaccination programme.

### **An alternative**

In the case of *Vassiliev v Frank Cass & Co* [2003] EWHC 1428 (QB) decided by Eady J, it was held that material described as "arcane, scholarly and complex" was covered by qualified privilege at common law because of the legitimate common interest between the publishers and the likely readers. The article in question, related to the late US official Alger Hiss (who may or may not have been a Soviet spy, a matter of long standing debate). It had been published in *Intelligence and National Security*, a specialist journal with 146 subscribers in the UK whose readers were said to have a specialist interest in historical and contemporary intelligence issues. The article was also freely available online from two university websites, but, from the nature of the material, Eady J concluded that it was unlikely in reality to have been read by any casual surfer who did not fall within the "same small circle of professional and academic specialist interest as the readers of the magazine."

On the face of it, *Vassiliev*, if followed in subsequent cases (it is a first instance decision, which was not the subject of appeal) may in itself provide the answer in affording additional and adequate protection to scientific and academic papers, published in scientific and academic journals, read by those within the scientific and academic community. Had the Henrik Thomsen case gone to trial, it is likely that this authority would have featured heavily.

There is, however, a potential drawback as the law stands. In *Kearns v General Council of the Bar* [2003] EWCA Civ 331 (a case which related to a communication sent out by the Bar Council to its over 10,000 members) the Court of Appeal considered the interplay between Reynolds privilege and the previously established lines of authority of privilege based on the existence of duty/interest and/or common interest. In the course of his judgment Keene LJ observed that "Reynolds was dealing with publication made to all the world, with the result that no pre-existing relationship was required..." and that "there is no half way house between publication to those in a pre-existing relationship, whatever their number, and publication to all the world."

It has been held in a number of cases that the defence of qualified privilege based on a pre-existing relationship of duty/interest and/or common interest applies only to publication to those who fall within the category.



Two cases (*Trumm v Norman* [2008] EWHC 116 (QB) decided by Tugendhat J. and *Brady v Norman* [2008] EWHC 116 (QB) decided by Richard Parkes QC) concerned the publication of material in the *Loco Journal*; the evidence was that 18,000 copies were distributed to members of ASLEF, 1,332 to retired members and 202 copies to others; of these 202 it was decided that somewhere in excess of 100 readers did not have any particular interest in the subject matter (above or beyond any member of the public) and therefore the defence of qualified privilege did not apply in respect of the publication to these few readers. Likewise in *Underhill v Corser* [2010] EWHC 1195 decided by Tugendhat J, it was held that although the defence of qualified privilege was available in respect of a serious allegation contained in a magazine, the “*King’s Messenger*”, circulated to 422 members of a society, it was not available in respect of its publication to an estimated 13 readers who were on the society’s mailing list, but who were not themselves members of the society.

In the Republic of Ireland, the Defamation Act 2009 (which codified that country’s law of defamation) at section 19 (2) provides that “The defence of qualified privilege shall not fail by reason only of the publication of the statement concerned to a person other than an interested person if it is proved that the statement was published to the person because the publisher mistook him or her for an interested person” [my emphasis]. I am doubtful whether the publishers of either the *Loco Journal* or the *King’s Messenger* would have been able to establish that they “mistook” non-members for “interested persons” (and the evidence appeared to be that both had lists of members to whom publication could have been limited) but the statutory provision in Ireland nevertheless appears intended to address this situation.

Where the vast majority of readers of a specialist publication, for example a scientific or academic journal, will have a particular interest in the subject matter, I would consider it unfortunate if the defence of qualified privilege is unavailable in respect of a comparatively few copies which may incidentally be published to others. Eady J’s reasoning in *Vassiliev*, however, would suggest that the common law is flexible enough to recognize that where the subject matter is itself of a specialist nature, the defence of qualified privilege will be available.

### **Conclusion**

The law of defamation draws a distinction between information published within a particular community and information published to the public at large. It is in my view right that it does so. Scientists and academics are able to exchange with colleagues theories and research for debate and further investigation without fear of liability, provided only that they are not proven to be dishonest. The law needs to strike a different balance where material is published to the public, where not only may unjustified harm be caused to the reputation and commercial interests of claimants, but also the public itself suffers if it is misinformed.





## Reframing Libel: A practitioner's perspective

Hugh Tomlinson QC, Barrister, Matrix Chambers

1. At the 2010 General Election the three main political parties included a manifesto commitment to libel reform." The Conservative Manifesto tells us,

"We will review and reform libel laws to protect freedom of speech, reduce costs and discourage libel tourism".<sup>1</sup>

1 Conservative Party Manifesto, p. 90.

[http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010\\_lowres.pdf](http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf)

2 The Labour Party Manifesto 2010, p.63.

<http://www.labour.org.uk/uploads/TheLabourPartyManifesto-2010.pdf>

3 The Liberal Democrat Manifesto, 2010, p.93.

[http://network.libdems.org.uk/manifesto2010/libdem\\_2010\\_yoursay.pdf](http://network.libdems.org.uk/manifesto2010/libdem_2010_yoursay.pdf)

The Labour Party Manifesto says,

"To encourage freedom of speech and access to information, we will bring forward new legislation on libel to protect the right of defendants to speak freely"<sup>2</sup>

Finally, the Liberal Democrats promised to:

"Protect free speech, investigative journalism and academic peer reviewed publishing through reform of the English and Welsh libel laws – including by requiring corporations to show damage and prove malice or recklessness, and by providing a robust responsible journalism defence"<sup>3</sup>.

2. When faced with such a clear cross-party political consensus, the practitioner must tread carefully. Particular care is required because one of the underlying concerns of libel reformers is that the law has been developed in such a way that serves the interests of lawyers at the expense of clients and the public. The wise practitioner might well take the view that this is a matter best left to politicians and reformers and simply await the outcome. Although cynicism is, of course, rare among lawyers, some might even welcome reform on the basis that the law of unintended consequences means that it is likely to generate more, rather than less, litigation.

3. While caution is appropriate I do not think that practitioners can or should avoid engagement with the libel reform debate. There are at least two reasons for this. First, contrary to the views of the cynic, the practitioner is not there to serve his or her own interests but the interests of clients. It is in the client's interest – whether as a claimant or a defendant – for libel proceedings to be as quick, cheap and efficient as is consistent with justice and fairness. Anything which might help achieve those aims deserves proper and careful consideration. Second, while libel practitioners have no special expertise in social policy, we do know how things work in practice – what goes right and what goes wrong in libel litigation. This is an important debate and should be informed and geared to practical outcomes.

4. The great advantage of libel practitioners – many of whom act for both claimants and defendants – is that they actually know what litigants want out of the system in practice. Our clients tell us this every day. There is sometimes a tendency among advocates of libel reform to attack practitioner critics as being lawyers who are "agitated about forthcoming changes to their business model" who have a "commercial interest in the outcome".



This is as unhelpful as the description of the Libel Reform Campaign as being the media corporations' "human shield". It is also dangerous because a reform which does not factor in the practicalities is a reform which is likely to fail to achieve its objectives.

### **SOME GENERAL THOUGHTS ABOUT LIBEL**

5. It seems to me that a useful starting point is to ask the question: what outcomes should libel law be producing? What social function do we want our law of libel to perform? The answer to this question can then inform the discussion of whether and how libel law should be re-framed.

6. There are some fundamentalists who take the view that the law of libel is not needed at all: that we can rely on the free market of ideas to distinguish truth from falsity. This contention does not bear serious examination: the free market is as dysfunctional in the realm of ideas as it is the realm of banking. Those with the greatest market power – the rich and powerful – are the ones whose ideas win out. In the absence of regulation – through courts – false ideas backed by the powerful gain the ascendancy. Every modern system of law has a law of libel and England and Wales cannot be an exception.

7. At the basis of the law of libel is the notion that there must be a legal mechanism for dealing with false statements which adversely impact on a person's reputation. This is closely linked to the fundamental value of human dignity. As the South African Constitutional Court has put it

"The value of human dignity ... is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements".<sup>4</sup>

4 *Khumalo v Holomisa* [2002] ZACC 12 [27]

8. There is social value in ensuring that false statements which adversely impact on a person's reputation are corrected. Within certain limits concerning private information, we all benefit from knowing the truth about other members of society. If a politician or a businessman is accused of being a crook we need to know whether that is true. The law of libel provides a mechanism for a "neutral determination" of that issue.

9. This brings me to the answer to the purpose of the law of libel: what outcomes should it be producing? It seems to me that the law of libel should provide a mechanism whereby the courts can determine the truth or falsity of allegations about individuals. What the law of libel needs to provide is a quick and efficient way of doing this at a reasonable cost.

10. This approach accords, I think, with the experience of most practitioners when advising clients who want to bring libel claims. What clients want is not huge damages – in practice, these are no longer available – but vindication. Most claimants would like a quick apology and a correction. It is also consistent with the views of defendants – ideally, they would prefer not to be sued for libel at all but, if they are, they would like the cases to be resolved in a quick, efficient and cost effective way. Bad claims should be quickly dismissed and bad defences swiftly overcome. The procedures should be fair, comprehensible and transparent. These are all areas in which the present English law of libel falls down.

11. From the perspective of the claimant, the law of libel presently provides a very imperfect mechanism for dealing with their concerns. It cannot, in general, provide a declaration of falsity or order a correction or apology. The only remedies which are traditionally available are injunctions and damages. The former prevents repetition of the libel, the latter provides vindication and compensation for damage to reputation and hurt feelings. But damages are obviously a blunt instrument. There are strong arguments in favour of "re-framing" in this area – arguments which have attracted little attention from libel reform campaigners

12. There is, of course, another important social value at stake in the law of libel: freedom of expression. The law should not restrict the expression of opinion or the making of comment – certainly not in relation to matters of public interest. Furthermore, the law should not penalise everyone who makes false statements of fact which adversely affect others. There are many situations in which such statements are made in accordance with a "legal, social or moral duty".



Furthermore, it is generally recognised, that publishers of false statements who have acted responsibly in the public interest should not be penalised for what they write or say.

13. These kinds of considerations have, in more or less explicit form, informed the development of the common law of libel. It provides defences for honest commentators, “duty” publishers and responsible publishers in the public interest. It is argued by libel reformers that these defences are imperfect and provide insufficient protection for legitimate expression.

14. In short, it could be argued that there are four areas in which the law of libel might be said to need reframing: costs, procedures, remedies and defences. The last is the only area substantively addressed in Lord Lester’s Defamation Bill. It is, as I will suggest, the least pressing of the three. I want to say something about them in reverse order.

## **DEFENCES**

15. Lord Lester’s Defamation Bill sets out to clarify a number of the most important “common law” libel defences: responsible publication, honest opinion and truth. Each is re-cast in statutory form. In each case, the concern would be the same: that codification would introduce rigidity whilst at the same time generating uncertainty. This is an area which has been extensively discussed by a number of commentators, notably Professor Mullis and Dr Scott, and I will only provide a brief outline of the arguments here.

### **“Responsible Publication”**

16. Codification of the defence of “responsible publication” is a particularly clear example of the problems generated. The Libel Working Group acknowledged that the quest for certainty of application was illusory: the need for flexibility in reconciling competing public interests would always make that impossible. Each “responsible publication” case is different and it is impossible to produce an exhaustive list of criteria.

17. The Defamation Bill does not set out to provide any exhaustive definition. Clause 1(1) sets out the two familiar conditions: public interest and responsibility. As regards responsibility, the Court is directed in clause 1(3) to have regard “to all the circumstances of the case”. Clause 1(4) then states that “those circumstances may include (among other things)” some 6 of the 10 issues from Lord Nicholls’ classic list in Reynolds. Two of the missing four are generally thought to be of considerable importance in most cases: the source of the information (whether the source had an axe to grind) and publication of the gist of the claimant’s riposte. As Desmond Browne QC said when discussing this provision, most would share Lord Hoffmann’s puzzlement as to what this clause is trying to achieve. Is he not right when he says that after Jameel, which was generally welcomed by the press, “there is a case for leaving well alone”? This clause does not set out to alter the substance of the law in this area and probably does not do so – although doubtless litigation will be required to make this clear.

### **Scientists and bloggers**

18. There are other “defences” which might be considered – although they are not mentioned in Lord Lester’s Bill. I have in mind two categories of writers who are particularly concerned about the law of libel: scientists and bloggers. It seems to me that in both cases the considerations may be different from those that apply to “mainstream media” publishers. There are good arguments in favour of special defences in both cases.

19. The public utility of science writing is obvious and scientists should be able to analyse and comment on the research of others without the need for libel lawyers. There is a strong argument for a qualified privilege for those writing in peer-reviewed scientific journals. This was proposed by the Faulks Committee as long ago as 1975. Clause 11(2) of the Draft Defamation Bill included in its Report provided as follows:

“Publication in a technical or scientific journal approved by and registered with the Secretary of State of an article of a technical or scientific nature shall be protected by qualified privilege”.



This recommendation was not adopted, although some years later in *Vassiliev v Frank Cass & Co Ltd*<sup>5</sup> Eady J ruled that the publication at issue – an article in a journal called *Intelligence and National Security*, “a specialist publication with a specialist readership who subscribe to it”, with about 146 subscribers in the UK – attracted qualified privilege at common law because it consisted of a “specialist subject matter” in which publisher and readers shared a common interest. Nevertheless, there is a strong argument for a revival of the Faulks Committee proposal – perhaps without the “registration” requirement to protect scientific writing. This would mean that someone writing in such a journal would have a complete defence to a libel action until they could be shown to have acted maliciously.

## **5 [2003] EWHC 1428 (QB); [2003] EMLR 33.**

20. The second possible area for the development of a new defence relates to bloggers and others who produce material on the internet, often with fairly limited readerships, but who face the possibility of ruinously expensive libel actions. As far as I am aware, there has been very little research in this area and it is difficult to know how serious a practical problem there is. Nevertheless, there are obvious anomalies about treating non-commercial bloggers and large media corporations in the same way for the purposes of a “public interest defence”.

21. There are a number of possible ways of dealing with this issue. One possibility would be to develop a “Code of Practice” for bloggers defining the standards of “responsible blogging” – which could be referred to as a part of any “responsible publication” defence. The approach would be very different to that which applies to the mainstream media. Another possibility might be to limit the available remedies (and costs) in claims against bloggers if the material was taken down within a reasonable time of notice being given that it was defamatory. On the one hand, responsible bloggers should be protected against abusive legal action whilst, on the other, the law should not provide a “defamers charter”. This seems to me an important area in which research and creative thinking is needed.

## **REMEDIES**

### **Damages**

22. The level of libel damages has been of concern to campaigners for many years. The high (or rather low) point of the development of the law in this area was the £1.5 million awarded to Lord Aldington against Count Tolstoy. But the law has moved on. At present libel damages are, effectively, capped at £215,000. The report “Free Speech is not for Sale” suggests a reduction in the level of the cap to £10,000. This is difficult to defend for two reasons. First, there is the need to preserve what has been called the “deterrent” effect of damages. As the Privy Council said in *Gleaner v Abrahams*<sup>6</sup>

## **6 [2004] 1 AC 628.**

“[Defamation] damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims... Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens”<sup>[53]</sup>

23. Second, there is the need to preserve flexibility. Whilst some libel claims involve minor complaints which could properly be compensated by small sums, there are some extremely serious libels which seem to require substantial compensation. The case of the McCanns is one recent example, but there are other recent cases involving false accusations of serious criminality or child abuse. An award of £10,000 appears obviously inappropriate in cases of this kind.

24. Damages are not capped in the United States or in Canada, New Zealand or South Africa. A cap has recently been introduced in Australia by the Uniform Defamation Act 2005. By section 35 there is a limit on general damages of Aus\$250,000 (£146,000) but the court can “otherwise order” and make a higher award if satisfied the case is such as to warrant an award of aggravated damages. It is noteworthy that according to the freedom of expression NGO Article 19 the only one of the 53 European countries surveyed had a statutory damages cap for defamation cases. This was Greece where the cap was set at US\$438,000.



25. The arguments in favour of a statutory cap on damages of £10,000 are not convincing and, taking account of developments in the law of defamation over the past two decades, it must be doubtful whether any statutory cap is needed at all. This is not a proposal taken forward by Lord Lester's Defamation Bill.

### **Apology, Correction and Declaration of Falsity**

26. There, however, another point on "remedies" where in my view there is a strong argument in favour of reform. In the "Free Speech is not for Sale" report it is suggested that an apology should be the primary remedy in libel. There is considerable force in this point. There is a strong argument in favour of giving the courts a power to order the publication of a correction or apology. This is available in many European countries. If the courts were able to order the publication of corrections or apology – perhaps in the form of the publication of a summary of the Court's judgment, with appropriate prominence – this would be a powerful factor in reducing the level of damages.

27. Another possible remedy – presently available only on summary determinations – is the "declaration of falsity". This is often the only thing that a claimant wants – for it to be publicly declared that he or she did not lie or cheat in the way alleged. In such a case the claimant could be required to prove the falsity of the allegations – as the price of a court declaration. The fact that there is a "privilege" or "responsible journalism" defence in such a case should be relevant only to costs. The question as to whether there is such a defence is irrelevant to the truth or falsity of the underlying allegation (and to the public utility of that falsity being established).

28. In practice, this remedy would prove attractive to many claimants for whom, as the Libel Reform campaign correctly suggests, vindication is often the primary aim. A declaration of falsity may, in many cases, be a sufficient remedy for a claimant whose main concern is to set the record straight. There has, unfortunately, been little debate about these alternative remedies. One reason for this may be their unpopularity amongst the media supporters of libel reform.

### **PROCEDURES**

29. The supporters of libel reform have focussed on a number of aspects of the law which could properly be described as "procedural". I want to deal with four: abusive actions, burden of proof, multiple publication and "libel tourism". I then want to make a "practitioner's" proposal for reform: a mechanism for the early determination of meaning.

### **Abuse**

30. One of the most powerful arguments against the current law of libel – and one which has helped the reform campaign gain considerable popular support – concerns the way in which the law is abused by claimants. There are two aspects to this.

31. The first, is that the law of libel it is a vehicle for "wealthy bullies" to

suppress criticism. There is obvious force in this argument. The law of libel has been used in an oppressive way by bullies from Robert Maxwell to the large corporations seeking to silence critics. But the fact that the present law of libel has been misused it not, of itself, an argument in favour of reform. For every Robert Maxwell there is a Robert Murat – he was, you may remember the innocent ex pat who came to be falsely accused by the British press of being involved in the disappearance of Madeleine McCann. It must also be remembered that rich bullies are not just claimants. Rich media corporations have, traditionally, sought to grind down meritorious claimants by so-called "long pocket" defences.

32. The fact that rich bullies can abuse the law of libel is a powerful argument in favour of "levelling the playing field". One way of doing this is, of course, making funding available for impecunious defendants (and claimants) so that they are on more or less equal terms with their rich opponents.

The "conditional fee system" was an attempt to do this. It is a system that is deeply flawed and open to abuse although, in the absence of public funding or charitable support, it may be the least bad system for providing access to justice in libel cases.



33. Furthermore, it is impossible to conceive of a reform which would, in practice, eliminate abuse. Whatever the provisions of the substantive law, the possibility of abuse is always present. A quick perusal of the reports of US libel litigation – where the substantive law is, as is well known, very heavily tilted towards the protection of defendants – will confirm this.

34. The second, and perhaps more pernicious form of abuse, are libel claims of a trivial nature – where a claimant sues over a small number of publications which, in practice, are highly unlikely to have caused him or her any damage at all. The defendant is put in the invidious position of either having to defend an action at great cost or of “admitting” the falsity of something which he or she knows or believes to be in fact true.

35. There is general agreement that “trivial libels” should not be allowed to clog up the courts, although less clarity about how they should be identified and dealt with. There is already jurisdiction, deriving from the case of *Jameel v Dow Jones*<sup>7</sup> to strike out a case as an abuse of the process if the publication does not amount to a “real and substantial tort”. Furthermore, the result of the decision in *Thornton v. Telegraph Media Group*<sup>8</sup> is that for words to be defamatory at all they must cross a threshold of seriousness. Lord Lester’s bill contains a provision, in clause 12 to the effect that a claim must be struck out unless a claimant shows that the publication has caused substantial harm to his reputation or it is likely that such harm will be caused – unless it is found to be in the interests of justice not to strike out.

#### **7 [2005] QB 946.**

#### **8 [2010] EWHC 1414 (QB)**

36. It is not clear what this provision adds to the current law of abuse. Presumably it is intended to apply a more rigorous test than that applied in *Jameel* – if not, there would be no point in having it. But how much more rigorous? How high is the new bar set by this provision? Neither the clause itself nor the Explanatory Notes to the Bill give any guidance. This is something which would have to be resolved by decisions of the court and would inevitably mean a period of considerable uncertainty whilst a body of case law interpreting the provision was developed.

37. The practitioners’ perspective on this clause is that it would be good for business but bad for the public. It would, inevitably, mean that in a large number of libel actions, there would be an “additional stage” at which the issue of “substantiality” would be considered. This would, in turn, involve consideration of a large number of issues which would involve the preparation of evidence. It seems inevitable that, in some cases, defendants would seek to argue that despite the apparent seriousness of the libel and the wide publication, the claimant’s reputation was such that no substantial damage had resulted. The practical consequence of this provision would be to increase the cost and length of libel proceedings. It would, in addition, require “front loading” of costs: that is, spending more money at the outset. Any well advised claimant would, before issue gather evidence to support the claim that the damage was substantial. As most cases settle well before trial, this approach would make cases more costly.

38. If the aim is indeed to “build on” *Jameel*, then any statutory reform needs to be much clearer about where the “bar” is to be placed and care should be taken to limit the time and costs taken up on this issue. Perhaps the best way forward is to bring in new rules of court (as suggested by the Libel Working Group).

#### **Burden of Proof**

39. In “Free Speech is not for Sale”, Index on Censorship and English PEN recommended that the burden of proof should be reversed in libel cases. The complaint is that, in a libel action, the burden is on the defendant to prove his defence: in the words of the Report “In libel, the defendant is guilty until proven innocent.”

40. I will make three points about this. First, the language of “guilt” and “innocence” is not really appropriate. The law requires someone who alleges that a person is guilty of wrongdoing to prove his charge.

This seems entirely fair and is consistent with the position in other areas of the civil law: if I damage someone’s property or punch them on the nose I am liable in trespass to goods or trespass to the person unless I can establish a lawful justification. Second, a reversal of the burden of proof will often require a person to “prove a negative” – to take an example from one of my recent cases, that he was not the mentor of person who committed a terrorist attack.



The difficulties are obvious: my client he would have had to prove the negative that he had never encouraged the man in question to engage in terrorism. Third, there is a strong policy in favour of requiring those who make defamatory allegations to think about whether or not they can show them to be true before they are made. Another point is sometimes made: that it would not make much practical difference because each side would still have to marshal evidence for and against the factual point in issue in any event much as they do at present. This may well be right although, if the burden of proof were to be reversed, it would undoubtedly require a lot of litigation to find out exactly how it worked.

### **Multiple Publication Rule**

41. Another complaint in “Free Speech is not for Sale” is that the “definition of ‘publication’ defies common sense” and a “single publication rule” should be introduced. This is not straightforward. The perceived problem of the “multiple publication” rule is that it means that a person can sue years after the – to use a neutral term – first “dissemination” of the words complained about. This, it is said, gives rise to potential difficulties for the keepers of online archives.

42. There is an obvious good point here – although there is in fact little evidence that this gives rise to problems in practice. The point could be dealt with by the introduction of an “archive privilege”. A “single publication rule” is something altogether different. It involves a “deeming” provision – treating all publications as if they took place on the date of the first one. Such a rule has been introduced in most US jurisdictions – but, as far as I am aware, nowhere else. It, inevitably, requires qualifications and exceptions – for example, the paperback edition of a book and its newspaper serialisation are “new publications”. Once again, a reform would generate new issues which would have to be resolved by fresh litigation.

### **Libel Tourism**

43. A third complaint concerns “libel tourism”. It is said that the “claimant friendly” (and unacceptable) state of English libel is demonstrated by the fact that “London has become an international libel tribunal” – the “libel capital of the world”. This is, as a matter of fact, untrue. The level of libel litigation in London is very low by world standards and very few of the cases are brought by foreigners against foreigners. The previous Government’s “Libel Working Group”<sup>9</sup> looked at the 219 libel actions issued in England in 2009 and found that 34 or 8% were identified as having a “foreign connection” (based on the addresses of the parties given on the claim form). There appear to have been no “pure libel tourism” cases – that is claims brought by foreign claimants against foreign defendants relying on the fortuitous publication of a few copies in England or on the internet. More recently, a survey by Sweet & Maxwell suggested that only 3 of 83 defamation lawsuits examined from the previous year were examples of “libel tourism” – and two of those were cases brought by UK residents.

9 23 March 2010, <http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>

### **Corporate Claimants**

44. A fourth point is that “not everything deserves a reputation”. The value of human dignity is plainly not directly engaged when a company’s reputation is attacked. The “Free Speech is not for Sale” report suggests that the law should “exempt large and medium-sized corporate bodies and associations from libel law unless they can prove malicious falsehood”. Practitioners are aware that successful malicious falsehood cases are vanishingly rare – partly because English law provides strong protection for journalist’s sources, making prove of malice almost impossible. This would mean that the proposal would leave “large and medium-sized companies” without remedy in the case of false and damaging publications. Lord Lester’s Defamation Bill is not quite as radical. Clause 11 provides that:

“A body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused or is likely to cause, substantial financial loss to the body corporate”



45. This goes both too far and not far enough. It goes too far because it excludes “non-trading” corporations – running charities or NGOs – from making claims. It does not go far enough because it does not restrict the ability of large multi nationals to bring claims in relation to most kinds of defamatory allegations. Any reform proposal must recognize the special position of non-trading corporations and the need for corporations of all kinds to be able to vindicate their reputations in the face of false allegations which damage their ability to carry out their activities. If the right of large corporations to claim damages for defamation is to be restricted, it could be replaced by the right, in appropriate cases, to seek declarations of falsity – to provide vindication in the face of false allegations.

### **Early Determination of Meaning**

46. There is another procedural reform which could, however, produce substantial benefits in libel litigation: a procedure for the early determination of meaning. This would involve a judge deciding, at an early stage, what allegation the words complained of were making (that is, their “meaning”). Disputes about meaning are often central to libel actions and such determinations could, potentially, save considerable time and costs.

47. There is, however, one consequence of a rule which allowed for “early determination of meaning” which some regard as being of profound constitutional importance. If such a determination was to be made by a judge it would require the abrogation of the right to trial by jury in defamation cases. Many regard this as a historical anomaly – and in practice such trials are now rare (there has not been one in London since July 2009). The issue is, nevertheless, a difficult one which requires full consideration and debate.

### **COSTS**

48. The issue of costs is central to the concerns of many of those who want to see the law of libel “reframed”. This issue is, unfortunately, not just confined to libel cases. The costs of all forms of civil litigation in England are scandalously high. The result is that there are only three classes of people who can realistically obtain access to the courts: the rich, those who have public funding and those who have the benefit of CFAs and ATE insurance.

49. The reasons for these high levels of costs are complex and lie deep in our legal culture. Two factors seem to me of particular importance.

50. First, there is the traditional common law approach to trials – requiring extensive disclosure of documents and then full cross-examination of witnesses. This means that cases which, in civil law systems, can be dealt with in a matter of weeks, with hearings measured in hours, take one or two years to come to trial, with hearings measured in days or weeks. This is something which could be reformed – although its consequences are far reaching and would require very careful analysis and development. It is interesting that, as far as I am aware, no one has proposed such a reform whether in the libel context or more generally.

51. Second, there is the “commercialisation” of English legal practice. Thirty years ago, most solicitors’ firms were small “professional” offices with a handful of fee earners. Solicitors are now often very large commercial organisations, in large offices with hundreds or thousands of staff and turnovers measured in the millions. Large organisations generate large overheads. Practitioners’ earnings have increased to levels which are, by historical standards, extremely high. As a result of all these factors, legal fees have hugely increased. Once again, this could be the subject of radical reform. The courts could cap practitioners’ hourly rates at substantially reduced levels. This would mean recasting lawyers’ business models. It is noteworthy that, in his wide ranging and widely praised review of civil costs, Lord Justice Jackson did not engage with the issue of hourly rates at all.

52. In other words, the reform of the unacceptably high level of civil legal costs is difficult and will take time. This is not an argument for not doing it but rather a caution against “quick fixes”. A series of measures have been attempted – including “costs budgeting” and “costs capping”. None have been entirely successful. This does not mean that we should stop trying but it does mean that careful research and analysis is needed.



53. On a slightly different point, there are strong arguments for reducing the level of libel CFA success fees – although not to the 10% suggested by the last government. The success fee should reflect the actual rates of success of libel claims. CFAs provide access to justice for claimants and defendants who would otherwise not be able to afford to go to court. As I have already said, they may well be the “least bad” way of providing access to justice. There should be proper control over the costs which are incurred and success fees should properly correspond to the risk. All practitioners hate CFAs but, without them, access to justice will suffer.

54. From this practitioner’s perspective, the only practical solutions under this head are piecemeal ones. In relation to costs, there should be stricter rules about recovery, particularly in relation to CFA success fees.

55. If the costs issue cannot be resolved quickly and directly, is there an “indirect” way of approaching the problem? In “Free Speech is not for Sale” it is proposed that a Libel Tribunal should be established “as a low-cost forum for hearings”. There are obvious attractions in this proposal. Of course, a Libel Tribunal would be determining civil rights and obligations under Article 6 of the European Convention on Human Rights. It would, therefore, have to be “Article 6 compliant” in terms of its composition and procedures. However, employment and discrimination cases – where the law is sometimes complex and difficult - are litigated in Employment Tribunals in front of a professional judge and two lay members. Why shouldn’t the same apply in libel cases? Such tribunals could take all libel cases or perhaps those below a certain value or those not involving corporate defendants.

56. There are two issues which arise. The first is that the procedures of “tribunals” are often just as complex as those in courts – this is not surprising as they are part of the ordinary court system. Like Employment Tribunals, Libel Tribunals would have pleadings, disclosure and cross-examination. It is doubtful whether there will be much advantage in terms of speed or cost.

57. The second issue is more important. In the English tribunal system the usual rule is that orders for costs are only made in exceptional circumstances. This means that litigation can be conducted by claimants without real financial risk and it also gives decisive advantages to the wealthy who can litigate without needing to recover their costs. The risk of having to pay costs helps to focus the minds of litigants – to stop them bringing or defending unmeritorious claims. A tribunal system removes this risk and makes it likely that more cases will fight.

58. Instead of a Libel Tribunal, there are attractions to the recent idea put forward by Tracey Brown of having libel cases heard in the County Court. Actions against the police – which are often tried by civil juries – are regularly heard in the County Court and defamation cases are no more complex. Any change in this regard would require the repeal of section 15(2)(c) of the County Courts Act 1984 which expressly provides that the County Court “shall not have jurisdiction to hear and determine ... any action for libel or slander”. Costs are lower in the County Court and the procedure may be slightly quicker. There is no reason why libel cases should not be heard in the County Court – particularly if they were dealt with by designated judges with experience of the area. It is noteworthy that, in New South Wales (which appears to have 15 times more libel litigation than England and Wales) the smaller “non-media” cases are now generally dealt with in the local equivalent of the County Court – the District Court. This kind of reform should achieve some – modest – costs savings.

## CONCLUSION

59. This is one practitioners’ perspective. It is very different from many supporters of libel reform. For the reasons I have tried to explain, I am sceptical about many of the libel reform arguments. The English law of libel, in general, has the balance between free speech and reputation in more or less the right place. Subject to some adjustments to limit the ability to sue of large corporations and provide defences to scientists and bloggers and I am not persuaded by the case for reform to the substantive rules of libel law.

60. The position in relation to costs and procedure is very different. These aspects of the English law of libel are not in a happy condition. The law is costly and inaccessible to most people, it does not provide proper remedies to claimants. There is no “magic bullet” which will solve all these problems with one shot. What is needed is are specific and focused procedural reforms, along with continuing efforts to control costs and provide cheaper methods of resolving claims. What is required is not a fundamental “reframing” of the law but continuing vigilance and revision to ensure that it properly serves the public interest.





## Reforming English Libel Law: Evolution, not Revolution

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When William Shakespeare opined “He that filches from me my good name, robs me of that which not enriches him, but makes me poor indeed”<sup>39</sup>, he could perhaps be forgiven for not having foreseen our Twenty-first Century information economy, where such economic value rests upon the publication and sale of celebrity gossip, among other scandalous media (often tabloid) content.

The birth of the world wide web has only served to exacerbate this situation, raising significant difficulties which, if not wholly new, at least had never previously existed on such a scale as they do now. English libel law has come under much attack, both from within the jurisdiction – see, for example, the work of LibelReform.org and various associated bodies in this respect – and without; no less sensationalist a term than ‘libel terrorism’ has been used in, of all places, the US Congress when speaking of English libel judgements against American defendants. This short paper offers one academic’s view of libel reform. The thrust of the argument which will be presented is that yes, libel law is in dire need of reform in key specific aspects, however (to paraphrase Mark Twain), suggestions of its expiry, or at least, unfitness for purpose, have been greatly exaggerated. Key suggestions from the reform lobby will be addressed, as will the more measured reforms encompassed by the Defamation Bill of 2010. The conclusion to be drawn is that a more natural, evolutionary process of reforming the law of libel in order to maintain its currency in a Twenty-first Century media sphere should be preferred over a radical redrawing of the rules which would, ultimately, result in little more than an unjustifiable and heavy rebiasing in favour of certain interest groups.

### Bringing the libel action

The first key issue raised by the reform lobby relates to the categories of persons to whom the option of bringing a libel suit is open. Specifically, the suggestion has been put that large corporations be prevented from filing suit in defamation. The author, recalling the spectacle of the infamous McLibel trial, in which two unemployed defendants were forced by financial circumstances to represent themselves against the corporate might of McDonalds, would have some sympathy with this view. Even more so when considering the proliferation of private sector services in our modern world.

Why should, for example, a private company running a rail network be able to sue its critics where its nationalised predecessor would have been prevented from so doing? Corporate concerns in many respects now dominate much of what was formerly nationalised industry; their having recourse to the libel laws raises the concern that criticism of essential services might be chilled where provision has been contracted out to the private sector. Were this to be changed, individuals within those private interests could still sue in libel to protect their own personal reputations. Some critics raise the concern that this would provide a ‘back-door’ into protecting corporate reputation, however the courts would (as is currently the case in respect of, for example, members of political parties including, of course, MPs) distinguish between questions of corporate and personal reputation before allowing a case to proceed: it should be relatively straightforward to make such a distinction on the facts of a given case.

<sup>39</sup> *Othello* Act III, Scene iii



Lord Lester in his Defamation Bill presented an alternative method for seeking to prevent corporations from abusing the libel laws in order to silence criticism unduly. Section 11 of the Bill (“Action for defamation brought by body corporate”) requires that such a claimant, in addition to the normal requirements for a libel suit, must establish that the alleged defamatory publication “has caused, or is likely to cause, substantial financial loss to the body corporate.” This concentration upon financial loss is wholly appropriate, corporate bodies having legal personality but lacking emotion. Where the criticism aired is sufficiently libellous that it carries the potential for causing financial harm on such a scale, it should not be difficult for a corporation to demonstrate the likelihood of such an outcome. Should Lord Lester’s approach come to be favoured by the legislature when the new, government-backed defamation bill is introduced, it is submitted that they should at least consider a broader reaching reform along these lines. It does not seem unreasonable to the author that all libel claimants be required to demonstrate at least the likelihood of harm to reputation being occasioned by the publication at issue, as opposed to such harm being simply assumed. This would, it is recognised, dissolve the key difference between cases of libel and slander. Perhaps this is wholly appropriate in the modern world, as we are now living in a time when the primary means of spreading gossip are increasingly not face to face, but via technology – email, social networking sites, bulletin boards, Twitter, SMS and so on, all of which are more likely to fall under libel. No longer is libel the preserve of traditional publishers and the press. A single, all-embracing concept of defamation would seem a timely approach.

In debates around the bringing of libel suits, a common argument is that the UK should adopt the US *New York Times v Sullivan*<sup>40</sup> rule. This places a further requirement upon libel claimants who qualify as “public persons” that they satisfy the court that the publication in question was made with malice. As a general rule, malice in English libel law can incorporate recklessness in relation to the truth of an article published. This would mean that in some cases the strict liability standard for libel would be effectively abandoned, intention of the publisher becoming a factor. While the author holds the view that many of those who make their living in the public eye have willingly placed themselves in such a position (live by the media, die by the media), it still seems somewhat counterintuitive to say other than that all claimants should be treated equally by the courts rather than developing a two-tier system of libel based upon the public awareness of the individual about whom allegations have been made. Further, this would seem to go against the overarching policy of the current regime, that the media must take responsibility for the allegations they make.<sup>41</sup>

### **The financial impact of libel law**

There is no doubt that the financial impact of a libel suit is great. As a result of the settlement following *Godfrey v Demon*<sup>42</sup>, the defendant company was sold, largely in order to meet the cost of the case.<sup>43</sup> Even a successful defendant can be left in a very difficult financial position should the claimant prove unable to foot the bill for the cost of mounting the defence. For an unscrupulous claimant to launch a case which succeeds on a technical grounds but not in persuading the award of any more than nominal damages or only a limited contribution to their costs is one thing; quite another for the defendant who did not choose to initiate proceedings. While one would disagree with those who would suggest that significantly reducing the financial impact of defamatory proceedings is a cure-all for the problems of English libel law, it is certainly one of the most immediate concerns for those caught up in a case. The libel reform movement has put the suggestion that some form of tribunal may be the way forward; certainly a suggestion worth exploring. The Press Complaints Commission might be seen as partially fulfilling that function under Clause 1 of its Code. Clause 1 relates to ‘accuracy’, and clearly covers material which would be libellous within its ambit.<sup>44</sup> Where the individual concerned would be wholly satisfied with the publication of a retraction, correction and apology, this might be a realistic alternative to expensive libel proceedings. Of course, it is limited to UK print publications and their online equivalents only, and so does not provide an alternative in every case. Many practicing libel lawyers also feel that the PCC lacks ‘teeth’; it is, after all, a self-regulatory body, with none of the legal authority that a co-regulatory alternative such as Ofcom has within its media ambit. A co-regulatory body, formed under statutory authority, might be likely to provide a more credible alternative to the courts. The Ministry of Justice, under the previous UK government, has already carried out a public consultation on the issue of reducing costs in defamation proceedings; this is to be welcomed, but radical action may prove necessary in order to fully address concerns here.

<sup>40</sup> 376 US 254 (1964)

<sup>41</sup> See further discussion, below, on the defence of justification.

<sup>42</sup> [1999] EMLR 542

<sup>43</sup> The case settled for a reported £500,000, including £15,000 damages agreed as being payable to Mr Godfrey.

<sup>44</sup> See Clause 1(ii), which refers to “significant inaccuracy, misleading statement or distortion”.



On the matter of the financial impact of defamation, damages present a thorny issue. In their original 2009 report which launched the LibelReform.org campaign, Index on Censorship and English PEN made the assertion that “English Libel Law is more about making money than saving a reputation.”<sup>45</sup> While there certainly are some would-be claimants who doubtless are motivated by the perception of a financial windfall being within easy reach, it is submitted that they are likely to be in the minority. It seems highly unlikely that many would launch a libel suit so frivolously. It should also be borne in mind that the larger payouts tend to arise only in celebrity cases where the claimant is already in a position of some wealth. The aging pop star who “likes flowers” sufficiently to spend £300,000 on them in the space of nine months, seemingly able to shrug off such expenditure in a very casual manner, is unlikely to be motivated by the monetary element of a libel judgement, even if that were to be closer £350,000 than £75,000.<sup>46</sup> Nevertheless, there is a good case to be made that damages available in libel cases should be subject to a cap. The reform movement has suggested that the appropriate figure for such an upper limit would be £10,000. This could be in danger of being inflexible in some cases, but the suggestion is subject to a clear caveat that a higher award might be made where a sufficient case could be made to prove material damage, such as, for instance, loss of earnings.<sup>47</sup> This would be a welcome move and could only strengthen the position of good-faith libel claimants as the accusation of gold-digging could not be levied against them.

### Defences to Libel

The area of libel law which stands to benefit most from reform is that of defences. A number of the most significant defences to libel are to be found spread across caselaw; to put those on a statutory footing and clarify their conditions and remits is entirely desirable, and was perhaps the high point of the Lester Bill. This is not to say, however, that all defences require radical or even substantial reform. For instance, justification. This is the ultimate defence to libel: in essence, it involves proving that the allegations made are wholly or at least substantially factual, and thus the claimant’s reputation is not unfairly maligned. As a matter of principle, it is submitted that it is indeed right and fair to hold the media to a high standard in this respect. It is not unreasonable in the least to expect a responsible publisher or journalist to, within reason, be in a position to substantiate their claims. A common suggestion made by many proponents of reform is that the claimant should instead bear the responsibility of showing to the court’s satisfaction that the alleged defamatory statements are materially false. The Index on Censorship and English PEN 2009 report suggested that a claimant be required to prove the falsity of a statement. “This reform,” it stated, “would reverse the burden of proof, bringing English law up to global standards.”<sup>48</sup> The difficulty here is, of course, that this will often involve proving a negative. How might, for instance, an academic accused of conducting a sexual affair with one of his students who goes on to achieve top grades despite rarely appearing in class and not submitting a significant proportion of assessed coursework prove that this is not in fact the case? Surely it is a much simpler matter for those who would make such allegations to prove that they are true. If they are not in a position to do so, it does not seem unreasonable to the author that they should either refrain from publication or lay themselves open to face action. The suggestion was made that in some circumstances this might not be suitable and that the defence might then be required to adduce evidence of the factual nature of their allegations. This is not, however, especially clear, and the author would be of the opinion that the burden of proof should remain as it is. Of course there will always be those claimants who lie on the stand, safe in the knowledge that the allegations, although truthful, cannot be proven.<sup>49</sup> This might always be a problem, however it does not, it is submitted, provide a valid argument for lowering journalistic standards to the level of passing on unfounded rumour. On a related note, claimants found to have brought libel proceedings in bad faith should face the full force of the perjury laws, as did both Jeffrey Archer and Jonathan Aitken.

<sup>45</sup> *Free Speech is not for sale: the impact of English Libel Law on Freedom of Expression* report by English PEN & Index on Censorship, 2009 at page 8. Full report available online at [www.libelreform.org](http://www.libelreform.org)

<sup>46</sup> See *John v MGN* The Times, 14 December 1995

<sup>47</sup> *Free Speech is not for sale: the impact of English Libel Law on Freedom of Expression* report by English PEN & Index on Censorship, 2009 at page 8. Full report available online at [www.libelreform.org](http://www.libelreform.org)

<sup>48</sup> *Free Speech is not for sale: the impact of English Libel Law on Freedom of Expression* report by English PEN & Index on Censorship, 2009 at page 8. Full report available online at [www.libelreform.org](http://www.libelreform.org)

<sup>49</sup> See, for instance, *Liberace v Daily Mirror Newspapers*, The Times, 18 June 1959



Much as the author supports the Lester Bill's efforts to place justification as it currently stands on a statutory footing<sup>50</sup>, he nevertheless maintains a position of vociferous opposition to the notion of renaming it as a 'defence of truth'. This is not in any way an attempt to be arch or to labour a wry joke about the honesty or otherwise of the legal profession. It is simply the expression of a firmly held view that the courtroom is no place for "truth". "Truth" is a matter for the philosopher, perhaps the theologian; the court room is a place of provable fact. This is especially the case when dealing with civil proceedings where a decision falls to be made on the balance of probabilities, a very different standard than the notion of objective truth. One must recognise and have much sympathy for Lord Lester's desire to demystify legal terminology for the average person – Lord Denning's "man on the Clapham omnibus" – but 'truth' seems a wholly inappropriate appellation in this particular context.

With respect to the existing defence of Fair Comment, the author would, as a matter of opinion, reject the notion that this is too onerous for the average defendant. If anything, it is significantly easier than justification as in the vast majority of cases statements of fact and opinion will be clearly distinct from each other, with the facts upon which an expressed opinion is based usually being matters of public record. The requirement that any such statement be in the public interest cannot in good faith be argued against as the very underlying argument for the media retaining the freedom to express an honestly held opinion is one of public interest. The one unsatisfactory element to this defence (which, as others, will benefit from being clearly laid out on a statutory footing), is the misnomer by which it is known. The very nature of the defence, requiring only that the opinion is honest and free from malice, not that it be in any way reasonable, flies in the face of the notion of "fair comment". A far more appropriate label is that proposed in the Lester Bill, "a defence of honest opinion".<sup>51</sup>

On the matter of public interest, there is always much interest among reform campaigners in the idea of a specific public interest defence. Often details of how this might operate are scant, unfortunately. Libel defendants already have several strong defences open to them, including justification and fair comment, and so an open-ended defence that publication of a libel may be excused where it was in the public interest so to do would seem unnecessary and unhelpful. However, the issue of qualified privilege at common law does require clarification, especially what is now termed Reynolds Privilege<sup>52</sup>. This requires that there be a demonstrable public interest in both publication and receipt of the statement in question, subject to a requirement of responsible journalism. The problem with Reynolds as decided by the House of Lords is that several of Lord Nichol's factors for determining whether the defendants behaved responsibly in all the circumstances could amount to a reversal of the burden of proof for this defence. The defendant must establish the defence, which can then only be defeated where the claimant can show malice on the part of the defendant. The problem here is that certain factors which the courts ruled should be taken as part of the defence in this case, including the nature and quality of the sources of the story, the failure to put the claimant's side of the story and, indeed, the failure to alert the claimant of the defendant newspaper's conclusions prior to publication, were all issues which, as acknowledged in Lord Hope's dissenting judgement, might properly be seen as going to the issue of malice rather than qualified privilege. These issues require to be clarified. A further problem with the expectation that the defence produce evidence as to the quality of their sources lies in the fact that this conflicts with a journalist's right to withhold the identity of confidential sources of information<sup>53</sup>, long held to be a cornerstone of journalistic integrity and an important factor in protecting the press' role as a public watchdog and defender of free expression. Under Reynolds, either the defendant must give up such information, or risk that the judge or jury may draw pejorative inferences from any refusal so to do. Lord Steyn, in his judgement in the Lords acknowledged the difficulty presented here, but concluded that there was no unfairness in the Lords' ruling as no one was to be forced to give up their confidential sources – they could choose to withhold these, and if that limited their chance of succeeding in a qualified privilege defence than that was their choice. Lord Nicholls, on the other hand, considered that such a refusal should not weigh against the defence. This remains an undecided point. Lord Lester's Bill made a welcome effort to clarify Reynolds privilege in setting out a defence of "responsible publication on matters of public interest".<sup>54</sup>

<sup>50</sup> See sections 4 and 5

<sup>51</sup> See Section 3

<sup>52</sup> See *Reynolds v Times Newspapers Ltd* [2001] AC 127

<sup>53</sup> See Section 10 of the Contempt of Court Act 1981

<sup>54</sup> See Section 1



This does clarify the nature of the defence rather a lot, which is to be welcomed, but it still leaves the above issues open as potential problems. It may be that these will have to fall to be addressed by the courts, although it would be preferable, if possible, to clarify at the statutory level. Welcome also is Lester's proposing the availability of the defence be to anyone who makes a responsible publication in the public interest in all the circumstances, rather than limiting it to 'journalists' with all the complications that would bring in the age of the amateur but influential blogger.

### **The Tangled Web**

The internet, in particular the birth of the world wide web and the arrival of cheap home broadband services as a norm in the early part of the twenty-first century has been a game-changer for English libel laws. As demonstrated by the results of *Loutchansky v Times*,<sup>55</sup> the multiple publication rule effectively emasculates the limitation period, meaning that for the full extent of a potential claimant's natural life, the publisher of material made available online remains open to a libel action even many years after the original publication was first made. This carries distinct difficulties for the defence: aside from concerns about chilling effect and a threat to the Article 10 right of free expression, dismissed by the Court of Appeal, it is foreseeable that in a case where a great length of time has elapsed since initial publication there may even be a threat to the Article 6 right (fair trial) if circumstances make it very difficult to mount a defence. For instance, the journalists who wrote an allegedly defamatory piece, published in the online archive of a newspaper, may have left its employ, may be dead or otherwise untraceable; the editor and even the owner or publisher may be entirely different persons. While the multiple publication rule applies equally offline as on, it is a particular problem for online publishers for the simple reason that publicly accessible online archives tend, by and large, to be far more likely to be maintained and made available by the original publisher, and so awareness-based defences are unavailable. The European Court, while deciding against unsettling the ruling of the English Court of Appeal did note that such problematic circumstances could arise.<sup>56</sup> In the instant case, Europe seems only to have decided to let it stand as on the facts it was only a mere matter of weeks beyond one year from first publication, and so there was no significant additional hardship for the defence than had they been sued within an initial twelve month period from first publication, as opposed to during a new limitation period begun by publication via downloading of the articles at a later date. As the author has argued at length elsewhere,<sup>57</sup> had English law adopted a US-style single publication rule, meaning that the claimant here would have been out of time when the action over the online publication was commenced, a court could still have exercised its discretion to hear the case anyway where it was the court's opinion that it would be in the interests of justice so to do. The author is, of course, in favour of altering the English position here only in terms of point of publication in time, not geography. Any suggestion that the limitation period be lengthened seems superfluous; certainly it would make no practical difference while the multiple publication rule remains. This issue was addressed in the Lester Bill, which would include within the category of statements to which statutory qualified privilege attaches subject to explanation or contradiction:

"A fair and accurate copy of, extract from or summary of material in an archive where-

the material has been publicly available online for a period of at least 12 months starting with the date of first publication by or on behalf of the archive; and

in the course of that period, no challenge has been made, whether in the courts or otherwise, which indicates that the material is considered to be defamatory."<sup>58</sup>

This would go some way towards addressing the problems raised by *Loutchansky*, but it would still seem that the adoption of a rule which states that the limitation period for defamation be calculated from point in time of original publication, running out twelve months thereafter not to be restarted, would be a much simpler means of doing so.

<sup>55</sup> [2002] 1 All ER 652

<sup>56</sup> *Times Newspapers Ltd (No 1 & 2) v UK* Application 3002/03 & 23676/03 10 March 2009

<sup>57</sup> Sutter "One Way, or another? Is it time for the introduction of the single publication rule in English defamation law?" *Contemporary Issues in Law* Volume 7 Issue 4 2005/2006

<sup>58</sup> Defamation Bill Schedule 1 Part 2 Paragraph 11



Much of the libel debate in recent years has concerned the position of intermediary distributors in the online context. When Parliament put the old defence of innocent dissemination on a statutory footing in Section 1 of the Defamation Act 1996, care was taken to ensure that those categories of persons involved in publishing a defamation to whom the defence would be unavailable were defined such that online intermediaries were excluded and therefore classified as distributors who might qualify for the defence. In essence, this defence is available to those who are not the author, editor or publisher of a defamation, who merely play a passive role in making it available, and who, having taken all reasonable care in relation to the content which they make available, cannot fairly be considered either to have been aware or that they should have been aware of the defamatory statement in question. As a result of the domestic enactment of the Electronic Commerce Directive<sup>59</sup> via the Electronic Commerce (EC Directive) Regulations 2002, a very similar set of provisions now apply in respect of online service providers to all situations in which liability for third party provided unlawful content is at question. There exists a school of thought which suggests that English libel law should adopt a 'safe-harbour' defence for such parties, a la that set out in Section 230 of the US Communications Decency Act 1996. This is something that the author would reject, for several reasons. Firstly, as a simple matter of legal obligation, the UK cannot opt out of the requirements imposed by the Electronic Commerce Directive. In any case, the US CDA is and should not be considered a model to follow. It is, in fact, a clear case of the law of unintended consequences writ large. The CDA originally contained a number of provisions designed to help drive pornography off the internet, at least insofar as might be accessible to children. The Act criminalised the provision of online pornography to minors, as well as the knowing provision of internet services to those who would seek to use them so to do. These offences were, in the landmark case of *Reno v ACLU*<sup>60</sup>, ruled unconstitutional by the US Supreme Court on the ground that in prohibiting content which was not obscene but merely indecent, they were in violation of the First Amendment protection of free speech.<sup>61</sup> Section 230 was left to remain alone. The original intent of this section, which provides a complete immunity from any liability for third party content (criminal content and infringements of intellectual property being excepted), was to encourage online intermediaries to help weed out the undesirable, pornographic content by freeing them to actively edit their servers without fear of thereby opening themselves to strict liability for any defamatory content thereon under the prior existing state of the law. In practice, however, all that seems to have happened<sup>62</sup> is that those who make content available online have been granted an effective licence to continue to make available defamatory material with impunity. Those who advocate such a position in English law would argue that the alternative is to place a distributor in the unenviable position of having to make a judgement call as to whether or not to act upon a complaint of defamation, risking losing out in court if they wrongly choose to allow the material to remain online. And yet it strikes the author that in many cases it would be equally undesirable to allow a distributor to knowingly continue to make available defamatory material, safe in the knowledge that they face no liability as it is third party provided content. This is an area which requires much consideration in order to ensure that standards of fairness are applied to the online intermediary community and that free expression is not threatened by over-cautiousness in responding to complaints received by them. Nonetheless, it is difficult to see a Section 230 type alternative as likely to solve matters rather than simply raising new concerns. The difficulties here encountered will not fall to be decided within the remit of the libel debate, but rather now form part of a much broader consideration of the limits of intermediary liability in respect of material which others make available via their services. This debate can now inevitably only be addressed at the European level.<sup>63</sup>

A final major issue which arises in relation to the internet is cross-border publication. As the internet respects neither geographical nor political borders, it is inevitable that the instances of publication into the UK from outside are now vastly more common than in the pre-web age. So-called 'libel tourism' is often the subject of criticism, with many in the wide libel-reform lobby seeing it as something that should be strictly limited. The author is not entirely convinced that there is any such need; it may also be worthy of consideration to note that the English legal profession has never objected to such trade either.

<sup>59</sup> 2000/31/EC

<sup>60</sup> 521 US 844 (1997)

<sup>61</sup> See further Sutter "Nothing New Under the Sun': Old Fears and New Media" *International Journal of Law and Information Technology*, Vol 8 No 3

<sup>62</sup> See the whole line of caselaw on this, from *Zeran v AOL* 129 F 3d 327 (4th Cir. 1997)

<sup>63</sup> On the issue of intermediary liability for third party provided online content in general, see further Sutter [2007] "Online Intermediaries" in Reed & Angel [2007] *Computer Law* (Sixth Edition), OUP, Oxford at pp233-282



It must be remembered that while English law does indeed reflect the principle that downloading within a jurisdiction equates to publication<sup>64</sup>, this is not the end of the matter. Rather, the courts will only exercise their jurisdiction to hear a case brought by a non-national where that claimant can satisfy the court that they have a sufficient connection with the jurisdiction to occasion a reputation worth protecting<sup>65</sup>, while the court must also consider that publication has been sufficiently wide for the case to be worth the time and expense involved in hearing it, as opposed to publication being so limited as allowing suit to be brought would amount to an abuse of process.<sup>66</sup> Such limitations mitigate against the notion that foreign claimants will be able to come to England with the express intent of taking advantage of a claimant-friendly libel law on no other basis than that the article in question is accessible online from within the UK. The US legislature passed the clumsily-named Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010, duly signed into law by President Obama. This legislation makes clear that no foreign libel judgement which would violate the First Amendment will be enforceable within the USA. In reality, this is unlikely to make any noticeable difference as to whether US claimants bring cases before the courts in London; of those who have done so, most are global celebrities of the level of Tom Cruise, Nicole Kidman, Don King, et al, the sort of person who would be more interested in the protection of their reputation and good name rather than recovering damages – something which they commonly view as readily achievable via the inevitable global publicity court action in London will generate. At an early stage, the Libel Reform movement suggested that some form of general rule be put in place, a quota that ten per cent or more of total publication must be into the UK before a UK court would hear the case.<sup>67</sup> This was an interesting suggestion, albeit one that has been let drop at this later point in the debate, but any such rule is likely to encounter circumstances in which it would prove inequitable. For example, should a celebrity biography include an allegation about a US citizen which a potential claimant believes defamed them, sell 2 million copies worldwide, including 157,000 copies within the UK, any claim would be barred – yet 157,000 copies is rather a large circulation in the grander scheme of things. If that person can show a sufficient connection to the UK and a reputation here to protect, why should they be prevented from so doing? Whether this judgement is enforceable in another territory is a matter for the local authorities, not something that should concern the English courts. This approach was broadly reflected in the Lester Bill, although qualified to the extent that:

“No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant’s reputation having regard to the extent of publication elsewhere.”

The author is unconvinced of the need to make any amendment to the existing state of the law in this matter, however if it should prove inevitable then Lester’s limited measure would be preferable to a much stricter, quota-approach.

### Concluding Remarks

To sum up, what then are the major issues that the author considers must be dealt with by the future government-backed Defamation Bill? What might be included in the Sutter Defamation Bill of 2011, were such a beast to exist? Firstly, the author would propose a limitation upon those who are entitled to sue in libel via requiring that the claimant establish at least a likelihood of damage as an integral part of the claim, rather than damage to reputation being merely assumed. It should be noted, however, that this should not amount to the claimant being expected to adduce evidence as to falsity of the statement in question. This would be extended not only to a limited category of claimant such as corporate bodies, but to all libel claimants alike. The issue of cost must be addressed, and to that end some form of low cost alternative to a full libel trial must be created. A wider process of reform of libel costs is also necessary, which rightly includes (as has already been carried out under the previous government) a review of Conditional Fee Arrangements. Reform here must be approached with caution in order to ensure no repeats of the situation in which the McLibel defendants found themselves presenting their own defence for lack of funds to employ counsel, the global corporate might of McDonalds and its top flight lawyers ranged against them.

<sup>64</sup> See *Harrods v Dow Jones* [2003] EWHC 1162

<sup>65</sup> See, for example, *Don King v Lennox Lewis* [2004] EWCA Civ. 1329

<sup>66</sup> See, for instance, *Jameel v Dow Jones* [2005] EWCA Civ 75

<sup>67</sup> *Free Speech is not for sale: the impact of English Libel Law on Freedom of Expression* report by English PEN & Index on Censorship, 2009 at page 8. Full report available online at [www.libelreform.org](http://www.libelreform.org)



Any tribunal style alternative to a court hearing to be established should encourage mediation, while ensuring that defendants are not pressured into expensive settlements out of fear of the likely results of losing the case. Some level of cap on damages would be welcomed, providing that provision is made for flexibility where a higher award might be appropriate.

In respect of defences, clarification via statute is generally welcome. The author differs with Lord Lester on the semantic issue of the desirability of using the word 'truth' as opposed to justification, although rebranding 'fair comment' as, much more accurately given its nature, 'honest opinion' would be very welcome. Reynolds privilege is in strong need of clarification. Lord Lester's Bill did provide a start on the right path with clarification and emphasis upon responsible behaviour on the part of persons responsible for the publication, but the concerns raised with respect to blurring the boundaries between establishing the defence and malice remain unanswered. It may be difficult to address these directly in legislation, even by creating exhaustive lists of factors to be considered as opposed to Lester's open-ended approach (which did, of course, reflect Lord Nichol's judgement in Reynolds); perhaps guidance for interpretation by the courts might be worth exploring.

Regarding online libels, the author sees no problem needing solving with respect to so-called libel tourism. The multiple publication rule, on the other hand, is now outdated and outrageous in its application. It must be replaced, the simplest method of doing so to be the introduction of a clear rule that the limitation period in respect of defamation begins with first publication and is only ever to be calculated from that point in time. It is right and just that distributors do face liability over third party content in some circumstances, rather than creating a situation as the US legislature unintentionally did, with online distributors free to spread libel with impunity providing it is provided by a third party. There remain many difficult questions to be answered here, but the Section 230 approach is not a solution that should be adopted. This is an exciting time for those interested in libel law, with the prospect of very real and far-reaching change in sight for the first time in many years. The temptation to plump for radical change for its own sake must, however, be resisted: for all its bad press, the English libel law has much to recommend it and much that should remain. Parliament should resist major change where a subtle tweaking may often be enough.





## Reframing Libel: taking (all) rights seriously and where it leads

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In preparing this paper, we have returned to first principles and re-evaluated fundamental aspects of libel law. We offer a fresh analysis of the purposes of the law which culminates in innovative proposals regarding its substance and its processes. Our thinking has been informed by, first, philosophical understandings of democracy and the public sphere and in particular the role of freedom of speech and of the media therein, and secondly, the social psychology of reputation.

The conclusions that we reach lead us to reject the overall approach taken in the Defamation Bill sponsored by Lord Lester. Though we agree with a number of his proposals and would support their adoption, we fear that overall the Bill will do little to reduce the existing complexity and expense of the law. Indeed, it may exacerbate both. Most fundamentally, we consider that the Bill addresses the problems of libel law through the prism of an over-weaned emphasis on freedom of expression, and therefore fails properly to triangulate the rights and interests of claimants, defendants and the wider public.

Ultimately, we recommend a coherent set of significant substantive and procedural reforms that if enacted would enhance access to justice, simplify processes and reduce costs for the vast majority of libel actions. In essence, our proposal involves the recommendation of a two-track libel regime.

The first track in this new regime would comprise a much-simplified process. This could be administered by the High Court, but the function might instead be allocated to the County Court, the Tribunals Service, or an appropriately designed (self-)regulator. The overwhelming majority of cases would be addressed by this route. Damages would only be available for psychological harms protected under Article 8 ECHR, but would be capped at £10,000. Vindication would be obtained by an appropriate – and mandated - discursive remedy (correction; apology; right of reply; declaration of falsity). The remedy in damages for intangible harm to reputation would be withdrawn. Special damages for provable loss would be unavailable in this track. Determination of the meaning of imputations would be much simplified by adopting the meaning(s) inferred by the claimant subject to a test of reasonableness or significance. Truth and fair comment would remain as the primary defences, while in appropriate cases the defendant would also be able to rely on absolute, traditional or statutory qualified privilege. The rationale underpinning the Reynolds public interest defence in track one would disappear. The approaches to substantive questions suggested here would very significantly reduce the complexity and cost associated with particular cases. Hence, it would reduce the chilling effect of the law on publication, and markedly enhance access to justice for defendants and claimants.

The second track would be limited to the most serious and/or most damaging libels. Cases would proceed down this track only where special damages for provable loss are claimed, or where psychological harms protected under Article 8 are severe so that the track one procedure would be manifestly inappropriate to deal with the case. Track two cases would continue to be heard in the High Court. As in track one, the remedy in damages for intangible harm to reputation would be unavailable, and vindication would be obtained by a discursive remedy. Where proven by the claimant, special damages would be recoverable. Uncapped damages would be available for Article 8 psychological harm (although a de facto cap would remain by pegging to damages recoverable for physical injury). On account of the power of the court to award very substantial damages and the likelihood of significantly increased costs, the potential pre-publication chilling effect requires the availability of a Reynolds-style public interest defence in track two. Where the defendant relies on Reynolds, however, proper recognition of the underlying principles of freedom of expression and the importance of reputation require that the defendant provide either a right of reply or a notice of correction with due prominence. Truth and/or fair comment would remain available, and in appropriate cases the defendant would be able to rely on absolute, traditional and / or statutory qualified privilege.



We envisage that adoption of the above scheme together with the existing offer of amends procedure would also provide significant incentives for complaints to be settled quickly between the parties without recourse to the formal legal regime. We recognise that the availability of track two may continue to facilitate the abusive threat of legal action, but suggest that claims to have suffered severe Article 8 harm or particular losses could be easily identified and quickly dismissed by the court if unsubstantiated. We also recognise that the releasing of media defendants in most cases from the risk of very significant legal costs and damages may encourage 'game-playing' by some organisations. In our view, the blunt constraint currently afforded by high costs are adequately substituted by obliged dedication of space to accommodate discursive remedies and the loss of credibility that would go along with such repeated emphasis on poor quality journalism. We do not shy from the fact that these remedies themselves involve interference with defendants' Article 10 rights 'not to speak'. We also note that discursive remedies afforded quickly are often the primary outcome that claimants seek.

### **Reframing Libel: taking (all) rights seriously and where it leads**

Libel reform is happening. Earlier this year, Lord Lester sponsored a path-finding – if ultimately abortive – reform Bill in the House of Lords. The Government has recently confirmed that it has started work on a draft defamation Bill, and that this will be complete by March 2011. A period of consultation is planned after publication of the draft Bill, and it is currently proposed that a Defamation Bill will be introduced in the second session of this Parliament.<sup>68</sup> No one contests that there are problems with the existing law and practice of libel. If the Government does not renege on a good number of the proposals set out in the Lester Bill, however, it will have missed an historic opportunity to reframe the law so as properly to value and balance personal and social interests in expression, reputation and access to justice. Our basic complaint regarding both the Index on Censorship / English PEN report<sup>69</sup> and the Lester Bill has been that they over-emphasise freedom of expression to the virtual exclusion of other important values.<sup>70</sup> In consequence, they focus in large measure upon revising the substantive law of libel. Our view has been that the primary problems in this area concern procedures and costs. We think that there is a real risk that because the Lester Bill has now taken the floor, it will continue to distract attention from the key problems.

In preparing this paper, we have returned to first principles and re-evaluated fundamental aspects of libel law, its purposes, its substance, and its processes. Our thinking has been informed by, first, philosophical understandings of democracy and the public sphere and in particular the role of freedom of speech and of the media therein, and secondly, the social psychology of reputation. By doing this, we are able to ground some of the proposals for reform made previously by Index on Censorship, English PEN, Lord Lester and others. We do so, however, not through the prism of an over-weaned emphasis on freedom of expression, but rather by triangulating the rights and interests of claimants, defendants and the wider public. Ultimately, we recommend a coherent set of significant substantive and procedural reforms that if enacted would enhance access to justice and reduce costs for the vast majority of libel actions. In essence this involves the recommendation of a two-track libel regime. The first track would involve the establishment of a new approach to libel actions, and might be administered by the High Court but alternatively could be overseen by a libel tribunal, a (self-) regulator, or perhaps the County Court. The vast majority of cases would be disposed of by this route. The second track would involve only the most serious and/or most damaging libels. These would continue to be heard in the High Court.

In the paragraphs that follow, first, we review and develop the principles that should underpin the libel regime. Secondly, we consider the purposes of libel law and reflect on how the revised understanding of the foundational principles should influence regime design. We conclude by sketching the outlines of a two-track libel regime that is consonant with the underlying principles on which any such regime must be based.

<sup>68</sup> Ministry of Justice, Business Plan 2011-2015, at 19.

<sup>69</sup> Index on Censorship / English PEN (2009) *Free Speech is Not For Sale*. Available at: [WWW] <http://www.libelreform.org/our-report> (accessed November 2010) (the Index / PEN report).

<sup>70</sup> Mullis and Scott (2009) Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation. *Communications Law*, 14(6), 173-183; (2010) Lord Lester's Defamation Bill: a distorted view of the public interest? *Inform*, 7 July.



### Principles Underpinning the Libel Regime

The normative foundations of any coherent libel regime must comprise an appropriate valuation of the individual and social importance of freedom of expression, reputation, and access to justice. These principles will sometimes be in tension. As reflected in our previous contributions to the reform debate, our concern has been that the first of these ideas has come to predominate, and that to the extent that the third principle is discussed this is almost always done to highlight the undoubted ‘chilling effect’ of the existing costs regime on freedom of speech.

### Taking Free Speech Seriously

The central importance in a democracy of freedom of expression is universally recognised. It is regularly reiterated by European and domestic courts.<sup>71</sup> It is a mainstay of liberal political theory. Our thinking has been informed by Habermas’ theories of communicative action, discourse ethics, and the public sphere, which comprise a seminal contribution to the literature on ‘deliberative’ or ‘discursive democracy’.<sup>72</sup> The starting point is Habermas’ identification of a series of normative standards for human conduct that are implied in every communicative act (the ‘inescapable presuppositions of speech’).

This understanding is then correlated with the depiction of society as composed of ‘system’ and ‘lifeworld’ to offer a two-tiered model of the democratic constitution. The first tier comprises the ‘public sphere’, wherein proceeds the open discussion between disparate citizens, interest groups, organisations, and expert commentators of all issues of mutual concern. Obviously, the mass media offers a significant platform for public sphere representations and - to some extent - discussion. In addition, however, “a portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body”.<sup>73</sup> That is, on every occasion on which people discuss matters of mutual, public concern. On the second level are the legally constituted institutions of government, responsible for the formal transposition of the collective political will into positive law.

The role of constitutional critique and scholarship is twofold: to consider the extent to which the constitution allows powerful interlocutors to subvert the integrity of the public sphere, and to assess the coherence of the articulation between the two tiers in terms of both processes and outcomes.

Manifestly, libel law is one aspect of the constitution of the public sphere, and is therefore – notwithstanding its primary focus on the determination of individual interests - an important subject for constitutional critique. There are few people who do not recognise the strictures that the current libel regime can impose on free speech. There is clearly potential for misuse of libel law to preclude investigative journalism, to stifle scientific and medical debate, to undermine the important work of human rights organisations and other NGOs, and to invite the strategic legal tourist from abroad.

<sup>71</sup> In *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, for example, the European Court of Human Rights noted that “[freedom of speech is] one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment... applicable not only to ‘information’ or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’” (at [87]). Similarly, in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 1 AC 115, Lord Steyn explained that “freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J... ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’... thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power” (at 126).

<sup>72</sup> See Habermas (1992) *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Transl. T. Burger, Cambridge: Polity Press); (1984) *The Theory of Communicative Action. Vol. I - Reason and the Rationalisation of Society* (Transl. T. McCarthy, Boston: Beacon Press); (1987) *The Theory of Communicative Action. Vol. II - Lifeworld and System: A Critique of Functionalist Reason* (Transl. T. McCarthy, Cambridge: Polity Press); (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Transl. W. Rehg, Cambridge: Polity Press).

<sup>73</sup> Habermas (1974) *The Public Sphere: An Encyclopedia Article* (1964). *New German Critique*, 1(3), 49-55, at 49.



To the extent that the law allows powerful individuals or corporate entities to ‘chill’ important, warranted comment concerning themselves, their activities, their products or their ideas, it is socially dysfunctional. Where we have differed from others in recognising this potentiality is in identifying costs, processes, and remedies rather than the substantive law as the key issues to be addressed.

One of the important features of Habermas’ work is the contention that rights are considered to be ‘relational’ in origin. They are derived from the fact of society, and are not primarily inherent in individuals. Their importance and value are not just personal or individual; they are also social in character. This is clear as regards freedom of speech in the emphasis placed on the interests of the wider public in the rendition of the standard arguments from democracy and from truth.<sup>74</sup> It also applies to the rights to privacy and to reputation. Moreover, the potential for divergence between the interests of the media and those of the audiences for its output must not be overlooked.<sup>75</sup>

This suggests a further respect in which the current law of libel does not adequately secure the provision of full and accurate information on matters of public importance. This is its failure sometimes to ensure the correction of error, with the result that the wider public is often left misinformed by false publications.<sup>76</sup> This situation arises on account of a number of systemic weaknesses. First, limitations on access to justice for claimants can mean that some errors are never challenged.

Secondly, the award of damages alone for vindication does not necessarily highlight mistakes that have been published,<sup>77</sup> and if apologies and corrections are made this is often done without what might be considered to be due prominence.

Thirdly, the manner in which the Reynolds public interest defence currently operates masks the fact that the impugned publication has not been demonstrated to be true, and the claimant is left without vindication of reputation. Whether such continuing misinformation is in the public interest can be reasonably questioned.<sup>78</sup> This need not be the impact of a coherent libel regime.

In our view, libel law can be constructed so as to form part of the ‘discursive constitution’. Perhaps paradoxically, it can be so designed as to promote freedom of expression, and to secure the provision to the general public of the fullest possible information on matters of collective importance. Mandated discursive remedies - such as corrections, apologies, and rights of reply – could serve these objectives.

<sup>74</sup> See generally, Barendt (2005) *Freedom of Speech* (2<sup>nd</sup> edn, Oxford University Press), ch. 1. These ideas are encapsulated in the comments of Lord Steyn in *ex parte Simms* (see above).

<sup>75</sup> This was reflected in the recent comments of Tugendhat J in *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB) to the effect that “it is not to be assumed that news publishers are always concerned to protect the Art 10 rights of the public” (at [61]). In contrast, it was elided by Lord Lester when acting as Chair at the ‘Reframing Libel’ symposium, City University London, 4 November 2010 who explicitly assimilated the media and the public suggesting that their respective interests were entirely mutually-held.

<sup>76</sup> The imperative of making such corrections is recognised in journalists’ own statements of professional ethics – see, for example, the PCC *Editors’ Code of Practice*, clause 1(ii) (“a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published”); NUJ *Code of Conduct*, clause 3 (“[a journalist] does her/his utmost to correct harmful inaccuracies”) – although it is a common complaint that such principles are much-honoured in the breach. Interestingly, as regards the ‘Comment is free’ section of its website, *The Guardian* provides an automatic right of reply to any person mentioned in a published article (see <http://www.guardian.co.uk/commentisfree/series/response>).

The failure to ensure the correction of misinformation can also be seen as a shortcoming of the American approach to the defamation of public figures. Traditionally, this concern has been addressed by a relatively high and generalised commitment to journalistic ethics that insists upon fact-checking and the correction of error. It may be, however, that the inadequacies of this ‘cultural’ form of regulation are exposed when confronted with more ‘populist’ forms of media content such as that reflected in publications such as the *National Enquirer* or broadcasters such as Fox.

<sup>77</sup> Although Clause 1(iv) of the PCC *Editors’ Code of Practice* provides that “a publication must report fairly and accurately the outcome of an action for defamation to which it has been a party”. Libel claims that are settled will often include an agreement that an appropriate correction and/or apology will be published, and sometimes that an apologetic statement in open court will be made.

<sup>78</sup> Coad (2007) Reynolds and public interest: what about truth and human rights? *Entertainment Law Review*, 18(3), 75-85.



### Taking Reputation Seriously

Some uncertainty surrounds the status of reputation in law. A notable development in Convention jurisprudence concerns the drawing of the concept within the ambit of Article 8 ECHR.<sup>79</sup> Yet, reputation - by dint of being determined by aggregating the appraisals made of an individual by other people - is quintessentially public in nature. The emerging case law therefore immediately begs the question of how reputation can be protected as an aspect of one's private or family life.

The first strands of this jurisprudence were roundly rejected by some notable commentators. Robertson and Nicol, for example, were categorical in their derision of what they considered to be an "impermissible slight [sic] of hand".<sup>80</sup> They asserted that the recognition of reputation as a component of Article 8 was the "careless" and "illegitimate" result of "overworked judges and their registrars churning out decisions".<sup>81</sup> They viewed the equation between reputation and privacy as a "brazen", "plainly wrong... aberration", and the fruit of European judges' "unprincipled and unprecedented frolics".<sup>82</sup> Irrespective of this critique, the development has subsequently been confirmed in a number of Strasbourg decisions, and has also been endorsed in domestic jurisprudence. In the first of the European decisions, *Lindon, Otchakovsky-Laurens and July v France*, an expanded justification for the inclusion of reputation as a component of Article 8 was developed in a concurring judgment.<sup>83</sup> In *Pfeifer v Austria*, the Strasbourg court demonstrated incontrovertibly for the first time, and at some length, how the balancing of Articles 8 and 10 should proceed in defamation actions.<sup>84</sup> Some subsequent decisions of the European Court, however, have been more equivocal.<sup>85</sup> Notwithstanding this, the development was considered and affirmed by the Supreme Court in *Re Guardian News & Media Ltd*.<sup>86</sup>

None of this case law particularly answers the normative question as to quite why a 'right to reputation' should be considered to fall within Article 8.

There is a persuasive answer, however, and it is to be found in the social psychology canon.<sup>87</sup> In social psychology, for over one hundred years, it has been absolutely standard, generally accepted knowledge that

<sup>79</sup> The first jurisprudential association between the protection of reputation and the right to private life was made only in 2004. In *Radio France v France* (2005) 40 EHRR 706, the court observed – in a passing reference only – that 'the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention' (at [31]). Shortly afterwards, in *Chauvy v France* (2005) 41 EHRR 29, the court proceeded on the basis that the inclusion of an individual's reputation as a value actively protected under Article 8 was routine (at [70]). This shift was subsequently alluded to in a number of further cases – see, for example, *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 41, at [91]; *White v Sweden* (2008) 46 EHRR 3, at [26]; *Leempoel v Belgium*, Application No 64772/01 (unreported, 9 November 2006), at [67]. For an excellent overview and discussion of this development, see Rogers (2010) *Is there a right to reputation?* *Inform*, 26 October (part one) and 29 October (part two).

<sup>80</sup> Robertson and Nicol (2007) *Media Law* (5th edn, London: Sweet & Maxwell), at 67.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*, at 70.

<sup>83</sup> (2008) 46 EHRR 35.

<sup>84</sup> (2009) 48 EHRR 8.

<sup>85</sup> See, for example, *Karako v Hungary*, app.no 39311/05 (ECtHR, unreported, 29 April 2009).

<sup>86</sup> [2010] UKSC 1, at [37]–[42], *per* Lord Rodger. See also, *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, at [68]; *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804, at [20]; *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), at [39].

<sup>87</sup> See, generally, Emler (1990) *A Social Psychology of Reputation*. Stroebe and Hewstone (eds) *European Review of Social Psychology*, 1, 171–193. Our adoption of this literature is unlikely to be considered exceptional by those who have considered the function and design of defamation law. Professor Eric Barendt's rumination in (1999) *What is the Point of Libel Law?* *Current Legal Problems*, 52, 110–125 made precisely this point, and has been the starting point for much recent reflection. Earlier still, the seminal article on reputation and defamation by Robert Post has also informed much subsequent research – see 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) *74 California Law Review* 691. Post considered that reputation could be understood in different ways, as property, as honour, and as dignity. In the last respect, he noted that a person's dignity depends on whether others in the community give him the deference that is his desert as a full member of society. As he explained, "our own sense of intrinsic self-worth, stored in the deepest recesses of our 'private personality' is perpetually dependent upon the ceremonial observance by those around us of rules of defence and demeanor, thereby protecting the dignity of its members" (at 710). He considered that, denied such deference, a person's intrinsic sense of his own self-worth and dignity is diminished. A similar idea was aired by the Marchioness de Lambert in *Advice of A Mother to her Son: A Tract particularly recommended to his son by Lord Chesterfield*, 'the love of esteem is the life and soul of society; it unites us



the opinions of others become incorporated into the individual's sense of self-worth. In 1902, Charles Cooley developed the framework of the 'looking-glass self'.<sup>88</sup> In 1934, George Herbert Mead described a similar process, and observed that "we are more or less unconsciously seeing ourselves as others see us".<sup>89</sup> Subsequently, these formulations have been revised somewhat and three components of self-worth have been identified: self-appraisals; the actual appraisals made by others, and the individual's perceptions of the appraisals made by others (or 'reflected appraisals'). Interestingly, considerable research indicates that there is a stronger relationship between reflected appraisals and self-appraisal, than between actual appraisals and self-appraisals.

Social psychology tells us that it is primarily the perceived level of esteem that we think others hold for us that affects our judgments of self-worth. Hence, it is not difficult to appreciate why libellous publications might impact upon an individual's sense of self-esteem; how defamatory statements can impact upon our capacity to engage in society. Over time, and drawing on the concepts of human dignity and autonomy, Strasbourg jurisprudence has expanded the coverage of Article 8 to encompass both a person's physical and their psychological integrity.<sup>90</sup> In light of this, it is perfectly reasonable to contemplate a Convention right to reputation. It is also easy to understand why libel law should correct for harms to self-esteem caused by false statements.

In terms of the level of compensation that might be necessary to address harms of this type, it is important to appreciate that the level of esteem in which we think others hold us is not the singular determinant of self-worth.

Often, perhaps usually, the influence of reflected appraisals will be trifling relative to other factors. Hence, in standard cases the appropriate measure of damages might be expected to be quite low. On occasion, however, the psychological impact of perceived reputational harm may be devastating. Referring to the impact of publication of details and video footage of his private sexual behaviour, Max Mosley has commented that: if somebody takes away your dignity, for want of a better word, you can never replace it.

No matter how long I live, no matter what part of the world I go to, people will know about it... People do not [snigger behind your back and make jokes] but you know that they know... you go into any place, a restaurant or anything and nobody says anything but you know they all know. You know that in any country you go to, and I go all over the world, I know they all know and that is not very nice for me... the suffering [newspapers] impose not just on the victim but on his family is really, really serious.<sup>91</sup>

In his judgment in the associated privacy action, Mr Justice Eady affirmed that "the claimant... is hardly exaggerating when he says that his life was ruined".<sup>92</sup>

Even more poignantly, in the case involving Christopher Lillie and Dawn Reed (two nursery school workers wrongly accused of systematically sexually abusing children in their care), Mr Justice Eady commented that:

with the possible exception of murder, it is difficult to think of any charge more calculated to lead to the revulsion and condemnation of a person's fellow citizens than that of the systematic and sadistic abuse of children... [the defendants] must have appreciated too that the claimants' lives would never be the same again. It would not have taken much imagination to visualise the virulence of the reactions they would stir up in the general public. The two claimants recalled in evidence how they had to leave in haste their homes, families and career prospects. They had to go into hiding.<sup>93</sup>

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to one another: I want your approbation, you stand in need of mine. By forsaking the converse of men, we forsake the virtues necessary for society; for when one is alone, one is apt to grow negligent; the world forces you to have a guard over yourself'. In *Practical Morality, or, a Guide to Men and Manners* (William Andrus, 1841) at 155.

<sup>88</sup> Cooley (1902) *Human Nature and the Social Order* (New York: Scribner).

<sup>89</sup> Mead (1934) *Mind, Self and Society from the Standpoint of a Social Behaviorist* (University of Chicago Press), at 68.

<sup>90</sup> See, for example, *Von Hannover v Germany* (2005) 40 EHRR 1, at [33]. In *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, Lord Bingham noted that "'private life' has been generously construed to embrace wide rights to personal autonomy" (at [28]).

<sup>91</sup> House of Commons Culture, Media and Sport Committee [2009-10] *Second Report: Press Standards, Privacy and Libel*. HC 362-II (London: The Stationery Office Limited), Ev 56.

<sup>92</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), at [236].

<sup>93</sup> *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), at [1538]-[1539].



Asked during cross-examination how she had felt in the months following publication of the allegations, Reed explained “low enough to think my family would have an easier life without me... I would sit at the top of Marsden cliffs in my car with the engine running”.<sup>94</sup> For such very significant harms, the libel regime should provide access to very substantial compensatory damages.

### Taking Access to Justice Seriously

Access to justice is important in terms of both principle and practice.<sup>95</sup> In terms of principle, there is a clear association between such access and the rule of law. It is not impossible to imagine a disgruntled claimant, too poor to go to the law, somehow taking the law into their own hands. This may seem fanciful, but its plausibility has been thoroughly demonstrated in Heinrich Böll’s classic novel *The Lost Honour of Katharina Blum*. It is also possible to understand the curiously one-sided representation of the problems of libel law in the national press as a specific response to frustration of some defendants in the face of what they perceive as obvious, but intractable, injustice.

On the practical side, the chilling effect of the very high potential liability in costs for defendants under the current libel regime has rightly been a primary focus of the libel reform debate.

Estimates vary, but it is not uncommon for it to be suggested that contested actions will likely result in costs bills that run into the millions of pounds.<sup>96</sup> As a matter of logic, the upshot is likely to be that there will be financial incentives to settle cases irrespective of the merits of the claim. For even well-heeled defendants, the potential cost of defending a libel action may sometimes be prohibitive.

The main factors that are said to contribute to the cost of proceedings are the protracted nature of libel proceedings, and the high base costs charged by specialist libel lawyers. In addition, where utilised, conditional fee agreements (CFAs) currently permit the charging of an uplift on costs (the ‘success fee’) of up to 100% (although in practice this uplift would rarely exceed a figure of half that and figures produced by claimant law firms, to which we have had access, suggest that the average uplift is around 20 per cent). Moreover, ‘after-the-event’ (ATE) insurance premiums that protect the users of CFAs against the risk of incurring the costs burden associated with losing the case can also be charged to the losing party.

While the practical difficulty for libel defendants in securing access to justice is much-discussed, the converse problems facing claimants are rarely highlighted. The cost of libel actions is prohibitive for many prospective claimants. Indeed, the one-time ‘rule of thumb’ regarding assessment of the legal risk of publication rested upon the claimant’s means. This calculus has been altered somewhat by the availability of CFAs. That said, CFAs and hence the courts more generally are not available to all prospective claimants, but rather only to those who satisfy the risk management regimes operated by claimant lawyers. Proposals - such as that floated by the last Government<sup>97</sup> or that put forward by Lord Justice Jackson<sup>98</sup> - to amend the

<sup>94</sup> Woffinden and Webster (2002) Cleared. *The Guardian*, 31 July. A similar illustration can be seen in the admission by Professor Phil Jones of the University of East Anglia Climate Research Unit that he had contemplated suicide following allegations that he had manipulated research data concerning the impact of human behaviour on the global climate. Professor Jones was subsequently exonerated of wrongdoing – see Laing, “‘Climategate’ Professor Phil Jones ‘considered suicide over email scandal’”, *Daily Telegraph*, 7 February 2010.

<sup>95</sup> See, for example, Lord Neuberger, ‘Has Mediation Had Its Day?’ First Gordon Slynn Memorial Lecture (2010): “the law’s majestic equality is for civil justice of fundamental importance. Notwithstanding the views of Anatole France to the contrary, equal access to justice for all underpins our commitment to the rule of law. It ensures that we live not under what Friedrich Meinecke characterised as a ‘government of will [but under] a government of law.’ It ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent - whether that opponent is another such individual, a powerful corporation or the state itself. We should not, in light of this, be too surprised to note that equality before the law, isonomia, – of which equal access to the courts is one aspect – was for the citizens of Athens two and a half thousand years ago, the basis out of which democracy arose”.

<sup>96</sup> An oft-cited statistic is that costs of proceedings here are four times as high as the next most expensive European state (Ireland), and 140 times the average cost in other European jurisdictions – see PCMLP (2008) *Comparative Study of Costs of Defamation Proceedings Across Europe*. Available at: [WWW] <http://pcmlp.socleg.ox.ac.uk/> (accessed October 2010). The sustainability of this research finding has, however, been compellingly refuted – see Howarth (tbc) *The Cost of Libel Actions: a sceptical note*. Forthcoming research paper – on file with the authors.

<sup>97</sup> The abortive Conditional Fee Agreements (Amendment) Order 2010 proposed under section 58(4) of the Courts and Legal Services Act 1990 was criticised by the House of Lords Merits Committee (HL 94), the House of Commons First Delegated Legislation Committee (30 March 2010) and in debate on the floor of the House of Lords (718 HL Deb cols 1152-1178) before being lost in the ‘wash-up’ before the prorogation of Parliament prior to the 2010 general election.



current regime by drastically reducing the available success fees risk exacerbating these concerns. Having conducted a review of the available evidence on the cost of libel proceedings, one commentator concluded that “the reality is that we know little about the costs of libel cases, and what we do know does not justify precipitate measures that would have the effect of reducing claimants’ access to justice”.<sup>99</sup>

### **Application: the Purposes of Libel Law**

In determining the purposes of libel law, a reasonable starting point is to note what are the stated objectives of various remedies currently afforded to successful claimants. In English law, damages are the standard remedy and four objectives underpinning their award can be discerned: to compensate for distress, hurt and humiliation; to compensate for unquantifiable, presumed reputational harm; to compensate for special (provable) harm, and to vindicate or restore the claimant’s damaged reputation.<sup>100</sup> In the paragraphs that follow we note how these objectives might best be understood in light of the foregoing discussion, and highlight the ramifications of our analysis for the design of a coherent libel regime.

### **Compensating Article 8 Harm**

As regards the objective of compensating for the distress and injury to feelings caused by libel, it would seem reasonable to assert that the harm that requires compensation in this regard is that identified in the foregoing discussion of social psychology.

It is to the extent of such harm that we consider the protection of reputation to fall within the ambit of Article 8 ECHR.<sup>101</sup> As noted above, we consider that in the majority of cases the quantum of damages that would be necessary to compensate for the harm suffered by a claimant would be relatively low. In that context, it is reasonable to consider a damages ‘cap’. A figure of £10k has been mooted by some.<sup>102</sup> We take the view that a ‘hard’ cap on libel damages would be inappropriate (but see further below). Beyond this, however, understanding this head of damages in line with the above discussion entails a number of ramifications for the design of the libel regime.

### **Ramifications: meaning**

Disputes about meaning are often central to libel actions, with the result that much lawyers’ time and hence significant legal costs are spent on the matter. This situation arises in part because the law requires a ‘single meaning’ to be inferred from the impugned publication, and the determination of this single meaning is usually left to the jury at the end of the trial. Thus, argument must sometimes be presented to the court – by both parties to the action – relating to meanings that are ultimately deemed irrelevant. If one understands this element of the harm in question as having been caused in the mind of the claimant, then it is the claimant’s inferred meaning that should provide the basis for the subsequent consideration, subject to a test of reasonableness or significance. The reasonableness threshold would introduce a necessary element of objectivity into the exercise. Such a test would speak to the need for a sufficient level of seriousness as is

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In evidence to the Lords committee, law firm Carter Ruck noted “widespread concern within the legal profession that the proposed reduction in success fees would seriously reduce - if not eliminate altogether - the rights of ordinary individuals without substantial means to obtain access to justice in defamation and privacy cases”. Professor Richard Moorhead of Cardiff University concurred: “the basic economics of conditional fee agreements would suggest that... a level of 10% uplift would prevent all but the most meritorious cases from proceeding on a conditional fee. For rich litigants, this presents no problem, for poorer litigants this presents a major impediment to access to justice”.

<sup>98</sup> Jackson (2010) *Review of Civil Litigation Costs* (London: Ministry of Justice), ch. 32.

<sup>99</sup> Howarth, above n 28.

<sup>100</sup> *John v MGN Ltd* [1997] QB 586, at 607 (*per* Sir Thomas Bingham MR).

<sup>101</sup> Actual harms to reputation speak more to the conception of reputation as property discussed by Post – see above n 20.

<sup>102</sup> In a parliamentary debate, Denis MacShane MP suggested a cap of £10k – 485 HCDeb cols 74WH, 17 December 2008. Moreover, the Index / PEN report also suggested a cap of £10k, but with room for additional sums where special damage can be proven (the report also emphasised the preferability of some form of apology remedy) – see above n 2. We have previously stated, however, that “this level of damages cap is seriously flawed” on the basis – *inter alia* - that such an award would simply be insufficient to compensate someone in the position of the McCanns or Lillie and Reed (nursery workers accused of child sexual abuse in a public authority report) - see Mullis and Scott, above n 3, at 177-178. We note also that in a recent public lecture, Lord Hoffmann contrasted the proposed cap with the exorbitant sums that newspapers regularly pay sources for salacious stories – see ‘Lord Hoffmann and Libel Tourism: three comments’. *Inform*, 5 March 2010. No proposal to cap damages was included in the Lester Bill.



required to engage Article 8 ECHR.<sup>103</sup> Hence, the determination of meaning becomes very straightforward. The question is not 'what is the meaning', but rather only 'is the given meaning a capable or reasonable one'.

The ramifications of this approach are very significant. There would be no reason to leave the determination of meaning to a jury. Hence, there would be no reason to persist with the 'single meaning rule', a legal fiction - it is obvious that in fact words are understood in different ways by different people - that has been described as "anomalous, frequently otiose and, where not otiose, unjust".<sup>104</sup> There would be no need to argue defences relevant to multiple, indeterminate meanings. The claimant would have an incentive to plead mainstream or natural meanings so as to satisfy the reasonableness test.

#### **Ramifications: defences**

The primary defences that would be necessary in the context of the revised approach to compensation for Article 8 harm would be those focused on meaning: justification (truth) and fair comment (honest opinion). There would be no particular need to retain the Reynolds privilege, unless the possible quantum of damages is very significant.

That defence was introduced to offset the chilling effect of the high costs and potential liability in damages of libel actions. Given the approach to meaning outlined above, the complexity and hence cost of the majority of such actions should be very significantly reduced. It would be faintly comic – and obviously tautological - for defendants to claim that costs remain a significant problem necessitating the retention of a public interest defence to limit the chilling effect of libel, if the primary generator of costs was precisely the defendant's own choice to rely on that public interest defence. Hence, if damages too are limited, then the logic for the defence dissolves. This is especially the case when one considers that there have always been concerns regarding the pathological consequences of the defence. One complaint regarding Reynolds - and the US comparator approach in *New York Times v Sullivan* - is that it displaces all focus away from the truth or otherwise of the allegations made onto the question of whether journalistic practices have been responsible.<sup>105</sup> Moreover, claimants do not receive vindication, and inaccuracies that misinform the wider public are not corrected. This argument suggests that a two-track libel regime, with different routes for standard and more serious cases, may be appropriate.

#### **Ramifications: standing**

One significant debate regarding libel reform concerns the question of whether corporations should continue to be permitted to sue in libel, and if so whether they should be subjected to especial requirements such as an obligation to prove damage.<sup>106</sup> The current position with regard to damages is that corporations cannot sue in respect of injury to feelings,<sup>107</sup> but they can recover substantial damages even in the absence of proof of special damage for words that have a tendency to injure them in the way of their business.<sup>108</sup> Under the revised understanding of injury to feelings described above, there would remain no basis for corporations to recover for Article 8 harm.

<sup>103</sup> In *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, Laws LJ commented that the "core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable... the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'" (at [22-23]). See also, *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, at [28] (per Lord Bingham); *Secretary of State for Work and Pensions v M* [2006] UKHL 11, at [83] (per Lord Walker).

<sup>104</sup> *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd* [2010] EWCA Civ 609, at [31] (per Sedley LJ). Lord Justice Rimer added that "if the single meaning rule does achieve a fair balance in defamation law between the parties' competing interests, that would appear to be the result of luck rather than judgment... the application of the rule can also be said to carry with it the potential for swinging the balance unfairly against one party or the other, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others" (at [43]).

<sup>105</sup> See, for example, the contribution of Professor Roy Greenslade to the 'Reframing Libel' symposium, City University London, 4 November 2010.

<sup>106</sup> The Index / PEN report recommended that corporations should be denied standing to sue in libel, and be required instead to rely upon malicious falsehood – see above n 2. Clause 11 of the Lester Bill provides that corporations should have to prove "substantial financial loss".

<sup>107</sup> *Lewis v Daily Telegraph* [1964] AC 234, at 262 (per Lord Reid).

<sup>108</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44.



### **Ramifications: costs and access to justice**

The changes outlined above on the determination of meaning and on defences would entail that there would be a very substantial reduction in costs in respect of Article 8 harm. The upshot would be that there would be enhanced access to justice for relatively impecunious claimants who are not currently able to avail of a CFA, while the chilling effect on publication would be significantly reduced.

### **Vindicating Reputation and Compensating for Intangible Harm**

In addition to compensating the claimant for hurt feelings, damages are also currently awarded both to compensate for unquantifiable, presumed reputational harm and to vindicate / restore the claimant's reputation. These heads of damage are available in order that the harm that is caused to the claimant's reputation in the minds of third parties is corrected and compensated. We are not persuaded that in either respect the current form of remedy allowed is the most efficacious or appropriate available.

### **Discursive remedies for vindication**

The award of damages to vindicate the claimant's reputation was justified by Lord Hailsham in *Cassell v Broome* as necessary "in case the libel, driven underground, emerges from its lurking place at some future date... [to allow the claimant] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge".<sup>109</sup> Of course, money can be used to serve such a function, but we are not persuaded that it represents the best means of achieving vindication. In other jurisdictions, this function is fulfilled by the provision of a discursive remedy.

As Hugh Tomlinson QC has pointed out, "in many European countries the primary remedy is an order for the publication of corrections or apology – often in the form of the publication of a summary of the Court's judgment.

This would provide vindication without the need for substantial damages".<sup>110</sup> An alternative would be a mandated declaration of falsity or a right of reply published with due prominence. Such a remedy has been said to be unavailable at common law,<sup>111</sup> though it does exist under section 9 of the Defamation Act 1996 on the summary disposal of a claim under section 8 of the Act.<sup>112</sup>

In our view, the most effective way of vindicating a person's reputation is to introduce a new remedy requiring provision of an appropriate discursive remedy. In this respect we agree, in part, with the view expressed in the Index / Pen report that "the chief remedy in libel should be an apology, not financial reward".<sup>113</sup> The grant of a discursive remedy would remove the need to award damages to vindicate the claimant's reputation, but would instead provide the claimant with the very thing that most claimants want: a public declaration that they did not do what they were alleged to have done. The chilling effect of a potentially large damages award would be reduced, and importantly - if we are serious about achieving one of the underlying purposes of freedom of expression - the truth would enter the public sphere and be made available to the public. As the PCC Editors' Code of Practice states, "a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published".<sup>114</sup> Therefore, we propose the withdrawal of damages for vindication.

### **Withdrawal of the remedy in damages for intangible harm**

In addition to the withdrawal of damages for vindication, we suggest that no award should be made for unquantifiable, presumed harm to reputation. In some respects, this may appear to conflict with our earlier comments regarding the social impact that a defamatory statement can have on a person. We do not underestimate the harm that such a statement can cause to a person's standing in his community, and indeed social psychological research is beginning to evidence the fact that in many cases reputational

<sup>109</sup> [1972] AC 1027, at 1071.

<sup>110</sup> 'Libel, Damages and Declarations of Falsity'. *Inform*, 2 November 2011.

<sup>111</sup> *Loutchansky v Times Newspapers (No.6)* [2002] EMLR 44.

<sup>112</sup> Pursuant to Defamation Act 1996, s 9(1) the claimant may obtain such of the following as may be appropriate:

- (a) a declaration that the statement of which he complains was false and defamatory
- (b) an order that the defendant publish or cause to be published a suitable correction and apology;
- (c) damages not exceeding £10,000; and
- (d) an order restraining the defendant from publishing or further publishing the matter complained of.

<sup>113</sup> Index /Pen Report, above n 2, at 8.

<sup>114</sup> Clause 1(ii).



damage is likely to linger even after the truth is published. Discursive remedies designed to restore reputation will sometimes not be perfect in effect; they may not entirely eradicate the 'stain' on the claimant's reputation. In the face of such arguments, our reasons for recommending that damages for unquantifiable, presumed harm to reputation be withdrawn are largely pragmatic. We take the view that the award of damages under Article 8 ECHR for the pain and humiliation caused by the publication together with an appropriate discursive remedy for vindication will provide an adequate – although admittedly not perfect – remedy for the harm caused. The proposed remedies would give most claimants what they want. They avoid the indeterminacy surrounding the task of fixing on an appropriate sum, and they reflect the underlying importance of freedom of expression.

#### **Ramifications: determination of meaning for purposes of the discursive remedy**

If a new discursive remedy is introduced and damages for vindication and presumed reputational harm are withdrawn, a question arises as to whether it is still appropriate to use the meaning pleaded by the claimant and determined by the judge to be a reasonable one. In other words, if the judge orders the defendant to apologise, in respect of what meaning should the libel be assessed and any apology made. In our view, the continued use of the claimant's meaning(s) remains entirely appropriate. Put another way, all defamatory meanings pleaded by the claimant should, if deemed reasonable by the judge or tribunal, be met with a discursive remedy.

Where it is determined that the meaning(s) pleaded by the claimant is in fact a reasonable one, then in effect this entails that some reasonable readers would in all probability have read the words in the way set out.

Given this, where no defence is made out it seems entirely appropriate to require the defendant either to apologise for publishing the complained of statement and/or to explain that the impugned meaning was unintended. In either event, the current single meaning rule could be safely abandoned here as in the claim for malicious falsehood.<sup>115</sup>

#### **Ramifications: corporations, standing and appropriate remedies**

As is implicit in the foregoing, we take the view that - in the absence of proof of special damage - corporations should be entitled only to a discursive remedy, and they should be unable to recover damages for unquantifiable, presumed reputational harm. We have previously noted the importance of the corporate sector to the British economy,<sup>116</sup> and we view with concern the approach taken in the Lester Bill that would only allow a company to sue if it can prove that the publication of the words or matters complained of has caused or is likely to cause "substantial financial loss".<sup>117</sup> We also recognise the real danger, however, that large and powerful companies may, through the threat of a libel claim, chill legitimate and accurate comment about their conduct. Rather than isolating corporations and specifically limiting their right to sue in any respect, our proposals address incidentally the potential misuse of libel by all relatively powerful entities to achieve strategic goals unrelated to the substantive merit of claims.

#### **Ramifications: defences**

So far as the defences are concerned, under our approach the defendant would be free to rely on the defences of justification (truth) and fair comment (honest opinion). We see no reason to make significant changes to these defences as they currently exist in English law. Insofar as justification is concerned, the defence would succeed only if the defendant could prove the words true in the meaning(s) pleaded by the claimant and accepted by the judge as a reasonable meaning.

As regards Reynolds privilege, we would draw a distinction between standard cases and those involving more serious and/or damaging statements. Where only a discursive remedy and (possibly) a minimal measure of damages for Article 8 harm are sought, the pre-publication umbrella afforded by Reynolds against the potential chilling effect of the threat of a libel claim is unnecessary. The chilling effect will have been significantly addressed by simplifying the existing procedure, reducing costs, and limiting the remedies available. To allow a defendant to rely on Reynolds in this situation would unduly weight the balance in favour of the defendant and would unnecessarily increase the costs in such cases.

Again, however, there is an argument for a bifurcated approach dependent upon the severity of Article 8 harm and/or the capacity to plead special damage. In the latter type of case, there is very much more at

<sup>115</sup> *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd* [2010] EWCA Civ 609.

<sup>116</sup> Mullis and Scott, above n 3.

<sup>117</sup> Defamation Bill 2010, cl 11.



stake. The potential costs of defending a full-blown libel claim where the allegation made is of a particularly serious nature or has particularly serious repercussions, in addition to the extent of the damages that may be awarded, inevitably means that the chilling effect would be considerably increased. In these circumstances, it seems appropriate to allow the defendant to avail itself of Reynolds if sued. The knowledge that such a defence is available would limit the potential pre-publication chilling effect. If at trial the defendant sought but failed to rely on justification or simply relied solely on Reynolds by way of defence, however, the claimant should be entitled to a declaration of falsity or a right of reply. This would properly value both the Article 10 and Article 8 rights at stake.

### Reflections

Clearly there are 'down-sides' for both parties in our proposals. So far as the defendant is concerned, it could be forced to provide a proper and prominent apology or have a declaration of falsity issued against it which would be placed on the record and could be relied upon by the claimant to vindicate reputation. Yet the media, and newspapers in particular, have traditionally been very hostile to the imposition of a mandated apology or declaration of falsity.

As the eminent claimant lawyer Keith Schilling has noted, "newspapers want to pay negligible damages and print a small apology buried away in the middle of the paper – this of course achieves nothing except to annoy the person injured".<sup>118</sup> Mandating a discursive remedy would certainly involve interference with the defendant's Article 10 right 'not to speak'.

We consider, however, that this would not be disproportionate, especially in light of the countervailing interest of the wider public in being fully and accurately informed on matters of public concern. An obligation to dedicate space to discursive remedies would be commercially disadvantageous: no organisation which relies for its revenue on a reputation for accuracy, probity and credibility wants to apologise publically for getting facts wrong. The upside for media defendants would be that the public and swift acceptance of error would have the useful, and entirely desirable, impact of enhancing journalistic credibility.

Perhaps most importantly, the award of a discursive remedy offers substantial benefits for society as a whole. Where granted, they would have the important effect that the public is not left misinformed by inaccurate but uncorrected statements on matters of public importance. Today, where Reynolds is successfully relied upon, in the absence of a voluntary publication of a correction by the defendant, the potential exists for an untrue statement to remain on the public record. Moreover, even where a plea of justification fails and the claimant is awarded damages, the mere existence of a reasoned judgment in favour of the claimant only doubtfully has the symbolic power of a straightforward and short statement of correction or an apology. The award of a discursive remedy would avoid these unsatisfactory results, and properly validate the claimant's Article 8 rights while ensuring that the public as a whole was aware of the errors in the original publication.

So far as the claimant is concerned, it must be recognised that the award of damages only for the pain and humiliation caused by the defamatory statement together with a discursive remedy may not wholly compensate the claimant for the injury he has suffered. Even after the publication of an apology and payment of a sum of damages, the fact is that in many cases reputational damage is likely to linger even after the truth is published. We take the view, however, that our approach strikes an appropriate balance between the claimant's Article 8 rights and the defendant's Article 10 rights, while also countenancing wider social goods. Pragmatically, some compromise of this nature seems essential to break the deadlock – both in principle and in public debate - over the design of a coherent libel regime.

### Compensation for provable harm

While damages should not be available to vindicate / restore the claimant's reputation or for any unquantifiable presumed reputational harm, we take the view that the claimant should be able to recover in respect of any special damages that he can establish. No good reason exists to prevent the recoverability of such damages, and the danger that a substantial claim for special damages may have a unduly chilling effect is mitigated in part by the recognised difficulty of proving such loss.<sup>119</sup> Abusive threats to litigate could

<sup>118</sup> Cash (2010) Stop the Presses. *Spears*, Summer, 28-31, at 30.

<sup>119</sup> Special damage must actually have accrued before the claim was brought. Neither the apprehension nor the possibility of such damage is sufficient to give rise to a claim. By way of example, in *Michael v Spiers and Pond Ltd* (1909) 101 LT 352 it was held that a threat by the father of the claimant to remove him from his office as director of a limited company unless he could succeed in vindicating his character against the charge of drunkenness was not



be relatively easily dismissed on the basis of the power of the court to strike out any claim for special damages where it has no reasonable possibility of success.<sup>120</sup>

Where a claim for special damages is made, all of the defences currently available to the defendant could be relied upon. It would be for the court to determine whether the defamatory statement caused the damage complained of. Here again, meaning becomes less central to proceedings as the primary focus is placed on the reasonable foreseeability of the special damage in question, which in turn implies that it must be possible for particular meanings to have been reasonably inferred.

### **Endpoint: a Two-Track Libel Regime**

Drawing the strands of the foregoing analysis together, it becomes possible to recommend a coherent set of significant substantive and procedural reforms that if enacted would enhance access to justice, simplify processes and reduce costs for the vast majority of libel actions. In essence, our proposal involves the recommendation of a two-track libel regime.

#### **Track One: simplified treatment for the majority of claims**

The first track in this new regime would comprise a much-simplified process. This could be administered by the High Court, but the function might instead be allocated to the County Court, the Tribunals Service, or an appropriately designed (self-)regulator. The overwhelming majority of cases would be addressed by this route. Damages would only be available for psychological harms protected under Article 8 ECHR, but would be capped at £10,000. Vindication would be obtained by an appropriate – and mandated – discursive remedy (correction; apology; right of reply; declaration of falsity). The remedy in damages for intangible harm to reputation would be withdrawn. Special damages for provable loss would be unavailable in this track. Determination of the meaning of imputations would be much simplified by adopting the meaning(s) inferred by the claimant subject to a test of reasonableness or significance. Truth and fair comment would remain as the primary defences, while in appropriate cases the defendant would also be able to rely on absolute, traditional or statutory qualified privilege. The rationale underpinning the Reynolds public interest defence in track one would disappear. The approaches to substantive questions suggested here would very significantly reduce the complexity and cost associated with particular cases. Hence, it would reduce the chilling effect of the law on publication, and markedly enhance access to justice for defendants and claimants.

#### **Track Two: full trial for the most serious and/or damaging libels**

The second track would be limited to the most serious and/or most damaging libels. Cases would proceed down this track only where special damages for provable loss are claimed, or where psychological harms protected under Article 8 are severe so that the track one procedure would be manifestly inappropriate to deal with the case. Track two cases would continue to be heard in the High Court. As in track one, the remedy in damages for intangible harm to reputation would be unavailable, and vindication would be obtained by a discursive remedy. Where proven by the claimant, special damages would be recoverable. Uncapped damages would be available for Article 8 psychological harm (although a de facto cap would remain by pegging to damages recoverable for physical injury). On account of the power of the court to award very substantial damages and the likelihood of significantly increased costs, the potential pre-publication chilling effect requires the availability of a Reynolds-style public interest defence in track two. Where the defendant relies on Reynolds, however, proper recognition of the underlying principles of freedom of expression and the importance of reputation require that the defendant provide either a right of reply or a notice of correction with due prominence. Truth and/or fair comment would remain available, and in appropriate cases the defendant would be able to rely on absolute, traditional and / or statutory qualified privilege.

### **Reflections and possible concerns**

We envisage that adoption of the above scheme would also provide significant incentives for complaints to be settled quickly between the parties without recourse to the formal legal regime. We recognise that the availability of track two may continue to facilitate the abusive threat of legal action, but suggest that claims to have suffered severe Article 8 harm or particular losses could be easily identified and quickly dismissed by the court if unsubstantiated. We also recognise that the releasing of media defendants in most cases from the risk of very significant legal costs and damages may encourage ‘game-playing’ by some organisations. In our view, the blunt constraint currently afforded by high costs are adequately substituted by obliged

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actionable because he had suffered no temporal loss; the claimant still had his office and the mere apprehension of its loss was insufficient to amount to special damage.

<sup>120</sup> CPR 3.4(2).



dedication of space to accommodate discursive remedies and the loss of credibility that would go along with such repeated emphasis on poor quality journalism. We do not shy from the fact that these remedies themselves involve interference with defendants' Article 10 rights 'not to speak'. We also note that discursive remedies afforded quickly are often the primary outcome that claimants seek.



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