

Editors' introduction

DAVID CAPPER AND GORDON ANTHONY

Queen's University Belfast

This is a collection of papers about the law of defamation in (primarily) the UK and the process of change that is on-going within it. The focus of the collection is not only the Defamation Bill that is presently working its way through the Westminster Parliament, but also the evolution of legal principle under the influence of the common law and the Human Rights Act 1998. Those latter factors have coalesced in recent years to effect very significant procedural and doctrinal shifts in UK courts, where the law continues to be redefined at the interface between domestic and European norms. Of course, when/if the Defamation Bill enters into force as an Act, it too will redefine aspects of the law, most notably, though not exclusively, at the level of defences.

The corresponding papers in the collection were each presented at a workshop held at the School of Law at Queen's University Belfast in the spring of 2011. Invitations to the workshop were made with two considerations in mind: the wish to attract contributions from leading academics working on the law of defamation; and the need to link academic insights to those that might be drawn from practice. In the event, we were fortunate to receive papers from some of the foremost academic names in the common law world, and also from a leading solicitor practitioner and a judge of the Northern Ireland High Court. The resulting papers thus address key academic and practical themes that include reform of the procedural regime, costs, libel tourism, the impact of the internet, and the future of the defences.

The first paper in the collection – by Alistair Mullis and Andrew Scott – re-evaluates fundamental principles of libel law when proposing root and branch reform of the existing procedural regime in England and Wales. Titled “Reframing libel law: taking (all) rights seriously and where it leads”, their proposals centre upon the fact that some libels are more serious than others and that there is scope for using two tracks for resolving disputes. The first track would be concerned with less serious libels and would be characterised by an expedition that would result in fewer costs and the use of discursive remedies to vindicate the reputation of the claimant. The second track would be reserved for the more serious libels – such as those that cause egregious psychological harm – and would involve hearings before the High Court. However, the focus in the second track would not simply be on the interests of the claimant, as it would be open to the defendant to plead the public interest in a particular publication, its damaging effects notwithstanding. The imagery is therefore of the High Court as a forum for resolving only the most controversial of cases and, where they arise, important points of legal principle.

Mullis and Scott also co-authored the second paper in the collection, which provides one of the fullest accounts of the hortatory influence that the caselaw of the European Court of Human Rights can have in the domestic courts (“The swing of the pendulum: reputation, expression and the re-centring of English libel law”). Noting how English libel law previously (over)emphasised the need to safeguard freedom of expression, their paper chronicles how European Convention on Human Rights (ECHR) Article 8 caselaw now accepts that psychological harm caused by defamatory statements can engage and violate the privacy and related rights of the individual. This is, of course, something within the realm of the egregious psychological harm that Mullis and Scott discuss in their first paper, although they argue that the domestic courts have not yet grasped the full dynamics of the Article 8 ECHR caselaw. In the absence of the courts doing so, Mullis and Scott caution that English law will remain characterised by lines of reasoning that will only ever prove practically and doctrinally problematic. As they express it:

[I]t seems likely that the law of defamation is set for a turbulent time. Even if the methodology that the courts are to adopt is clear, their failure to explain why reputation may be protected under Article 8, the uncertainty inherent in the methodology itself . . . [this means] that the future shape of the law is in the balance. (p. 58)

Following on from Mullis and Scott there are two papers addressing different aspects of the modern law of defamation. Eric Barendt discusses the *Reynolds* defence and the related defence of reportage, viz. of merely reporting that something allegedly defamatory was said or otherwise published without adopting or embellishing it in any way. Integral to this paper is discussion of the recent case of *Flood v Times Newspapers* in which a decision from the Supreme Court is eagerly awaited. While the additional protection for freedom of expression afforded by these defences is welcomed, indeed necessitated by the Human Rights Act 1998, the current position is still less than completely satisfactory. Libel laws are still “chilling” freedom of expression and successful invocation of these defences often leaves the claimant without a remedy for a publication that is untrue. Stephen Hedley’s paper addresses the increasingly important subject of the internet, as it impacts upon libel laws. Among the issues discussed are problems of jurisdiction (where was the libel published?), persistence (the republication rule that says every reading of allegedly defamatory matter published online is a publication that sets the limitation period running afresh), and intermediaries (the capacity of the internet to involve several persons, perhaps unwittingly, in the publication of defamatory material).

The next three papers are reflections on the very controversial subject of ‘libel tourism’. As is well known, this is where a libel is published in several jurisdictions and the claimant seeks to sue in a jurisdiction where the libel laws are most pro-claimant. Trevor Hartley discusses the private international law principles applicable in this area and argues that, where a libel action is taken in a jurisdiction where comparatively little publication has occurred, mainly because the libel laws are favourable to claimants, this denies the defendant its freedom of expression rights. Russell Weaver, an American jurist, shows how libel law has been *constitutionalised* in the United States, and how this makes it very difficult for American courts to enforce libel judgments from other jurisdictions when the substantive and procedural laws are incompatible with American constitutional values. Clive Walker, an acknowledged expert on terrorism, sets United States’ First Amendment protection of free expression in the context of federal laws regulating support for terrorism and concludes that the picture of the United States as a champion of freedom of expression is rather more nuanced than a study of libel laws alone would indicate.

Next, the collection moves to the subject of procedure and costs in libel actions. There is no legal aid for defamation proceedings of any kind so costs rules and the procedures of the superior courts inevitably have a serious impact upon the ability of litigants to take and defend defamation actions in the courts. There are some overlaps here with the first paper by Mullis and Scott, and Mr Justice Gillen discusses the procedural regime that applies in Northern Ireland for managing defamation cases. Most of the initiatives he discusses have been made under his judicial guidance and they have been driven by the twin objectives of simplifying procedure and avoiding delays within actions. Paul Tweed, senior partner in Johnsons solicitors and one of the most eminent defamation practitioners in the United Kingdom and the Republic of Ireland, considers the funding of litigation from a claimant's perspective. He notes how, in Northern Ireland, it can be extremely difficult to bring a libel action because conditional fee agreements are not available in that jurisdiction. This leaves a claimant at risk of incurring a crippling costs order for unsuccessful litigation and it inadequately incentivises solicitors to undertake litigation on behalf of clients who will not be able to pay professional costs if their case is lost. In contrast, conditional fee agreements are available in England and Wales, albeit that the proposals in the report of Lord Justice Jackson are likely to substantially reduce their attractiveness to claimant lawyers. Reforms include making success fees and after-the-event premiums irrecoverable from losing defendants, capping success fees at 25 per cent of the claimant's damages, and increasing damages awards in all civil litigation by 10 per cent. Tweed concludes that the absence of conditional fee agreements from Northern Ireland and the reforms proposed by Lord Justice Jackson are likely to make defamation litigation more, not less, the preserve of the wealthy.

The final essay in the collection, by Gavin Phillipson, provides a detailed analysis of the Defamation Bill and its implications in terms of the Human Rights Act 1998 ("The 'global pariah', the Defamation Bill and the Human Rights Act"). Starting with an exposition of the theoretical and legal backdrop to the Bill and the reforms it hopes to effect, the essay analyses the provisions of the Bill that govern, among other things, the requirement of "substantial harm", the key defences and the single publication rule. Phillipson is careful to assess the impact of these provisions with reference to the expression/reputation problem, and he also notes areas that the Bill has not addressed and which, in his view, it should address (such as a restriction on actions brought by corporations). His conclusion about the potential strengths of the Bill is thus conditioned by an awareness of its weaknesses and the need for the legislature to act upon those. Absent such action, he is of the view that "law reformers who recognise the congruence of values underlying free speech and the right to reputation should not be satisfied with reform that passes only half this test" (p. 184).

As the editors of the collection, we would of course wish to thank each of the contributors for their promptitude in submitting the final versions of their papers for publication. We would also like to thank Professor Sally Wheeler, the Head of the School of Law at Queen's, for lending logistical and financial support to the spring workshop at which the papers were first presented. That event provided an excellent opportunity to tease out the different practical and theoretical points about defamation, and it was clear that all participants benefited from the opportunity to discuss the papers in draft. It is our view that this final version of the papers now provides a valuable resource for those who wish to understand the law of defamation in its current and, indeed, its future form.

David Capper and Gordon Anthony
12 March 2012

