Northern Ireland Legal Quarterly

Volume 63 Number 1

EDITOR
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Northern Ireland Legal Quarterly Volume 63 Number 1

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Editors' introduction

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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

NILQ 63(1): 5–25

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

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1 Introduction

Libel reform is happening. In 2009, Index on Censorship and English PEN published a report in which they lamented the state of English libel law and made recommendations for reform.[1] Some of these reform proposals were then incorporated into an abortive Defamation Bill sponsored by Lord Lester and debated in the House of Lords in July 2010. The reform baton was taken on by the Ministry of Justice which published a Draft Defamation Bill and consultation paper in March 2011.[2] A Joint Committee of Parliament has offered its view,[3] and it is currently expected that a Defamation Bill proper will be introduced by the government in the second session of this Parliament.[4] No one seriously contests that there are problems with the existing law and practice of libel. The government draft Bill, like Lord Lester's forerunner however, does little to address the breadth of these problems. There is now a serious risk that the government will miss 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 the reform movement has been that it overemphasises freedom of expression (specifically speakers' interests) to the virtual exclusion of other

* We are indebted to Tor Tarantola for research assistance in support of this paper. We consulted widely on a working paper version, and are immeasurably grateful for the extensive advice and criticism we are received thereon. In particular, we wish to express our gratitude to Tamsin Allen, Jack Anderson, Eric Barendt, Jason Bosland, Alastair Brett, David Capper, John Charney, Rod Christie-Miller, Dominic Crossley, Mike Dodd, Sir David Eady, Nick Emler, Conor Gearty, Sir Charles Gray, Jonathan Heawood, Steve Hedley, David Howarth, Meirion Jones, Gavin Millar QC, Richard Moorhead, Adrienne Page QC, Benjamin Pell, Gill Phillips, Gavin Phillipson, David Price QC, James Price QC, Joshua Rozenberg, Keith Schilling, Adam Speker, Hugh Tomlinson QC and Paul Tweed. All errors, omissions and inanities are attributable to the authors alone.

1 Index on Censorship/English PEN, *Free Speech is not for Sale* (2009), available at www.libelreform.org/our-report (accessed November 2010) (hereafter the Index/PEN report).

2 *Draft Defamation Bill Consultation*, Cm 8020, March 2011, available at www.justice.gov.uk/consultations/draft-defamation-bill.htm (accessed November 2011).

3 *Draft Defamation Bill*, HL Paper 203, HC 930-I (2010–2012). The report welcomed many of the proposals contained in the government draft Bill, but urged the government to go further in a number of respects.

4 Ministry of Justice, *Business Plan* 2011–2015, p. 19.

important values.[5] In consequence, it is focused in large measure upon revising the substantive law of libel, when the primary problems in this area instead concern procedures and costs (though there are some changes to the substantive law that are desirable). The proposals on the table spectacularly fail to deal with some of the key issues that blight the law of defamation. There is a real risk that the government will produce a Bill that will continue to ignore these concerns.

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, second, 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, most recently, in the government draft Bill. 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 that would emphasise the swift resolution of complaints and the provision of discursive remedies (adding information into the public domain rather than permitting censorship by law). This would be administered by co-regulatory bodies designated under a new Defamation Act. This group would certainly include a self- or statutory media regulator,[6] but might also extend to expert professional panels (under the auspices of, for example, the British Medical Association or the Royal Society) or independent arbitrators (for example, Early Resolution) for cases arising other than through media publication.[7] The vast majority of cases would be disposed of by this route. The second track would involve only some aspects of the most serious and/or most damaging libels (claims for special damage or truly egregious psychological harm), and cases where the defendant wished to develop a defence based on the public interest rather than truth. These aspects would be referred out for consideration in the High Court and would see the parties carry their own costs. The High Court could also be asked to review the first-track decisions of the designated bodies.

In the paragraphs that follow, first, we review and develop the principles that should underpin the libel regime. Second, 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.

2 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

5 A Mullis and A Scott, "Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation" (2009) 14(6) *Communications Law* 173–83; "Lord Lester's Defamation Bill 2010: a distorted view of the public interest?" (2011) 16(1) *Communications Law* 6–19; "Worth the candle? The government's Draft Defamation Bill" (2011) 3 *Journal of Media Law* 1–17.

6 For recent discussion of the possibility of a media regulator undertaking libel adjudications, see H Tomlinson, "A radical new proposal: Pt 3 – the Media Regulation Tribunal", *Inforrm* 4 October 2011; A Rushbridger, "After Murdoch's excesses, let us seize the opportunity in the phone hacking inquiry", *The Guardian*, 10 November 2011.

7 Further details of Early Resolution are available at www.earlyresolution.co.uk/ (accessed November 2011).

access to justice. These principles will sometimes be in tension. There is a significant concern 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.[8] 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".[9] 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. This is the bedrock of the polity. 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".[10] 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

8 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)

9 See J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a category of bourgeois society*, T Burger (trans.) (Cambridge: Polity Press 1992); *The Theory of Communicative Action. Vol. I – Reason and the rationalisation of society*, T McCarthy (trans.) (Boston: Beacon Press 1984); *The Theory of Communicative Action. Vol. II – Lifeworld and System: A critique of functionalist reason*, T Burger (trans.) (Cambridge: Polity Press 1987); *Between Facts and Norms: Contributions to a discourse theory of law and democracy*, W Rehg (trans.) (Cambridge: Polity Press 1996).

10 J Habermas, "The public sphere: an encyclopedia article (1964)" (1974) 1(3) *New German Critique* 49–55, p. 49.

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 non-governmental organisations, and to invite the strategic legal tourist from abroad. 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. In recognising this potentiality, it is vital to appreciate that it is costs, processes and remedies rather than the substantive law that comprise 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.[11] 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.[12]

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.[13] 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. Second, the award of damages alone for vindication does not necessarily highlight mistakes that have been published,[14] and if apologies and corrections are made this is often done without what might be considered to be due prominence. Third, the manner in which the *Reynolds* public interest defence currently operates masks the fact that the impugned publication has not been

11 See, generally, E Barendt, *Freedom of Speech* 2nd edn (Oxford: OUP 2005), ch. 1. These ideas are encapsulated in the comments of Lord Steyn in *ex parte Simms* (see above).

12 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. Revised versions of the papers delivered at the conference, along with an event video are available at http://reframinglibel.com (accessed November 2011).

13 The imperative of making such corrections is recognised in journalists' own statements of professional ethics – see, for example, the PCC *Editors' Code of Practice*, cl. 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*, cl. 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 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*, television channels such as Fox News, or the proliferation of online gossip websites.

14 Although cl. 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.

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.[15] This need not be the impact of a coherent libel regime. 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, retractions, and rights of reply – could serve these objectives.

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 of the European Convention on Human Rights (ECHR).[16] 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 caselaw 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".[17] 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".[18] They viewed the equation between reputation and privacy as a "brazen", "plainly wrong . . . aberration", and the fruit of European judges' "unprincipled and unprecedented frolics".[19] 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.[20] 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.[21] Some subsequent decisions of the European

15 J Coad, "Reynolds and public interest: what about truth and human rights?" (2007) 18(3) *Entertainment Law Review* 75–85.

16 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 discussion of this development, see D Spielmann and L Cariolou, "The right to protection of reputation under the European Convention on Human Rights" in D Spielmann, M Tsirli and P Voyatzis (eds), *The European Convention on Human Rights, A Living Instrument: Essays in honour of Christos L Rozakis* (Brussels: Bruylant 2011); H Rogers, "Is there a right to reputation?", *Inforrm*, 26 October 2010 (part one) and 29 October 2012 (part two); A Mullis and A Scott, "The swing of the pendulum: reputation, expression and the re-centring of English libel Law" (2012) 63 *NILQ* 25.

17 G Robertson and A Nicol, *Media Law* 5th edn (London: Sweet & Maxwell 2007), p. 67.

18 Ibid.

19 Ibid. p. 70.

20 (2008) 46 EHRR 35.

21 (2009) 48 EHRR 8.

Court, however, have been more equivocal.[22] Notwithstanding this, the development was considered and affirmed by the Supreme Court in *Re Guardian News & Media Ltd*.[23]

None of this caselaw 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.[24] In social psychology, for over one hundred years, it has been absolutely standard, generally accepted knowledge that 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".[25] In 1934, George Herbert Mead described a similar process, and observed that "we are more or less unconsciously seeing ourselves as others see us".[26] 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

22 See, for example, *Karako* v *Hungary*, (2011) 52 EHRR 36).

23 [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]. In Mullis and Scott, "The swing of the pendulum", n. 16 above, we consider a number of different justifications offered by the European Court of Human Rights and the English courts as to why, and when, reputation may fall to be protected by Article 8. Though the jurisprudence is by no means consistent, nor fully developed, the most convincing justification has been offered in the European Court of Human Right's decision in *Karako* v *Hungary* (2011) 52 EHRR 36. In *Karako*, the court strongly emphasised the variability of Article 8 coverage of reputation. It noted "a clear distinction, ubiquitous in the private and constitutional law of several Member States, between personal integrity and reputation" (at [22]), and that "personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual" (at [23]). Having distinguished harm to an individual's psychological integrity from harm to other people's perceptions, the court explained that only when a libel was sufficiently serious would it be liable to impinge upon personal integrity and hence invoke Article 8 (at [23]). The approach taken by the court in *Karako* has the merit of clearly differentiating two aspects of reputation. Reputation as it affects personal dignity or psychological integrity, and reputation as property or quasi-property. Moreover, this approach is consistent with the social psychology canon referred to in the text.

24 See, generally, N Emler, "A social psychology of reputation" (1990) 1 *European Review of Social Psychology* 171–93. 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 "What is the point of libel law?" (1999) 52 *Current Legal Problems* 110–25 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 deserts 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 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* (Hartford: William Andrus 1841), p. 155.

25 C Cooley, *Human Nature and the Social Order* (New York: Scribner, 1902).

26 G H Mead, *Mind, Self and Society from the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press, 1934), p. 68.

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.[27] 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. Most poignantly, in the libel 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.[28]

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".[29] For such very significant harms, the libel regime should provide access to very substantial compensatory damages.

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27 See, for example, *Von Hannover* v *Germany* (2005) 40 EHRR 1, at [33]; *Karako* v *Hungary* (2011) 52 EHRR 36; *A* v *Norway* 28070/06 [2009] ECHR 580 (9 April 2009); *Polanco Torres and Movilla Polanco* v *Spain* 34147/06 (unreported 21 September 2009). It was contested in *Karako* itself, however, in a partly concurring judgment delivered by Judge Jociene who considered that the prior caselaw had been consistent in finding reputation always to fall within Article 8. 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]).

28 *Lillie and Reed* v *Newcastle City Council* [2002] EWHC 1600 (QB), at [1538]–[9].

29 B Woffinden and R Webster, "Cleared", *The Guardian*, 31 July 2002. 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 A Laing, "'Climategate' Professor Phil Jones 'considered suicide over email scandal'", *Daily Telegraph*, 7 February 2012.

Taking access to justice seriously

Access to justice is important in terms of both principle and practice.[30] 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.[31] 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.[32] 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 per cent (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 –

30 See, for example, Lord Neuberger MR, "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."

31 A demonstration of this point provides the dénouement of Heinrich Böll's classic novel *The Lost Honour of Katharina Blum* (London: Vintage Classics 1993).

32 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 Programme in Comparative Media Law and Policy, *Comparative Study of Costs of Defamation Proceedings Across Europe* (2008), available at http://pcmlp.socleg.ox.ac.uk/ (accessed October 2010). The sustainability of this research finding has, however, been persuasively challenged – see D Howarth, "The cost of libel actions: a sceptical note" (2011) 70 *Cambridge Law Journal* 397–419.

such as that floated by the last government[33] or that put forward by Lord Justice Jackson[34] and now presented to Parliament with some variation by the current government[35] – to amend the 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".[36]

3 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 actual (provable) harm; and to vindicate or restore the claimant's damaged reputation.[37] 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. This involves parsing out the different forms of damage that may be caused by a libel, and hence the range of purposes to be served by a coherent libel law and the remedies that it might afford.

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 the social psychology of reputation. That is, the loss of dignity or self-esteem occasioned when an individual believes that others have been caused – wrongly – to think less of him or her. It is to the extent of such harm

33 The abortive Conditional Fee Agreements (Amendment) Order 2010 proposed under s. 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 (HL Debs, vol. 718 cols 1152–78) before being lost in the "wash-up" before the prorogation of Parliament prior to the 2010 general election. 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."

34 R Jackson, *Review of Civil Litigation Costs* (London: Ministry of Justice 2010), ch. 32.

35 Under Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, "success fees" and "after the event" insurance will no longer be recoverable from the losing party. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will be subject to further regulation. In defamation cases, the government has proposed that the maximum success fee will remain at 100% and that this will be paid from the damages recovered (damages for non-pecuniary loss in all tort claims – which includes defamation – will be increased by 10%). See, http://inforrm.wordpress.com/2011/03/29/news-conditional-fees-the-government-responds-to-the-consultation/. As the mean average award of damages in a defamation claim is around £38,000 and the median award around £20,000 (for the raw data used to calculate this figure, see C Doley and A Mullis (eds), *Carter-Ruck on Libel and Privacy* 6th edn (London: LexisNexis 2010), appendix on awards of damages in defamation claims), the practical effect of implementation of the government's proposals is likely to be a significant reduction in the ability of claimants to secure access to justice.

36 Howarth, "The cost of libel actions", n. 32 above.

37 *John* v *MGN Ltd* [1997] QB 586, at 607 (per Sir Thomas Bingham MR).

that we consider the protection of reputation to fall within the ambit of Article 8 of the Convention. Actual harms to reputation speak more to the conception of reputation as property.[38] Understanding this head of damages in line with the above discussion entails a number of ramifications for the design of the libel regime.

(a) Ramifications: meaning

Disputes about meaning are often central to libel actions: "very often if not always the most important issue is meaning".[39] The result is 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,[40] and the determination of this single meaning is usually left to the jury or judge 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. 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 required to engage Article 8 ECHR.[41] Hence, the determination of meaning becomes very straightforward. The question is not "What is the meaning?", but rather only "Is the given meaning a 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".[42] There would be no need to argue

38 See Post, "The social foundations", n. 24 above. We do not here assert that damages should not be recoverable for provable financial loss, but instead intend to make the point that where the only harm caused by a defamatory statement is financial, Article 8 is not engaged.

39 Uncorrected evidence given by Mr Justice Tugendhat to the Joint Committee on the Draft Defamation Bill, 7 July 2011, at Q40. For an illuminating discussion of, inter alia, the law and practice regarding the determination of meaning in English and Australian defamation law, see A Kenyon, *Defamation Law: Comparative law and practice* (London: UCL Press 2006). This research, based on qualitative interviews undertaken in 2000 – and followed up in 2003 – with a sizeable cross-section of libel practitioners, gives substantial insight into how libel claims are pleaded that is available from few other sources. See also, Doley and Mullis, *Carter-Ruck*, n. 35 above, Pt 3 "Practice and procedure".

40 The single meaning rule requires the court to select one meaning from the range of those that the publication may reasonably be capable of bearing as that which would be discerned by a hypothetical ordinary, reasonable reader. The House of Lords affirmed this rule in *Charleston* v *News Group Newspapers* [1995] 2 AC 65.

41 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).

42 *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 of 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].

defences relevant to multiple, indeterminate meanings.[43] Indeed, the defendant would know from the first contact with the prospective claimant what meanings required defending. He or she could then choose whether to argue that the proposed meaning was an extravagant – and hence unreasonable – inference to draw from the published words, to rely on justification, fair comment or privilege, or to accept the claimant's interpretation of the impugned words as reasonably possible and to offer some suitable remedy. Especially given the approach to remedies – discussed below – entailed by the Article 8 starting point, the likelihood would be that in the many cases where what has upset the claimant was not in fact what the defendant intended to convey, the immediate clarity on meaning would allow speedy redress without any need to revert to court. The existing incentive for defendants to introduce obfuscatory alternative meanings more suited to their own legal arguments would be substantially reduced. The claimant would have an incentive to plead mainstream or natural meanings so as to satisfy the reasonableness test.

(b) Ramifications: whether a statement is defamatory

The fact that a given meaning is accepted by the court as reasonable, does not automatically entail that it must also be considered to be defamatory. This requires a separate assessment. Under the current law, the standard test is that of whether the words have a tendency to lower the claimant in the estimation of right-thinking people generally.[44] This has recently been restated by Tugendhat J following a review of numerous previous definitions: "a publication is defamatory of a claimant if it substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do".[45] Clearly, the claimant will believe that the pleaded meaning is defamatory as this subjective perception is what is alleged to have generated the harm complained of. As with the determination of meaning, however, the court should not simply accept the claimant's contention. If the impugned words cannot be fairly read as defamatory, then the Article 8 harm is caused not by the words published, but rather by some over-sensitivity or paranoia on the part of the claimant. Whether in fact imputations are defamatory should remain an objective question.

A useful parallel can be seen in the way in which workplace harassment on grounds of age, religion, sexual orientation, or other "relevant protected characteristic" is considered under the Equality Act 2010.[46] Section 26(1) provides that harassment occurs where a person engages in unwanted conduct, and that conduct has the purpose or effect of violating the victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. In determining whether the second part of this test is satisfied, that is whether the conduct in question has one or other of the deleterious effects, the Employment Tribunal will consider the victim's perception, the other circumstances of the case, and whether it is reasonable for the conduct to be understood as

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43 As Andrew Kenyon has explained: "a major reason lawyers differ about meaning may not be any complexity with meaning per se. At least within defamation law, the test for meaning is simple, and refers to ordinary understandings, so important theoretical questions are bracketed out and play no explicit role in defamation doctrine. Instead, lawyers may differ about meaning because of their concern with justification. Claimants seek to plead a short, sharp and memorable meaning that cannot be proved true – which may not be the most plausible meaning to arise from the publication. And defendants seek to plead a similar but broader and less damaging meaning that will allow them to adduce damaging evidence they have about the claimant" – see Kenyon, *Defamation*, n. 39 above, p. 120.

44 *Sim* v *Stretch* [1936] 2 All ER 1237, at 1250 (per Lord Atkin). For recent discussions of the concept of defamatory meaning, see L McNamara, *Reputation and Defamation* (Oxford: OUP 2007), especially Pt 3; Doley and Mullis, *Carter-Ruck*, n. 35 above, pp. 59–77.

45 *Thornton* v *Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

46 The full listing of relevant protected characteristics is set out in s. 26(5).

having that effect.[47] Explaining this provision in *Richmond Pharmacology* v *Dhaliwal*, Underhill J noted that:

> a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred . . . proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so . . . if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal . . . dignity is not necessarily violated by things said or done which are trivial or transitory . . . it is . . . important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.[48]

The view of a claimant on whether an imputation was defamatory should be relevant to but not determinative of the view reached in libel adjudications.

(c) 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 honest 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, and thereby to encourage publishers to communicate information that they believed to be true and in the public interest.[49] 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 comical – 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.[50] Moreover, claimants do not receive

47 S. 6(4).

48 [2009] IRLR 336, at [15] and [22]. In that case, the tribunal was in fact interpreting a very similar predecessor provision to s. 26.

49 There is some debate as to whether the *Reynolds* defence was intended by the House of Lords to permit the publication of information that the publisher believed to be true, but was aware *at the time of publication* that it would not be possible to prove so to the satisfaction of the court. An example may be where a source of information was always unwilling to defend an allegation.

50 See, for example, the contribution of Professor Roy Greenslade to the "Reframing Libel" symposium, n. 12 above.

vindication, and inaccuracies that misinform the wider public are not corrected. This argument suggests that some form of two-track libel regime, with different routes for standard and more serious cases, may be appropriate.

(d) Ramifications: measure of damages

If a meaning complained of proves to be both reasonable and defamatory and no defence is made out, then two questions regarding damages arise. First, what should be the possible range of damages awards and, second, how should the measurement of damages in any given case proceed. It could not be appropriate simply to invite the claimant to depict the harm suffered and to match the damages award to the poignancy of this narrative. The administration of justice should not seek to mimic a drama school audition. That said, there should be some attempt to match the damages award with the subjective assessment of the harm actually suffered. It should not be an exclusively objective determination. This is not a straightforward exercise:

> It is self evident that the assessment of compensation for an injury or loss which is neither physical nor financial presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise . . . there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation . . . hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.[51]

Libel law, of course, is not the only context in which such estimations must be made. Here also, for example, a useful parallel can be drawn from the context of employment discrimination cases in which damages for injury to feelings, as distinct from psychiatric injury, have been considered by the Court of Appeal.

In respect of the range of possible damages award, in the overwhelming majority of libel cases the quantum of damages that would be necessary to compensate for the Article 8 harm suffered by a claimant would likely be relatively low. In that context, it is reasonable to consider a damages "cap". A figure of £10,000 has been mooted by some.[52] A "hard" cap on libel damages, however, would be inappropriate. A similar view informed the Court of Appeal when determining damages for injury to feelings in the context of employment law. In *Vento* v *Chief Constable of West Yorkshire Police*, Mummery LJ suggested three bands

51 *Vento* v *Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, at [50]–[51] (per Mummery LJ).

52 In a parliamentary debate, Denis MacShane MP suggested a cap of £10,000 – HC Debs, vol. 485 col. 74WH, 17 December 2008. Moreover, the Index/PEN report, n. 1 above, also suggested a cap of £10,000, 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 n. 2 above. 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, "Something rotten", n. 5 above, pp. 177–8. 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", *Inforrm*, 5 March 2012. No proposal to cap damages was included in the Lester Bill.

of compensatory award.[53] An award within the lowest band – between £500 and £6000 – would be appropriate for "less serious cases", while awards in the middle band – between £6000 and £18,000 – should be made in "serious cases". Awards in the highest band, stretching to £30,000, were considered appropriate "in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race". The court accepted that there could be circumstances that warranted compensation above the rate envisaged in the highest of these bands, but expected that this would occur "only in the most exceptional case".[54] Compensation for Article 8 harm caused by libel would normally be adequately addressed by an award falling within the first or second of these bands, and occasionally the third. Very exceptionally, as perhaps with the situation caused by the libel in *Lillie and Reed*, it should be possible for courts to make more significant awards in order to achieve justice in light of the degree of harm caused to a claimant's psychological integrity.

As regards the determination of an award of damages in any given case, the court can be expected to allocate the case to the appropriate banding of the harm caused and to reach a just award within the banding. In *Vento*, the court admitted of "considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case".[55] As one element of this exercise, a court can realistically be asked to countenance the claimant's own evidence on the psychological impact of a libel. The subjective evidence would then stand as one of a range of factors in its determination of an appropriate damages award.[56]

(e) Ramifications: standing of corporations

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.[57] The current position with regard to damages is that corporations cannot sue in respect of injury to feelings,[58] 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.[59] Under the revised understanding of injury to feelings described above, there would remain no basis for corporations to recover for Article 8 harm.[60]

(f) 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

53 [2002] EWCA Civ 1871, at [65]. The band-limits set out in *Vento* were in fact slightly lower than those set out in the text that follows. They were adjusted for inflation by the Employment Appeal Tribunal in *Da'Bell* v *National Society for the Prevention of Cruelty to Children (NSPCC)* [2010] IRLR 19, at [44]–[5].

54 *Vento*, n. 53 above, at [65].

55 Ibid. at [66].

56 The importance of the subjective narrative in decisions on the award of damages was explicitly recognised by the Employment Appeal Tribunal in *Da'Bell*, see n. 53 above, at [47].

57 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 n. 1 above. Cl. 11 of the Lester Bill provides that corporations should have to prove "substantial financial loss".

58 *Lewis* v *Daily Telegraph* [1964] AC 234 at [262] (per Lord Reid).

59 *Jameel* v *Wall Street Journal Europe SPRL* [2006] UKHL 44.

60 The position with regard to other forms of damage is considered further below.

claimants who are not currently able to avail of a CFA, while the chilling effect on publication would be significantly reduced.

Vindicating reputations 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.

(a) 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".[61] 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."[62] 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,[63] though it does exist under s. 9 of the Defamation Act 1996 on the summary disposal of a claim under s. 8 of the Act.[64]

The most effective way of vindicating a person's reputation would be to ensure that the truth is aired, and misrepresentations corrected. This would require new provision for the award of an appropriate discursive remedy. This view was presaged, in part, in the Index/PEN report: "the chief remedy in libel should be an apology, not financial reward".[65] 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.[66] The chilling effect of a potentially large damages award would be reduced, and importantly – if one is serious about achieving one of the underlying purposes

61 [1972] AC 1027, at 1071.

62 "Libel, damages and declarations of falsity", *Inforrm*, 2 November 2011. See, generally, G Bruggemeier, A Ciacchi and P O'Callaghan (eds), *Personality Rights in European Tort Law* (Cambridge: CUP 2010); H Koziol and K Warzilek (eds), *The Protection of Personality Rights Against Invasions by Mass Media* (New York: Springer Wein 2005).

63 *Loutchansky* v *Times Newspapers* (No 6) [2002] EMLR 44.

64 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 or she 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.

65 Index/Pen report, n. 1 above, p. 8.

66 This general preference among libel claimants for a discursive remedy is recognised in the Pre-Action Protocol for Defamation, para. 1.4, available at www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_def.htm (accessed July 2011).

of freedom of expression – then a closer approximation to the truth would enter the public sphere and be made available to the public. As the Press Complaints Commission (PCC) *Editors' Code of Practice* states, "a significant inaccuracy, misleading statement or distortion once recognized must be corrected, promptly and with due prominence, and – where appropriate – an apology published".[67] Therefore, we propose the withdrawal of damages for vindication to be replaced by an appropriately designed scheme of discursive remedies.

Quite what such an appropriate scheme of discursive remedies might comprise is open for debate. Clearly, where error has occurred correction should follow. On occasion, this may amount to the total retraction of a piece. How such corrections should be made will depend on the form that the original publication has taken. With ongoing online publication, for example, amendment could easily be made to the article itself so that future readers would not be misled. It would seem to be best practice, however, for such changes also to be accompanied by a note at the beginning or end of the piece indicating that such a revision had been made. For hard copy publication, it would seem appropriate for any correction or retraction to be highlighted in a dedicated part of the publication or by some other placement that would secure due prominence.[68] There may also be a role for rights of reply. It would seem to go too far, however, to insist that a correction or retraction must normally be accompanied by an apology.[69] Nevertheless, it may be reasonable for the libel regime to mandate apologies or to award declarations of falsity in cases where the claimant assumes the burden of proof and demonstrates the falsity of statements made to the satisfaction of the adjudicator.

(b) 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 the concern 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 or her community, and indeed social psychological research is beginning to evidence the fact that in many cases reputational 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, the reasons for recommending that damages for unquantifiable, presumed harm to reputation be withdrawn are largely pragmatic. 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.

(c) 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 provide a discursive remedy, in respect

67 Cl. 1(ii).

68 It does not seem vital to us that efforts to achieve "due prominence" should necessarily entail that corrections should be placed on the same page with the same space dedicated as the original, offending publication.

69 See further, *Draft Defamation Bill*, see n. 3 above, Q604 (per Desmond Browne QC and Hugh Tomlinson QC).

of what meaning should the libel be assessed and any redress made? It is arguable that 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 adjudicator, 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 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 correct 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.[70]

(d) 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,[71] 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".[72] We also recognize 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.

(e) Ramifications: defences

So far as defences are concerned, under our approach the defendant would be free to rely on the defences of justification (truth) and honest comment (honest opinion). We see no immediate reason to make significant changes to these defences as they currently exist in English law.[73] 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

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70 *Ajinomoto Sweeteners Europe SAS* v *ASDA Stores Ltd* [2010] EWCA Civ 609.

71 Mullis and Scott, "Something rotten", n. 5 above.

72 Defamation Bill 2010, cl. 11. The government opened the question for consultation in *Draft Defamation Bill Consultation*, Cm 8020, March 2011, available at: www.justice.gov.uk/consultations/draft-defamation-bill.htm, at paras 135–46. The Joint Committee *Report on the Draft Defamation Bill* (www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/news/publication-report/) recommends that the government should go further than the Lester Bill and, in addition to requiring a company to prove that there is a likelihood of actual financial loss, should require corporations to obtain the permission of the court before bringing a libel claim (para. 116).

73 This is not to contend that there is no room for a considered review of the fair comment defence to be undertaken to ensure that its various components are apposite given the function that the defence is understood to perform within the wider corpus of libel law.

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.[74]

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 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 at least a right of reply. This would properly value both the Article 10 and Article 8 rights at stake.

(f) Reflections

Clearly there are downsides for both parties in these proposals. So far as the defendant is concerned, it could be forced to provide a proper and prominent correction or have a declaration of falsity issued against it that 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".[75] 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 recognized defendant that relies for its revenue on a reputation for accuracy, probity and credibility wants to highlight publicly that it has gotten 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

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74 It can be noted further that under this scheme the publication on the given matter of public interest could be entered into the public domain, and then any subsequent correction or retraction could be explicit that the discursive remedy was being afforded only because the truth of the statement could not be proven to the satisfaction of the court. Should the claimant wish to press the matter and seek an apology or declaration of falsity, he or she might reasonably be asked to assume the burden of proving falsity.

75 W Cash, "Stop the presses" (2010) (summer) *Spears* 28–31, p. 30.

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 recognized 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 or she has suffered. Even after the publication of a correction 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 or she 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 an unduly chilling effect is mitigated in part by the recognised difficulty of proving such loss.[76] Abusive threats to litigate could 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.[77]

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 adjudicator or 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.

4 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. It would involve the establishment of a new approach to libel actions that would emphasise the swift resolution of complaints and the provision of discursive remedies. This function could be retained by the High Court, but it might instead be administered by co-regulatory bodies designated under a new Defamation Act. This group could certainly include one or more self- or statutory media regulators for cases deriving from media publication. It may also

76 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 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.

77 Civil Procedure Rules (CPR) (SI 1998/3132 as amended), r. 3.4(2).

extend to expert professional panels for defamatory comments made in specialised contexts such as academic conferences, or independent arbitrators for the residue of other cases arising other than through media publication.[78] The overwhelming majority of cases would be addressed solely by this route. The High Court could exercise a supervisory function, and review the first-track decisions of the designated bodies on the traditional grounds of illegality, irrationality, procedural impropriety and for compliance with Convention rights.

In this first track, the 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. The single meaning rule would be withdrawn. Truth and honest 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 would disappear in respect of track one. Damages would only be available for psychological harms protected under Article 8 ECHR. The degree of harm would be allocated within one of three bands of award depending on the level of seriousness. The top band for exceptionally serious Article 8 harm would be capped at £30,000. Vindication would not be obtained by way of damages, but rather through an appropriate – and mandated - discursive remedy. Normally, this would be either a correction or retraction, although apologies could be mandated and declarations of falsity made where the claimant proved falsity. Rights of reply could be allied with any of the other remedies as deemed appropriate by the adjudicatory body. The remedy in damages for intangible harm to reputation would be withdrawn. Special damages for provable loss would be unavailable in this track. Recoverable costs would be limited.[79] 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: reference out to High Court for serious libels

The second track would be limited to aspects of the most serious and/or most damaging libels. Part of such cases would be referred out to this track only where the claimant sought special damages for provable loss or punitive damages, 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. It would also be open to a defendant to argue that the publication had raised a matter of real public interest. Those aspects of cases referred out to track two would continue to be heard in the High Court. Where proven by the claimant, special and punitive damages would be recoverable. Uncapped damages would be available for Article 8 psychological harm (although a de facto cap would remain by pegging to non-pecuniary damages recoverable for physical injury). A *Reynolds*-style public interest defence would be available 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 provides either a right of reply or a notice of

78 There would be no reason why such an adjudicatory body need be established directly by the state. Provided any decision of an authorised adjudicatory body was subject to judicial review, a private sector corporation such as the Early Resolution CIC (a community interest company founded by Alastair Brett and Sir Charles Gray which provides arbitration and mediation services to determine some or all the issues in a libel claim could be left to determine track-one claims, and would be likely to do so very much more quickly and cheaply than the High Court does currently. Other entities could also apply to be allowed to offer adjudication of track-one claims. Thus, for instance, the Internet Service Providers Association might establish a dispute resolution body (the decisions of which would be subject to judicial review) which would be available where the claimant was libelled online.

79 As a manifestation of the overriding objective of the CPR (r. 1).

correction with due prominence. Each party would carry their own costs with regard to those aspects of disputes referred out to track two.

5 Conclusion

A key benefit of adoption of the scheme outlined here would be to provide significant incentives for complaints to be settled quickly between the parties without recourse to the formal adjudicatory regime. We recognise that the availability of track two may continue to facilitate the abusive threat of legal action, but suggest – first – that claims to have suffered severe Article 8 harm or particular losses could be easily identified and quickly dismissed by the court if unsubstantiated and, second, that the revision to rules on the allocation of costs would mitigate this problem. 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 is 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 away 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.

Ultimately, it is our contention that only through the adoption of a radical revision to the law and procedures of libel such as is here proposed can the personal and social interests in expression, reputation and access to justice be properly valued and balanced. We fear that current proposals will serve instead to undermine personal and social interests in reputation, and allow untruths to perpetuate in the public sphere to the detriment of the wider understanding of matters of democratic importance. Simply precluding the possibility of litigation and redress – whether by withdrawing access to workable funding mechanisms so as to leave the option of litigation open to none bar a tiny minority of prospective claimants by dint of sheer cost, or by taking areas of subject matter entirely outside the purview of the law – is no way to design a libel law fit for a discursive constitution.

NILQ 63(1): 27–58

The swing of the pendulum: reputation, expression and the re-centring of English libel law

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1 Introduction

The task of designing any libel regime must involve reaching an appropriate accommodation between individual rights and social interests in both freedom of expression and reputation.[1] English libel law has long been criticised for its failure properly to reflect the importance of freedom of expression. Significant revisions have been made to law and practice in the area over the past two decades in the hope of addressing this concern. Much scholarship has reported on the shortcoming over time, and offered varied proposals for further reform.[2] In recent times, vociferous political campaigning has been dedicated towards asserting that problems persist still.[3] Given the egregious restriction that it once imposed on freedom of speech, it is perhaps unsurprising that so much modern thinking and action regarding libel law has emphasised the need better to valorise expression interests. The "constitutionalisation" of libel law has been viewed largely through the prism of Article 10 of the European Convention on Human Rights (ECHR) alone.

One consequence of this orientation has been that the need to defend reputation has been subordinated. As we explain in the first part of this paper, in the period before and for some years after the passing of the Human Rights Act 1998, the approach of courts to the need to balance expression and reputation interests focused almost exclusively on the question of whether existing rules of law were compliant with Article 10. The importance of reputation was not ignored, but freedom of expression was regarded as the "trump card". Reputation interests were considered only as a possible limitation on the

* We owe an especial debt of thanks to Cameron Doley, Eric Barendt and Benjamin Pell for developed feedback on this paper. All errors and omissions remain our own.

1 Access to justice is also key, both for defendants and claimants. Indeed, it may be in this respect that the English libel regime can be considered to have been – and to remain – most inadequate.

2 Notable in this regard have been E Barendt, L Lustgarten, K Norrie, H Stephenson, *Libel and the Media: The chilling effect* (Oxford: OUP 1997); I Loveland, *Political Libels: A comparative study* (Oxford: Hart 2000), and D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008).

3 Index on Censorship/English PEN, *Free Speech is not for Sale* (2009); *Reforming Libel: What should a defamation bill contain?* (2011), both available at www.libelreform.org (accessed April 2011).

right to freedom of expression where this could be demonstrated to be necessary in a democratic society.[4]

In the light of developments in European and English jurisprudence, this approach is no longer tenable. The Strasbourg and domestic courts have, since 2004, become progressively more pronounced in recognising that reputation falls to be protected under the Article 8 right to respect for private life. They have recognised a Convention right to the protection of reputation.[5] Hence, to the extent that it was thought that freedom of expression would always be the more important right, this is no longer the case. Today, at least in respect of most defamation claims, the court is required instead to weigh the competing interests of the claimants under Article 8 and the defendants under Article 10. In all cases, societal interests in the protection of individuals' reputations will also be in play. The second part of this paper charts the early development and deployment of the Article 8 right to reputation in European and domestic jurisprudence.

Yet, while this jurisprudential innovation is now embedded at both the European and domestic levels, it is not clear that a coherent intellectual underpinning has been articulated by the courts. The third part of this paper reviews four main justifications offered by judges and others to explain the articulation between reputation and privacy. Relying on the social psychology literature on reputation, the paper presents the expansion of Article 8 to cover reputation as an appropriate – indeed, as a necessary – development. It reprises and develops a dualistic understanding of reputation and explanation for its legal protection as proffered by the Strasbourg Court in *Karako* v *Hungary*,[6] centred on potential harms wrought on one hand to public perceptions of the character of an individual, and on the other hand that individual's sense of self-esteem engendered by the quality of this public regard. It suggests that only in the latter respect should reputation fall within the ambit of Article 8. The fourth part of the paper draws out a number of general repercussions of this understanding of Article 8 protection for reputation.

While the theoretic underpinning of the domestic courts' jurisprudence is as yet underdeveloped, there is a real likelihood that – whatever the outcomes of current parliamentary considerations – the coming years will see significant changes in the law of defamation as the implications of the new approach are worked through. We consider a number of the possible ramifications of the rights-based resurgence of reputation in the final part of the paper. Properly applied and understood, this approach does have the capacity to lead to a re-centring of the law that would validate the rights of claimants, defendants and the wider public, at least insofar as the substantive law of defamation is concerned.

2 Reaching the zenith: the rise and rise of freedom of expression

Any law of libel devised so as to defend reputations against the fall-out from unjustified criticism will necessarily constrain freedom of speech. A balance must be struck between the underpinning values served by the law and the individual and social benefits of free and open discussion. Historically, English libel law was much-criticised for striking this balance

4 Article 10(2) ECHR provides for the subjection of the Article 10(1) right to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, inter alia, for the protection of the reputation or the rights of others.

5 See, for example, the following Strasbourg decisions: *Chauvy* v *France* (2005) 40 EHRR 610, at [70]; *Radio France* v *France* (2005) 40 EHRR 29, at [31]; *Cumpănă and Mazăre* v *Romania* (2005) 41 EHRR 200, at [91]; *White* v *Sweden* (2008) 46 EHRR 3; *Lindon, Otchakovsky-Laurens and July* v *France* (2008) EHRR 35. For English cases, see: R*e Guardian News and Media Ltd* [2010] UKSC 1; R*e Attorney-General's Reference No 3 of 1999* [2009] UKHL 34; *Clift* v *Slough Borough Council* [2009] EWHC 2375; *Flood* v *Times Newspapers* [2009] EWHC 2375; *Brady* v *Norman* [2010] EWHC 1215; *Ronaldo* v *Telegraph Media Group Ltd* [2010] EWHC 2710.

6 (2011) 52 EHRR 36.

in an overly restrictive manner. Damages awards had become exorbitant,[7] no public interest defence existed (aside from those implied in traditional qualified privilege), and strict liability was the invariable rule. That some adjustment to the law was necessary could not be sensibly contested. The years immediately before and after the passing of the Human Rights Act 1998, however, were in fact characterised by just such a significant rebalancing in the law of defamation in favour of freedom of expression. The extent of the reshaping that occurred should not be underestimated.[8]

The rebalancing of the law began well before the passage of the 1998 Act. In several cases Article 10 ECHR was identified expressly as a factor influencing determinations of the courts. A significant decision concerning standing to sue was that of the House of Lords in *Derbyshire CC* v *Times Newspapers*.[9] In concluding that a local authority did not have the right to maintain an action for damages in defamation, the Court of Appeal had relied directly on the Convention.[10] On appeal, the House of Lords decided the case on the basis of domestic law, but nevertheless expressed the view that English law was Convention compliant.[11] Subsequently, Buckley J determined that a political party also cannot sue in defamation.[12] Again the importance of freedom of expression was emphasised.[13]

A second significant change occurred in relation to the assessment of damages. In a series of cases the most significant of which were *Rantzen* v *Mirror Group Newspapers*[14] and *John* v *MGN*,[15] the courts made clear that the days when libel awards could be regarded as "a road to untaxed riches" were over. The immediate catalyst for this change was the passing of s. 8 of the Courts and Legal Services Act 1990. This gave the Court of Appeal a discretion to intercede where damages awarded were excessive (or inadequate) and to substitute its own award for that of the jury. The Court of Appeal in *Rantzen* required that the exercise of this discretion should take Article 10 and related Strasbourg jurisprudence into account.[16] It also highlighted the requirements articulated by Lord Goff in *A-G* v *Guardian Newspapers Ltd (No 2)*: that any interference with the right to freedom of expression had to be justified by the existence of a pressing social need, and that where interference was justified it should be no more than is proportionate to the legitimate aim

7 See e.g. *Lord Aldington* v *Count Tolstoy*, *The Guardian*, 1 December 1989 (£1.5m awarded in respect of an allegation that the claimant was a war criminal); *Stark* v *Mirror Group Newspapers*, *The Times*, 4 November 1988 (£300,000 awarded to an actress for an imputation that she retained a "lingering love" for her former boyfriend and had secret meetings with him after marrying someone else); *Archer* v *Express Newspapers*, *The Times*, 25 July 1987 (£500,000 for an allegation that the claimant had paid a prostitute for sex and subsequently lied about it).

8 This primacy afforded to freedom of expression was also reflected in the jurisprudence of the European Court of Human Rights during this period – see generally G Millar, "Whither the spirit of Lingens?" (2009) *European Human Rights Law Review* 277–88.

9 [1993] AC 534.

10 [1992] QB 770. Balcombe LJ noted that the common law and the Convention were entirely consonant and hence analysed the case using the framework provided by the Convention (at 811ff.). Ralph Gibson LJ and Butler-Sloss LJ were somewhat more circumspect on the relevance of the Convention, but given what they perceived as an ambiguity and lack of clarity on point they each ultimately adopted the same analysis. In the Divisional Court, Morland J had decided the case in favour of the local authority, indicating that no explicit regard should be given to the Convention (at 787).

11 [1993] AC 534, at 551 (per Lord Keith).

12 *Goldsmith* v *Bhoyrul* [1998] QB 459.

13 Ibid. at 462.

14 [1994] QB 670.

15 [1996] 2 All ER 35.

16 [1994] QB 670, at 691.

pursued.[17] In *John* v *MGN*, the Court of Appeal returned to the issue of excessive damages and – although stating that the conclusion was reached independently of the Convention – effected additional change to the law to avoid the possibility of excessive awards. This took the form of requiring extensive guidance to be given by the judge to the jury. The practical result of these decisions has been a substantial decrease in the average award of damages over the last two decades.[18] An effective damages cap has been fixed in line with awards for non-pecuniary loss in personal injury cases.

The judgment most closely associated with the "constitutionalisation" of libel law is that of the House of Lords in *Reynolds* v *Times Newspapers*.[19] In that case, and the later decision in *Jameel* v *Wall Street Journal*,[20] their Lordships held that where a publication is on a matter of public interest, a defendant who cannot prove the truth of statements made is protected by privilege where it can be shown that the defendant's conduct was nevertheless responsible. As with the *Derbyshire* decision,[21] the Human Rights Act 1998 was not in force at the time *Reynolds* was decided. Rather, it was common ground that the case should be determined on the basis that the Act would soon be in force.[22] Though it is true to say that the importance of reputation was not wholly overlooked, Lord Nicholls' leading speech placed freedom of expression to the fore: "my starting point is freedom of expression . . . the crux of this appeal, therefore, lies in identifying the restrictions [on freedom of expression] which are fairly and reasonably necessary for the protection of reputation".[23] In similar vein, Lord Steyn stated:

> the starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation.[24]

For their Lordships, therefore, while reputation was an important value expressly identified in Article 10(2) of the Convention that deserved protection,[25] freedom of speech had a higher normative force. Restrictions or exceptions designed to protect reputation might be justified, but only if the restriction they entailed was necessary and proportionate in light of that pressing social need.

In light of concerns that *Reynolds* privilege was not having the liberating effect on freedom of expression that had been anticipated, the House of Lords took the opportunity in *Jameel* v *Wall Street Journal Europe* to restate its underpinning principles.[26] The unmistakable message infusing the speeches is that prior to the Human Rights Act 1998 the

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17 [1990] 1 AC 109.

18 For the raw data, see C Doley and A Mullis (eds), *Carter-Ruck on Libel and Privacy* 6th edn (London: Butterworths 2010), appendix on damages in defamation claims.

19 *Reynolds* v *Times Newspapers* [2001] 2 AC 127.

20 [2006] UKHL 44, [2007] 1 AC 359.

21 [1993] AC 534.

22 See, for example, [2001] 2 AC 127, at 200 (per Lord Nicholls), at 207–8 (per Lord Steyn), and at 223 (per Lord Cooke).

23 Ibid. at 200–1.

24 Ibid. at 208.

25 Ibid. at 201 (per Lord Nicholls).

26 [2006] UKHL 44, [2007] 1 AC 359.

law of defamation was too heavily weighted against freedom of expression and that this position was no longer tenable. As Lord Hoffmann explained:

> until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell* v *MGN Ltd* and in favour of greater freedom for the press to publish stories of genuine public interest in *Reynolds* v *Times Newspapers*. But this case suggests that *Reynolds* has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles.[27]

As was the case in *Reynolds*, their Lordships proceeded on the basis that, while restrictions on the right to freedom of expression could be justified by the need to protect reputation, any such restriction must be "necessary in a democratic society". The value of reputation was recognised, but the primacy of freedom of expression was to be treated as the starting point.

Further important shifts in the law reflecting the dominant influence of Article 10 and freedom of expression followed the advent of the Human Rights Act 1998. These include the development of the abuse of process jurisdiction, the emergence of the defence of reportage, the abandonment of the strict liability principle in so-called "look-alike" cases, and the broadening of the fair comment defence. The abuse of process jurisdiction derives from the decision of the Court of Appeal in *Jameel* v *Dow Jones & Co Ltd* and provides for the court to strike out claims where no "real and substantial tort" is at issue.[28] It is intended to ensure that the proceedings will be halted if there is no realistic prospect of a trial yielding any tangible or legitimate advantage that would justify either the expense to which the parties will be put and/or the dedication of court resources. In reaching its conclusion, the Court of Appeal recognised that it was appropriate to have regard to Article 10 ECHR in deciding whether a claim should be allowed to proceed at all, and that consideration of freedom of expression could not be left to be addressed only at the stage when a defendant was serving a defence. While a number of applications to strike out for abuse of process have been unsuccessful,[29] a good number of defendants have persuaded the court to strike claims out.[30]

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27 [2006] UKHL 44, [2007] 1 AC 359, at 378 (Lord Hoffmann dissented on the question whether a company, with a trading reputation in the UK but not otherwise resident in England or Wales, could bring a claim in defamation without proving damage but not on the *Reynolds* privilege issue).

28 [2005] QB 946; [2005] 2 WLR 1614; [2005] EWCA Civ 75.

29 These have included *Lewis* v *Commissioner of Police of the Metropolis* [2011] EWHC 781 (QB); *McKeown* v *Attheraces Ltd* [2011] EWHC 179 (QB); *France* v *Freemans Solicitors* [2010] EWHC 3291 (QB); *Cairns* v *Modi* [2010] EWHC 2859 (QB); *Taylor* v *Associated Newspapers Ltd* [2010] EWHC 2494 (QB); *McLaughlin* v *London Borough of Lambeth* [2010] EWHC 2726 (QB); *Ronaldo* v *Telegraph Media Group Ltd* [2010] EWHC 2710 (QB); *Underhill* v *Corser* [2010] EWHC 1195 (QB); *Baturina* v *Times Newspapers Ltd* [2010] EWHC 696 (QB); [2010] EMLR 18.

30 In the last three years, these cases have included *Wallis* v *Meredith* [2011] EWHC 75 (QB); *Smith* v *ADVFN plc* [2010] EWHC 3255 (QB); *Kaschke* v *Gray* [2010] EWHC 1907 (QB); *Khader* v *Aziz* [2010] EWCA Civ 716; [2010] 1 WLR 2673; [2011] EMLR 2 (confirming *Khader* v *Aziz* [2009] EWHC 2027 (QB)); *Brady* v *Norman* [2010] EWHC 1215 (QB); *Hays plc* v *Hartley* [2010] EWHC 1068; *Kaschke* v *Osler* [2010] EWHC 1075 (QB); *Budu* v *British Broadcasting Corporation* [2010] EWHC 616 (QB); *Williams* v *MGN Ltd* [2009] EWHC 3150 (QB); *Lonzim plc* v *Sprague* [2009] EWHC 2838 (QB); *Elton John* v *Guardian News & Media Ltd* [2008] EWHC 3066. On at least one occasion, the court has suggested that a *Jameel* application really should have been brought – see *Henderson* v *Hackney LBC* [2010] EWHC 1651 (QB) at [42] – while on others it has been held that *Jameel* arguments added nothing to other grounds for striking out an action – see e.g. *Bowker* v *Royal Society for the Protection of Birds* [2011] EWHC 737 (QB).

The reportage defence emerged fully formed in *Al Fagih* v *HH Saudi Research and Marketing (UK) Ltd*.[31] While some debate exists as to its scope,[32] in essence this development affords a defence to a defendant who provides a neutral and balanced report of attributed allegations without taking sides or embellishing the report. No authority was cited in support of the existence of such a defence, but it is not unreasonable to infer that the decision reflected the court's understanding of the particular importance of Article 10. For instance, Simon Brown LJ explained:

> neither [freedom of expression nor the right of an individual to his good reputation] is absolute but the former, particularly in the field of political discussion, is of a higher order, a constitutional right of vital importance to the proper functioning of a democratic society. That is why "any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved" (per Lord Nicholls in *Reynolds* v *Times Newspapers*), and why "any lingering doubts (as to how the balance should be struck) should be resolved in favour of publication" (per Lord Nicholls in *Reynolds* v *Times Newspapers*).[33]

The position on strict liability in respect of look-alike cases was addressed in *O'Shea* v *MGN Ltd*.[34] In that case, the defendants published an advertisement for an adult internet site. The advertisement included a photograph of a "glamour model". The claimant, a young woman who strongly resembled the model, brought a claim in libel, pleading that a number of persons had identified her with the photograph. After a careful review of prior jurisprudence, Morland J concluded that at common law the strict liability principle applied. He then proceeded, however, to consider the application of the Human Rights Act 1998 and whether application of the strict liability principle to look-alike cases was compatible with Article 10. In the judge's view, it was not: "to allow [the strict liability principle to apply to look-alike cases] . . . would be an unjustifiable interference with the vital right of freedom of expression disproportionate to the legitimate aim of protecting the reputations of 'look-alikes' and contrary to Article 10".[35]

As regards the development of the defence of fair comment, there have been a number of decisions in which Article 10, without being specifically relied upon as the basis for widening the ambit of the defence, was nevertheless clearly deemed a relevant consideration. Thus, in *Hamilton* v *Clifford*, Eady J commented that the greater readiness to treat inferences of fact as comment – reflected in cases such as *Branson* v *Bower*[36] – "was intended to clarify the law of fair comment and to ensure that English law was marching in step with the jurisprudence of the European Court of Human Rights".[37] So too in *Lowe* v *Associated Newspapers*, Eady J held that there was no need fully to set out the facts on which the comment was based to rely on the defence.[38] In so holding, the learned judge stated:

31 [2001] EWCA Civ 1634. For critique, see G Busittil, "Reportage: a not entirely neutral report" [2009] *Entertainment Law Review* 44, and J Bosland, "Republication of defamation under the doctrine of reportage: the evolution of common law qualified privilege in England and Wales" (2011) 31 *Oxford Journal of Legal Studies* 89.

32 See Doley and Mullis, *Carter-Ruck*, n. 18 above, paras 12.131–41.

33 [2001] EWCA Civ 1634, at [26].

34 [2000] EMLR 40.

35 [2000] EMLR 40, at [47].

36 [2001] EWCA Civ 791. It should be said that the Court of Appeal in *Branson* stated that they decided the case by applying the traditional common law rule without the need to consider the extent to which it has been in anyway affected by the passing of the Human Rights Act 1998 (at [11]).

37 [2004] EWHC 1542, at [55].

38 [2006] EWHC 320.

> I am also required by the Human Rights Act to take into account Article 10 and the jurisprudence associated with it. Having regard to those considerations, I am left in no doubt that the right to comment freely on matters of public interest would be far too circumscribed if it were a necessary ingredient of the English common law's defence of fair comment that the commentator should be confined to pleading facts stated in the words complained of. It would be more consonant with Article 10, and the rights of a free press in a democratic society, if the restriction were expressed in terms of the "subject-matter".[39]

Even in circumstances where the courts have held that the existing law was Convention compliant, the special importance of freedom of expression has been specifically recognised. In *Jameel* v *Wall Street Journal Europe SPRL*, for example, the House of Lords held that the rule that a trading company with a trading reputation in the jurisdiction was entitled to sue in libel without pleading or proving special damages is Convention compliant.[40] While this was a majority decision, there was no disagreement between their Lordships on the importance of freedom of expression and the requirement that any restriction be both justified by a pressing social need and proportionate to the legitimate aim pursued. Rather, the difference of opinion lay instead in the appropriate weight to be given to the two interests. In *Berezovsky* v *Forbes (No 2)*, the Court of Appeal confirmed that the English law rule requiring the defendant to prove the truth of the essence, substance or sting of a defamatory imputation was not a disproportionate invasion of the right to freedom of expression.[41] So too, in *Loutchansky* v *Times Newspapers Ltd and Others (Nos 2–5)*, the Court of Appeal concluded that the multiple publication rule did not constitute an unjustifiable restriction on the defendant's Article 10 rights.[42]

It is clear that the right to freedom of expression contained in Article 10 played a very significant role in the development of the law of defamation from the 1990s into the 2000s. While domestic courts did not overlook the importance of reputation, the clear direction of development of the law was such as to privilege freedom of expression. While there was one decision prior to 2005 in which an English court indicated that reputation may be among the rights protected by Article 8,[43] the prevailing view expressed in the caselaw was that freedom of expression was the higher right and that any restriction or exception to it had to be justified. The consequence of this was that the contours of the law had been significantly re-sculpted since the end of the 1980s. Damages were curtailed, a new public interest privilege was recognised, an abuse of process strike-out jurisdiction was acknowledged, the defence of fair comment was revitalised, and certain legal entities had been held to lack the capacity to bring a claim. Even in those cases where no change in the previous law was found necessary – as, for example, in relation to the multiple publication rule and the right of a trading corporation to sue in the absence of proof of damage – the

39 [2006] EWHC 320, at [42].

40 [2006] UKHL 44, [2007] 1 AC 359. Lord Hoffmann and Baroness Hale dissented.

41 [2001] EWCA Civ 1251, at [12].

42 [2001] EWCA Civ 1805 [2002] QB 783. The European Court of Human Rights has held that in this respect English law is Convention compliant although it suggested that should the law permit an action to be brought a very long period after the first publication this might prove to be too great a restriction of free expression – see, *Times Newspapers (Nos 1 and 2)* v *United Kingdom Application* [2009] EMLR 14.

43 *Greene* v *Associated Newspapers* [2004] EWCA Civ 1462, at [68] (per Brooke LJ): "for the purposes of this judgment we are content to assume that a person's right to protect his/her reputation is among the rights guaranteed by ECHR Article 8 (see *Affaire Radio France et autres* v *France* (No 53984/00) at para. 31)". Previously, in *Grobbelaar* v *News Group Newspapers Ltd* [2002] UKHL 40, Lord Hobhouse had mused: "Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms is always important. But article 10(1) is subject to 10(2) and the English law of defamation gives effect to this *and recognises that other human rights may be engaged as well, as for example under article 8(1)*" (at [63] – emphasis added).

law was carefully assessed for compliance with Article 10. While the English courts had not gone as far as their US counterparts in "constitutionalising" the law, the pendulum had swung significantly in favour of freedom of speech and the extent to which the law valorised reputation was much reduced.

3 Castles on the sand? The early jurisprudence on reputation and Article 8

If the period from the 1990s until 2005 was characterised by a special sensitivity for freedom of expression, by the end of that time the seeds of change were being sown by the European Court of Human Rights. While reputation is not expressly identified as a protected right under the Convention, in a series of cases beginning in 2004 the court recognised that it does fall within the right to respect for private life in Article 8.[44] This idea is potentially of real significance. Once Article 8 protection for reputation is allowed, the traditional approach to the assessment of an alleged breach of Article 10 – the presumed priority of freedom of expression over the enunciated social interests, intervention in the pursuit of which must be clearly demonstrated to be necessary by the state authorities – must transmute into a balancing exercise between competing Convention rights. On one hand, state parties would henceforth be able to offer a rights-based counterpoint where applicants challenged restrictions imposed by libel law on freedom of speech. On the other hand, because Article 8 imposes positive obligations on state parties to secure the substance of the right to their citizens,[45] it would permit disgruntled libel claimants to apply to the Strasbourg court to contest the perceived failure of domestic laws to ensure respect for the right to reputation.

The first jurisprudential associations between the protection of reputation and the right to private life were made only in early–mid 2004. In *Radio France* v *France*, 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, as one element of the right to respect for private life".[46] This assertion has been described by one leading commentator as a "bombshell".[47] Shortly afterwards, in *Chauvy* v *France*, the court proceeded on the basis that the inclusion of an individual's reputation as a value actively protected under Article 8 was routine.[48] The importance of this understanding was neither openly discussed nor readily apparent in the judgment. This shift was subsequently alluded to in similarly bare terms in a number of further cases in the following 18 months.[49] It also

44 Arguments to this effect had previously been presented to the court without their validity being unequivocally confirmed – see *Fayed* v *United Kingdom* (1994) 18 EHRR 393 at [46] and [7] in the concurring opinion of Judge Martens; *Niemietz* v *Germany* (1993) 16 EHRR 97 at [37]; *Rotaru* v *Romania* Application No 28341/95, unreported 4 May 2000, at [13] in the partly dissenting opinion of Judge Bonello.

45 In *Von Hannover* v *Germany* (2005) 40 EHRR 1, for example, the European Court stated that "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (at [57]).

46 (2005) 40 EHRR 706, at [31]. The focus of the consideration had been on whether interference with applicants' right to freedom of expression, which had been based on the Article 10(2) ECHR purpose of protecting reputation, had been necessary in the circumstances of the instant case. The case concerned civil and criminal sanctions imposed upon a media company, its publishing director and a journalist on account of defamatory allegations made in a magazine article and interview and radio broadcasts.

47 Millar, "Whither the spirit", n 8 above, p. 281.

48 (2005) 41 EHRR 29, at [70].

49 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].

found expression for the first time in the English Court of Appeal: in *Greene* v *Associated Newspapers*, the court was content to assume, relying on *Chauvy* v *France*, that a right to reputation was among the rights guaranteed by Article 8.[50] None of the judgments included any developed analysis of the point.

The inclusion of reputation within the ambit of Article 8 was a surprising innovation as there had been a conscious decision to omit the reference to "honour and reputation" – that was present in Article 12 of the pre-existing Universal Declaration on Human Rights – during the drafting of the provision.[51] The obligation to protect reputation is mentioned explicitly only in the series of grounds in pursuit of which limitations may legitimately be placed upon the right to freedom of expression guaranteed under Article 10 ECHR. The Convention is generally regarded, however, as "a living reality capable of unlimited development".[52] The European Court is not bound by an obligation of dogmatic obedience to the progenitors of the document. Hence, reliance on the documented intent of the drafters cannot obviate in principle any interpretation of a provision that may be deemed appropriate in light of the exigencies of a given case. Moreover, it has long been accepted that the "right to privacy" "comprises other rights than those expressly mentioned in Article 8",[53] and both the Consultative Assembly and the European Commission of Human Rights had formulated conceptions of the right that were broad enough to encompass reputation.[54] Nevertheless, the new jurisprudence was clearly a significant departure from the original intent of the "framers" of the Convention.

The first strands of the developing jurisprudence were either recounted without comment or roundly rejected as unfounded and ahistorical in the periodic and scholarly literature. Fenwick and Phillipson considered the development to be "potentially of great significance",[55] but "somewhat counter-intuitive" and in some circumstances even "perverse".[56] Robertson and Nicol were more categoric in deriding what they considered

50 [2004] EWCA Civ 1462, at [68].

51 J Velu, "The European Convention on Human Rights and the right to respect for private life, the home and communications", in A H Robertson (ed.), *Privacy and Human Rights* (Manchester: Manchester UP 1973), p. 16. In this respect at least, Judge Loucaides' argument in *Lindon* is untenable. He pronounced that following the experiences of the Second World War "it would have been inexplicable [for the authors of the Convention] not to provide direct protection of the reputation and dignity of the individual as a person" ((2008) 46 EHRR 35, at [O-I6]). He asserted that, consequently, a "correct" interpretation of the Convention would always have seen the right to reputation safeguarded by Article 8 as "part and parcel of the right to respect for one's private life" (at [O-I5]). This view does not accord with the historic record which demonstrates that the omission of the protection of honour and reputation from the ambit of Article 8 was consciously intended.

52 Ibid. at p. 25 (quoting Eissen: "si l'on voit dans la Convention une réalité vivante appelée à se développer sans cesse, si l'on préfère aux délices stériles de l'exégèse la recherche de solutions à la fois respectueuses du droits et conformes au bien commun, pour écarter une possibilité de progrès, pourquoi repousser une idée féconde et généreuse?"). See, further, H Tomlinson, "Strasbourg on privacy and reputation: Pt 2 – a right to reputation?", *Inforrm*, 9 March 2010.

53 P van Dijk and G J H van Hoof (1990) *Theory and Practice of the European Convention on Human Rights* (Deventer: Kluwer Law and Taxation Publishers), p. 368.

54 For instance, in Resolution 428 (1970) of the Consultative Assembly of the Council of Europe which contains the Declaration concerning the Mass Media and Human Rights it was stated that "the right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially." In *X and Y* v *Belgium*, D & R 28 (1982) 112 (124), the Commission also found that "the concept of privacy in Article 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the fulfilment of one's personality".

55 H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP 2006), p. 1070.

56 Ibid. p. 1100.

to be an "impermissible slight (*sic*) of hand".[57] 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".[58] In short, they viewed the linkage between reputation and privacy as a "brazen", "plainly wrong . . . aberration", and the fruit of European judges' "unprincipled and unprecedented frolics".[59] Perhaps importantly, they also noted that such references were absent from other – arguably seminal – cases that laid down fundamental principles for the defamation area.[60] The development was also criticised by Millar, who lamented the fact that:

> there has been no explanation as to why this interpretation of art. 8 should suddenly have been arrived at, when it eluded the drafters and the entire preceding generation of Strasbourg judges. Nor is there any attempt to answer the obvious point that reputation, and certainly the most exposed part of it, lies in the public domain. It resides in the estimation of people who do not actually know the complainant personally, though they may know him or her as a public figure. Why should this be considered part of private, rather than public, life?[61]

Given the absence of any explanation as to quite why Article 8 should be interpreted so as to protect reputation, it is understandable that the early commentary on the development was critical. In light of the growing weight of authority on the general point, however, it is perhaps better to focus energy on understanding the development and seeking to shape its parameters in a coherent manner.[62]

4 Remedial underpinning: emergent justifications for Article 8 protection

Notwithstanding the increasingly consistent message deriving from the caselaw on the coverage of reputation by Article 8, a fundamental question is obviously begged. Reputation – by dint of being determined by aggregating the appraisals made of an individual by other people – is quintessentially public in nature. To gain legitimacy beyond its bare positivity therefore, the emerging caselaw must provide a persuasive answer as to why reputation should be protected as an aspect of one's private or family life. In a number of more recent decisions, judges of both the Strasbourg and domestic courts have recognised the need for better foundations to be provided for the emergent jurisprudence. There has also been concern that Article 10 should not be too readily deposed from its formerly pre-eminent role in cases involving expression.[63] Different views have been expressed as to why protection is afforded relying variously on the public–private divide, the concept of human dignity, the contribution of reputation to psychological integrity, and the

57 G Robertson and A Nicol, *Media Law* 5th edn (London: Sweet & Maxwell 2007), p. 67.

58 Ibid.

59 Ibid. p. 70.

60 Ibid. p. 68. They cited *Steel & Morris* v *United Kingdom* (2005) 41 EHRR 22, at [87]; *Stoll* v *Switzerland* (2008) 47 EHRR 59, at [43]; and *Selisto* v *Finland* (2006) 42 EHRR 8, at [46].

61 Millar, "Whiter the spirit?", n 8 above, p. 282.

62 Legal attempts to have the Strasbourg court redress what is seen as an aberrant line of jurisprudence continue, however, for instance in the submission of the Media Lawyers Association in respect of the Grand Chamber's consideration of *Springer* v *Germany* (Application No 39954/08) and *Von Hannover* v *Germany* (Application No 40660/08), available at http://inforrm.wordpress.com/2010/09/16/von-hannover-and-springer-v-germany-the-media-intervention/ (accessed September 2011). For a view on the emergence of this jurisprudence that presents the development as entirely natural and unproblematic, see D Spielmann and L Cariolou, "The right to protection of reputation under the European Convention on Human Rights" in D Spielmann, M Tsirli and P Voyatzis (eds), *The European Convention on Human Rights: A living instrument* (Brussells: Bruylant 2011), pp. 401–25.

63 See, for example, *Karako* v *Hungary* (2011) 52 EHRR 36, at [20], and the partly dissenting opinion in *Lindon, Otchakovsky-Laurens and July* v *France* (2008) 46 EHRR 35.

impact of libel on personal relationships. A second-level question has been that of whether Article 8 is invoked by every instance of harm to reputation (albeit that with at least the first explanation for Article 8 coverage the answer to this query is given by default).

Public–private divide

The first suggestion concerning precisely when reputational harm should fall within the ambit of Article 8 has been that the protection should be afforded only where libels relate to private matters. Where false and defamatory statements concern public conduct, it is supposed, the adequacy of domestic libel laws should be assessed only under the rubric of Article 10(2). This view has scholarly support of some longevity. Writing in 1973, Velu argued that while:

> it is certain that the right to honour and reputation is not set forth as such in the Convention . . . it does not follow that [it] does not protect this right in any way. An attack on a person's honour or reputation may relate either to his private or to his public life. To the extent that it concerns his private life . . . it constitutes a violation of the right safeguarded by Article 8(1) . . . the Convention does not protect the individual against attacks on honour or reputation relating to his public life.[64]

More recently, Fenwick and Phillipson suggested that imputations regarding the performance of public functions should not give rise to any Article 8 interest.[65]

This is sensible insofar as one conceives of the private sphere as a physically and psychically sealable domain. Ultimately, however, this line of thinking is unsatisfying. Moreover, it coheres with neither the general tenor of Strasbourg jurisprudence,[66] nor the focused consideration given therein to Article 8 and reputation.[67] First, as a matter of practicality it would often be difficult to distinguish the public dimension of an individual's life from the private. The dividing line is at best fuzzy, on occasion non-existent. Secondly, a libellous imputation that relates directly – for example – to an individual's professional competence may have a debilitating effect on that person's psychological readiness to establish and develop personal relationships. Indeed, the compartmentalising of different aspects of life is less likely to be perceived as normal behaviour as it is evidence of some dissociative neurosis.[68]

Human dignity

A second suggestion as to why and when reputation should be covered by Article 8 has involved the linkage to the concept of human dignity. This idea was prominent in the first of two cases decided in late 2007 in which the European Court was called on to assess whether national criminal defamation laws properly balanced the desire to respect freedom of expression against the need to protect the reputation of the impugned parties. In a concurring judgment in *Lindon, Otchakovsky-Laurens and July* v *France*, Judge Loucaides

64 J Velu, "The European Convention", n. 51 above, p. 42.

65 Fenwick and Phillipson, *Media Freedom*, n. 55 above, p. 1100. This was explicitly a preliminary assessment (p. 1069). At another point the authors' discomfort with the development in the jurisprudence saw them concede that Article 8 must now be considered relevant in the context even of imputations regarding a person's discharge of official duties, but that in such circumstances the factor should be afforded "a relatively low weight" (p. 1100).

66 See, for example, *Niemietz* v *Germany* (1993) 16 EHRR 97, at [29].

67 With regard to Article 8 and reputation, this line of thought was expressly rejected in *Pfeifer* v *Austria* (2009) 48 EHRR 8, at [35]. See also the dissenting judgment of Judge Zagrebelsky in *Armonienė* v *Lithuania* (2009) 48 EHRR 53, at [O-I4].

68 A Goldman and A Jacobs, "Why everyone is going compartmental", *The Guardian*, 14 January 1999.

contended that the approach based solely on assessing the necessity and proportionality of restrictions under Article 10 involved the underestimation of the centrality of reputation, which he deemed to be of "sacred value for every person".[69] Novelly, he associated this "right to reputation" with the separate concept of individual human dignity.[70] He then proceeded to explain that reputation "requires more extensive and direct protection" such as would be provided were it properly "safeguarded as a human right under the Convention".[71] The judge was clearly aware that his reading would "[lead] inevitably to a more effective protection of the reputation of individuals vis-à-vis freedom of expression",[72] and that it would become "more difficult to defend a defamatory statement for purposes of Convention protection".[73] Nevertheless, he did not expand on his justification for such a fundamental shift beyond the level of bombastic rhetoric. This concept was picked up in a recent lecture given by Heather Rogers QC when highlighting the jurisprudence of the South African courts on that country's constitutional principle of human dignity.[74] Ultimately, however, she concluded only that this and other influences will see courts become "likely to look more and more at what is 'proportionate'".

The problem with citing human dignity as a basis for protecting reputation within Article 8, is that it does not amount to a specific justification, and cannot be used to differentiate the particular circumstances in which protection should be afforded from those in which it should not. The principle is at once everything and nothing:

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69 (2008) 46 EHRR 35, at [O-I10]. The case concerned an author's recreation of actual events in a fictional form in a book entitled *The Trial of Jean-Marie Le Pen*. The text recounts the racist murder of a young North African man and subsequent trial of his attacker. It suggests that as leader of the Front National the eponymous Le Pen was morally culpable for the devastating actions of his supporters. Following the finding that the fictional work was intended to identify the real-life Le Pen, the author and publisher were convicted for criminal defamation. A follow-up story in the *Libération* newspaper also resulted in a criminal prosecution. The majority of judges in the Strasbourg court adopted the standard approach and conducted an assessment of whether the right to freedom of expression was outweighed by the need to vindicate the right to reputation as one of the legitimate purposes stipulated in para. 2 of Article 10. Having conducted this exercise, they concluded that justice fell in favour of the restrictions imposed by the French law of defamation. Notably, four judges offered a strongly dissenting judgment in which they emphasised the centrality of freedom of expression in a democracy, the fact that the subject of the defamation was a political figure (and, *a fortiori*, one who himself engaged in virulent forms of discourse), and the importance of recognising the artistic form in which the material was presented. They found that there had been breaches of the expression right in respect of each of the three applicants, and that to conclude otherwise the European Court had foregone its normal supervisory rigour and merely adopted the impugned views of the French courts. In particular, they highlighted that, out of the 138-page novel, only three lines were ultimately considered to be defamatory by the Strasbourg court, and that this was deemed sufficient to justify the official response.

70 Ibid. at [O-I6]. An implicit association between reputation and human dignity was made previously in the concurring opinion delivered by Judge Thomassen in *Chauvy* v *France* (2005) 41 EHRR 29, at [O-I4].

71 Ibid. at [O-I6]–[O-I10]. A reasonable reservation can be raised over Judge Loucaides' rationale in this case, as in part it seemed motivated by a pragmatic assessment that this would be the most convenient means judicially to constrain an overbearing media industry. He warned that "one should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or occasionally, even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity of individuals . . . Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself." (at [O-I13]) Such thinking has been criticised by Eric Barendt among others – see "What is the point of libel law?" (1999) 52 *Current Legal Problems* 111–25, pp. 112–13.

72 (2008) 46 EHRR 35 at [O-I7].

73 Ibid. at [O-I8]. Judge Loucaides reiterated his views in extra-judicial writings – see, for example, *The European Convention on Human Rights: Collected essays* (Leiden: Martinus Nijhoff 2008), pp. 143–66.

74 The text of the speech is reproduced as H Rogers, "Is there a right to reputation?", *Inforrm*, 26 and 29 October 2010. See also, Milo, *Defamation*, n. 2 above, pp. 22–3.

> the use of "dignity", beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion . . . dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances.[75]

Human dignity is agreeable to everyone but adequately definable by no one. Hence, in the legal context, it becomes a malleable juridical concept ripe for exploitation. Where the idea of human dignity may potentially have more purchase, however, is in its association with the more empirical concept of psychological integrity.

Psychological integrity

The third possibility mooted by the courts as to when Article 8 should encompass a right to reputation invokes the concept of psychological integrity. The relevance of this theme for the defamation context was developed for the first time in *Pfeifer* v *Austria*,[76] the second case decided in late 2007 in which the European Court was called on to assess national criminal defamation laws.[77] Perhaps most importantly, that case erased any lingering doubt as to whether reputation is encompassed by Article 8. For the first time, the court

75 C McCrudden, "Human dignity and judicial interpretation of human rights" (2008) 19 *European Journal of International Law* 655–724, abstract. Professor Feldman concurs: "few people would argue that dignity, in the abstract, is unimportant. On the other hand, the meaning of the word is by no means straightforward, and its relationship with fundamental rights is unclear. The notion that dignity can itself be a fundamental right is superficially appealing but ultimately unconvincing." (D Feldman, "Human dignity as a legal value: Pt 1" (1999) *Public Law* 682–702, p. 682); "dignity [is] a highly complex concept. The content of its central core is not clear, making it an uncertain guide . . . human dignity may refer to characteristics or norms; it may relate to individuals, social groups, or the entire species; and it may be based on subjective or objective assessments of what amounts to a dignified way of life . . . the power of dignity as a value to inform human-rights decision-making cannot hide the weaknesses of dignity as a basis for rights. It can never be more than one of a number of values, principles and policies which pull decision-makers in different directions . . . protecting dignity indirectly through interpreting and enforcing other rights in the light of dignity is potentially valuable but far from unproblematic. The value offers judges an instrument with which they could subvert the proper relationship between themselves and the legislature in a democracy, or undermine respect for individual autonomy. Important as dignity may be, the law can sensibly only protect people indirectly against violations of their dignity, and even that requires careful thought" ("Human dignity as a legal value: Pt 2" (1999) *Public Law* 61–76, p. 76).

76 In the earlier private information case of *Von Hannover* v *Germany* (2005) 40 EHRR 1, the court had explained that "the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings" (at [50]). See also, *X and Y* v *the Netherlands* (1986) 8 EHRR 235, at [22]; *Raninen* v *Finland* (1998) 26 EHRR 563, at [63]; *Niemietz* v *Germany* (1993) 16 EHRR 97, at [29]; and *Botta* v *Italy* (1998) 26 EHRR 241, at [32]. This was one step in the interpretation of the Article 8 right that has seen it become almost a "general charter of individual autonomy" that may in principle impugn any restraint on individual choice – see M W Janis, R S Kay and A W Bradley, *European Human Rights Law: Texts and materials* 3rd edn (Oxford: OUP 2008), p. 374. See also G Marshall, "A right to personal autonomy at the European Court of Human Rights" (2008) *European Human Rights Law Review* 337–56.

77 (2009) 48 EHRR 8. Pfeifer – the editor of a Jewish community magazine – had published a critique of an earlier article written by a professor in which he had supposedly trivialised the crimes of the Nazi regime in pre-war Germany. Criminal proceedings were subsequently brought against the professor for holocaust denial, but he committed suicide before their culmination. Later articles in the *Zur Zeit* magazine charged Pfeifer with hounding the professor to his death. He sued for defamation in the Austrian courts, but lost his case.

determined that an applicant's right to reputation outweighed the countervailing interest in freedom of speech.[78] In doing so, it asserted that a person's reputation forms part of their personal identity and psychological integrity and – building on the *Von Hannover* case – that it therefore falls within the scope of his or her "private life".[79] This was said to be the case even where "that person is criticised in the context of a public debate".[80] The court did not develop a deeper explanation as to why one's reputation should be understood as contributing to one's psychological integrity, nor did it reflect on the question of whether this would always be the case. This explanation of the coverage of reputation by Article 8 was subsequently confirmed by the European Court of Human Rights in *Karako* v *Hungary*.[81] The court reiterated that "the Convention . . . extends the protection of private life to the protection of personal integrity", and that "this approach itself results from a broad interpretation of Article 8 to encompass notions of personal integrity and the free development of the personality".[82]

A further feature of the decision in *Karako* is also noteworthy: the court strongly emphasised the variability of Article 8 coverage of reputation. It noted "a clear distinction, ubiquitous in the private and constitutional law of several Member States, between personal integrity and reputation",[83] and that "personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual".[84] Having distinguished harm to an individual's psychological integrity from harm to other people's perceptions, the court explained that only when a libel was sufficiently serious would it be liable to impinge upon personal integrity and hence invoke Article 8.[85] While the reasoning of the court is consistent with that in *Von Hannover*, this was not an approach that had been adopted explicitly in previous cases. It has been confirmed, however, on a number of occasions since.[86] That Article 8 does not protect reputation in all circumstances has been acknowledged in domestic jurisprudence.[87] This approach has the merit of clearly differentiating two aspects of reputation. Reputation as it affects personal dignity or psychological integrity, and reputation as property or quasi-property. The dimension of reputation that is appropriately conceived as a property interest is not unimportant,[88] but

78 Similar determinations have since been reached in two further cases: *Petrenco* v *Moldova* [2011] EMLR 5 and *Petrina* v *Romania* 78060/01 [2009] ECHR 2252 (6 April 2009).

79 Ibid. at [33]–[5]. It followed therefore that the main issue became whether the state, in the context of its positive obligations under Article 8, had achieved a fair balance between the applicant's right to protection of his reputation (an element of his "private life") and the other party's right to freedom of expression guaranteed by Article 10 of the Convention (at [38]). While dissenting from the substance of the court's judgment, Judge Loucaides expressed his "great satisfaction at the clarity and firmness with which, for the first time, a judgment of this Court has made it clear that a person's right to protection of his or her reputation is protected by Article 8 as being part of the right to respect for private life" (at [O-I11]).

80 Ibid. at [35].

81 (2011) 52 EHRR 36.

82 Ibid. at [21].

83 Ibid. at [22].

84 Ibid. at [23].

85 Ibid.

86 See, for example, *A* v *Norway* 28070/06 [2009] ECHR 580 (9 April 2009); *Polanco Torres and Movilla Polanco* v *Spain* 34147/06 unreported (21 September 2009). It was contested in *Karako* itself, however, in a partly concurring judgment delivered by Judge Jociene who considered that the prior caselaw had been consistent in finding reputation always to fall within Article 8.

87 See, for example, *Flood* v *Times Newspapers* [2009] EWHC 2375, at [141].

88 See, G S Bower, *A Code of the Law of Actionable Defamation* 2nd edn (London: Butterworths 1923), p. 240; T Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours* 1st edn (London: J & W T Clarke 1813), p. 12. See also, Doley and Mullis, *Carter-Ruck*, n. 18 above, at 2.12–15.

there must be real concerns over affording it protection under Article 8 when it is inherently an extrinsic, perhaps a financial, form of harm.

Importantly, this approach is coherent with the social psychology canon.[89] In that discipline, for over one hundred years, it has been absolutely standard, generally accepted knowledge that 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".[90] In 1934, George Herbert Mead described a similar process, and observed that "we are more or less unconsciously seeing ourselves as others see us".[91] Given that social psychology tells us that the perceived level of esteem that we think others hold for us substantially affects our judgments of self-worth, it is not difficult to appreciate why libellous publications might impact upon an individual's sense of self-esteem. It is clear that defamatory statements can impact upon an individual's capacity to engage in society. As Strasbourg jurisprudence has drawn on the concepts of human dignity and autonomy to expand the coverage of Article 8 to encompass not only a person's physical but also their psychological integrity, it is perfectly reasonable to contemplate a Convention right to the protection of reputation. It is not reasonable to suggest that this will happen on every occasion that a libel is published.

Impact on personal relationships

Interestingly, when delivering the unanimous decision of the Supreme Court in *Guardian News and Media Ltd*,[92] Lord Rodger suggested that the protection of reputation still falls within Article 8 even where the libel in question is deemed insufficiently serious to bear on the claimant's psychological integrity. This may be to set off on a hunt for the "snark". Certainly, the view expressed by the Supreme Court in *Guardian News and Media Ltd* would appear to require a fourth explanation as to why Article 8 should be read as extending coverage to reputation. This concerns the impact of reputational harm on the capacity of an individual to engage in relationships with other members of the community. Lord Rodger explained that "the Court is really being invited to consider the impact of publication . . . on [the applicant's] reputation as a member of the community in which he lives and the effect that this would have on his relationship with other members of that community".[93] His Lordship must have been envisaging something other than the impact of a libel on a claimant's psychological integrity as this was explicitly ruled out on the facts in *Karako*. The additional basis can only have been the influence of the libel on the

89 This is not an entirely novel idea in the legal literature. L McNamara has drawn on anthropological literature to make a similar point: see *Reputation and Defamation* (Oxford: OUP 2007), pp. 44–6. Moreover, Barendt has mused that "sociologists and psychologists would, I imagine, agree that the esteem in which we are held by others is an integral aspect of our own dignity and self-esteem . . . to allege that someone is, say, seriously incompetent or dishonest may well damage the esteem in which he or she is held by others and consequently would his or her self-esteem. Such allegations may additionally cause significant economic damage . . . it is this argument which persuades me that there is a point to libel law", "What is the point?", n. 71 above, p. 116). In Barendt's view, however, "a right to human dignity, or to an aspect of it such as self-esteem, is far too vague and amorphous to provide a basis for a legal cause of action", p. 117).

90 C Cooley, *Human Nature and the Social Order* (New York: Scribner 1902).

91 G H Mead, *Mind, Self and Society from the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press 1934), p. 68. 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, the research indicates that there is a stronger relationship between reflected appraisals and self-appraisal, than between actual appraisals and self-appraisals.

92 [2010] UKSC 1, at [37]–[42].

93 Ibid. at [42].

behaviour of other people towards the claimant. That is, the fact that a libel may cause other people to shun, avoid or think less of the individual to whom the imputation related.

It is open to question whether this explanation as to why Article 8 should extend to cover reputation is sustainable or appropriate. Most importantly, it is based upon a misreading of precedent. Despite Lord Rodger's view to the contrary, the reading of *Karako* presented in *Guardian News and Media Ltd* is plainly at odds with the European judgment. This is important, not least because the Strasbourg court has accorded the *Karako* decision Level 1 status, entailing that in the court's judgment it has made "a significant contribution to the development, clarification or modification of its case-law". His Lordship suggested that *Karako* involved a factual circumstance in which the case for applying Article 8 based on psychological integrity had not been made out. Yet, he considered that the Strasbourg court had proceeded to balance Articles 8 and 10, on the assumption that Article 8 was engaged on the other basis that he then set out. He explained that a number of paragraphs of the Strasbourg judgment would otherwise not make sense.[94]

The problem with this analysis is twofold. First, it appears to run contrary to the clear dicta of the court to the effect that Article 8 is not concerned with the external evaluation of the subject of a defamatory statement. Second, in the paragraphs highlighted by Lord Rodger, the Strasbourg court in fact undertook a fleeting analysis under Article 10(2); it did not offer any balancing of Articles 8 and 10. While the slight ambiguity of the language used there does conceivably leave open the interpretation favoured by Lord Rodger, two further factors definitively rule it out. On the one hand, the caselaw cited by the Strasbourg court – *Feldek* v *Slovakia* and *Scharsach* v *Austria* – were referred to precisely because they set out the analytical method to be adopted when considering Article 10(2), not when balancing Articles 8 and 10.[95] On the other hand, had the court in fact proceeded on the basis that some Article 8 right had been restricted by the publication then, as Lord Rodger noted, it would have been in the territory of balancing the Article 8 and 10 rights. Notably, the court is traditionally cautious in this scenario, tending in all but the most unusual of circumstances to respect assessments made by the domestic court in recognition of the "margin of appreciation".[96] Lord Rodger appears to have been untroubled by the absence of any reference to this doctrine in the key paragraphs.[97] Had the Strasbourg court in fact been undertaking the balancing exercise that Lord Rodger suggested, it would have been highly irregular for there to have been no such mention. By placing the store that he did in a small number of ambiguous paragraphs of the Strasbourg judgment, Lord Rodger was seriously compounding a minor error made by the European Court.[98]

This is not to contend that the absence of any legal precedent for Lord Rodger's fourth explanation of the coverage of reputation should automatically preclude its relevance. Given the expansionary tendency of the interpretations afforded to Article 8, it may only

94 Specifically, paras 24–9 – see [2010] UKSC 1, at [41].

95 29032/95 [2001] ECHR 463 (12 July 2001), at [72]–[4], and (2005) 40 EHRR 22, at [30] respectively.

96 In *Evans* v *United Kingdom* (2008) 46 EHRR 34, for example, the court noted that "there will . . . usually be a wide margin if the State is required to strike a balance between competing . . . Convention rights" (at [77]).

97 Compare the references to the doctrine in *A* v *Norway* 28070/06 [2009] ECHR 580 (9 April 2009), at [66]; *Petrenco* v *Moldova* [2011] EMLR 5, at [54]–[6]. The court in *Karako* did make brief reference to the margin of appreciation to be afforded in the context of fulfilment of the state's positive obligation to meet the requirements of Article 8 – see (2011) 52 EHRR 36, at [19].

98 The court in *Karako* had been wrong to proceed to consider the balance between the freedom of expression interest and reputation as a putative limitation under Article 10(2). It had no need and no jurisdiction to undertake this task. It was asked by the applicant to assess the legality of a restriction on what he supposed was his Article 8 right and not to review the legitimacy of a restriction on Article 10. Having concluded that no Article 8 right of the applicant had been restricted, the court should have ended its analysis.

be a question of time before such an argument finds favour in Strasbourg. If the concept of "private life" is so elastic as to extend to cover one's right to establish and develop relationships with others,[99] then it may seem natural for the responses of such people to libellous imputations to be taken into account. If so, Strasbourg jurisprudence would dictate that such others would include not only a person's familial or social intimates, but also wider acquaintances.[100] It would be a leap, however, for the concept of privacy to be considered so elastic as to extend beyond the physical, psychological or moral integrity of the individual concerned also to encompass decisions made and actions taken by other people. It is conceptually more sound to align with *Pfeifer*, *Karako* and social science, and to draw the line after including the psychological impact on the mind of the affected person. In addition to doubts over its conceptual legitimacy, it might also be asked what this line of argumentation adds. There will not be many circumstances in which there will be an impact on external evaluations when the individual concerned does not also perceive this shift such that his or her psychological integrity is affected in some measure. It would seem strange for the court to proffer an argument that would in principle draw incidents into the sphere of an individual's private life that were considered unimportant by the person themselves.

5 Ramifications of psychological integrity as the basis for Article 8 coverage

On analysis then, the only coherent position on why Article 8 should be thought to require the protection of reputation is that developed by the majority in *Karako*: that personal integrity rights are inherent to every person independent of the evaluation of others; that Article 8 may be engaged where a person's reputation is besmirched, but that this happens only if a libel is such as to result in some impact on personal integrity. While many defamatory statements will have such an effect, not all will. That is, reputation per se is not protected by Article 8. In other cases, where an imputation does not undermine an individual's personal integrity, the individual and social interests in reputation would be taken into account under Article 10(2) as a possible basis for restricting the first paragraph right to freedom of expression.

Reliance on the justification for Article 8 protection for reputation that derives from the concept of psychological integrity allows more to be said on the question of specifically when the need to balance rights arises. It can also suggest factual circumstances in which a recognised Article 8 interest is likely to be strong or weak. Conversely, contemplation of the impact of a libel on psychological integrity can highlight scenarios in which only the disparate elements of Article 10 need be countenanced. In a number of cases, the domestic and Strasbourg courts have begun to engage in this exercise.

A balancing of rights

A first ramification is that the mere fact that reputation can justifiably be said to be encompassed by Article 8 entails that a balancing of rights will often have to be undertaken. This fact is clear in the Strasbourg jurisprudence.[101] At the domestic level, a mode of

99 See, for example, *Niemietz* v *Germany* (1993) 16 EHRR 97; *Armoniene* v *Lithuania* (2009) 48 EHRR 53, at [35].

100 In *Niemietz* v *Germany* (1993) 16 EHRR 97, the court considered that "it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" (at [29]). It extended the reach of this idea to persons encountered in a professional or business context.

101 See, for example, *White* v *Sweden* (2008) 46 EHRR 3; *Pfeifer* v *Austria* (2009) 48 EHRR 175; *Karako* v *Hungary* (2011) 52 EHRR 36; *A* v *Norway* 28070/06 [2009] ECHR 580 (9 April 2009); *Rukaj* v *Greece* 2179/08 [2010] ECHR 905 (21 January 2010); *Petrenco* v *Moldova* (decision of 30 March 2010); *Saaristo* v *Finland* 184/06 [2010] ECHR 1497 (12 October 2010).

analysis for such cases was set out by the House of Lords in *Re S (a child)*.[102] This comprises a new methodology to be applied to the assessment of defamation claims. Specifically, where both rights are engaged, the court must begin from the position that neither right has precedence. An intense focus on the comparative importance of the specific rights being claimed in the individual case will be necessary. The justification for interfering with or restricting each right must be taken into account, and finally the proportionality test applied to each. This methodology will operate at two levels. First, the relevant aspects of the law will be assessed in the abstract to ensure that they allow scope for a balancing of rights to be undertaken. There will be less room for general rules to determine outcomes in particular cases. "Bright-lines" do not sit well with rights-based jurisprudence. There must be scope for the particular circumstances of each case to influence outcomes. Second, judges will undertake an intense scrutiny of the facts of the case. The sometime need to undertake this exercise in the defamation context has begun to be recognised by the domestic courts.[103]

This balancing methodology is well established in the context of the claim for misuse of private information. It might be expected that the courts will adopt a similar approach in defamation cases. While the courts are already familiar with balancing in misuse of private information cases, however, the process is likely to be rather more convoluted in defamation cases. The misuse of private information claim is, in essence, a straightforward cause of action. Once a privacy interest is found to subsist, it requires the court directly to balance the privacy right of the claimant against the expression right of the defendant on the facts of the particular case (while also taking into account any relevant interests of third parties). Defamation, in contrast, is a relatively technical area of law, wherein claims will generally be rather more complicated. An individual case might raise any of a myriad of different legal questions depending on the underpinning factual circumstances, each of which will require its own rendition under the new methodology. In any given case, it may be necessary to weigh the relevant rights in respect of both the existence of the prima facie claim, and then the application of any defences. A range of such issues may arise in one and the same case.

When conducting the balancing exercise, judges must consider a number of factors. Thus, on one side will be the claimant's Article 8 interest in reputation. This may be nugatory, or if it does exist may be more or less strong depending on a range of variables. The nature of the information, the seriousness of the allegation, the credibility of the publisher, and the mode of and audience for the communication may all play a part in determining the extent to which the defamatory imputation might affect the claimant's perception of the harm caused to his or her reputation. For instance, the claimant would know that a publication in the *Washington Post* was more likely to be taken seriously by readers than the equivalent in the *National Enquirer*; a false allegation of paedophilia against a nursery worker would likely have more profound psychological consequences for the subject than inaccurate suggestions of sexual profligacy on the part of a celebrity. So too, where the allegation relates to the claimant's moral character, is made in a national newspaper and the claimant is not a public figure or official, it is likely that greater weight will be given to the Article 8 right than if the claimant is a public figure and the imputation relates to physical characteristics or quality of work. Expression interests on the other side of the balance can also be more or less strong. Speech on a matter of scientific or political

102 [2004] UKHL 47, at [17] (per Lord Steyn).

103 See, for example, *Re Guardian News and Media Ltd* [2010] UKSC 1; *Clift* v *Slough Borough Council* [2009] EWHC 2375; *Flood* v *Times Newspapers* [2009] EWHC 2375 (QB); *Brady* v *Norman* [2010] EWHC 1215 (QB); *Ronaldo* v *Telegraph Media Group Ltd* [2010] EWHC 2710 (QB).

controversy will be accorded significant weight, bolstered by the cumulative interest on the part of the wider public in receiving information on important matters of public concern. Where the subject matter of the story concerns the private life of a celebrity, the Article 10 interest is likely to be less strong.

A further point is worthy of general recognition: there is something artificial in this notional "balancing" exercise, at least to the extent that the metaphor implies that there is in every case some single, natural outcome to be found by the application of reason. Freedom of expression and respect for reputation are incommensurable goods. There is no easy equation for the exchange of a proportion of one for a given amount of the other.[104] Ultimately, the judge must determine whether – in all the circumstances of the case – a remedy is appropriate. To accord with the principle of due process, the judge must ensure that all relevant factors are identified and accorded appropriate weight so as properly to inform the decision. Nevertheless, this decision relies on judgment. As Eady J has been assiduous in highlighting in the context of privacy claims, when undertaking this task the judge must be alert to the risks of colouring legal judgments with personal attitudes.[105] Such danger is inherent in the new methodology of balancing Convention rights and the intense focus on the particular facts upon which the exercise rests. Perhaps unfortunately, this methodology will always allow scope for criticism by those dissatisfied with outcomes.[106] The safeguards against judicial bias include recusal, but routinely rely on the delivery of fully reasoned judgments and the availability of judicial appeal. Whether such safeguards are sufficient is a moot point.

Claimants with no Article 8 interest in reputation

The psychological integrity explanation entails that there will be certain types of claimant for whom Article 8 can never be used to defend reputation. Some claimants possess no

104 See, generally, J Alder, "The sublime and the beautiful: incommensurability and human rights" (2006) *Public Law* 697; G Beck, "Human rights adjudication under the ECHR between value pluralism and essential contestability" (2008) *European Human Rights Law Review* 214; S Tsakyrakis, "Proportionality: an assault on human rights?" (2009) 7 *International Journal of Constitutional Law* 468. The concept of incommensurability is most associated with the scholarship of Isaiah Berlin.

105 In *CC* v *AB* [2006] EWHC 3083 (QB), Eady J noted that "there is a risk that with greater emphasis on applying an 'intense focus' to the particular facts, with the room this leaves for the making of individual judgments, differing outcomes on what may seem to be broadly comparable facts may be interpreted by onlookers as being explicable on the basis of arbitrary personal differences between the judges. That is plainly undesirable because it would undermine faith in the rule of law, but the danger has to be recognised as inherent in the 'new methodology' of balancing Convention rights", and hence that "it is all the more important, therefore, that the outcome of a particular case should not be determined by the judge's personal views or, as it used to be said, by 'the length of Chancellor's foot'" (at [27]).

106 Famously, just such criticism was offered of the performance of Eady J in excoriating fashion in November 2008 by Paul Dacre, the editor-in-chief of Associated Newspapers, at the conference of the Society of Editors – see Society of Editors, "Paul Dacre launches conference with explosive speech", press release, 9 November 2008 (includes full text). Mr Dacre commented that "there is one remaining threat to press freedom that I suspect may prove far more dangerous to our industry . . . concentrate . . . on how inexorably, and insidiously, the British Press is having a privacy law imposed on it, which . . . [is] allowing the corrupt and the crooked to sleep easily in their beds . . . this law is not coming from Parliament – no, that would smack of democracy – but from the arrogant and amoral judgments – words I use very deliberately – of one man . . . freedom of the press, I would argue, is far too important to be left to the somewhat desiccated values of a single judge who clearly has an animus against the popular press and the right of people to freedom of expression." This criticism was widely considered to be inaccurate, unfair, and palpably self-serving, and was roundly dismissed by a group of leading lawyers in a letter to *The Times* published on 11 November 2008. Nevertheless, it can also be seen as a predictable response to a changing legal environment, the parameters of which were not obviously sketched out in advance. See also, speech delivered by Mr Justice Eady at City University, London, 11 March 2010, transcript available at www.judiciary.gov.uk (accessed May 2011).

psychological integrity. An obvious illustration is the trading corporation, but the same could be said of all non-human legal individuals. In domestic proceedings, such claimants are able to rely on Article 10(2) arguments only. Moreover, they would be unable to challenge the features of a domestic libel regime before the Strasbourg court. This point is uncontroversial: it is already a commonplace that corporations do not possess Article 8 rights of this type.

It is sometimes suggested that, like companies, any individual engaged in and criticised in respect of business, professional or public functions should be unable to claim any protection under Article 8 for reputational interests. To the extent that individuals can be conceived as merely economic actors such that reputational harm with be akin to property loss only, this is sensible. The "psychological integrity" explanation for drawing such reputational concerns within the rights-umbrella, however, militates against any generic limitation of the scope of protection. To the extent that a person builds their sense of self-worth in part on an appreciation of their competence, success or importance in an employment, professional or business context, the perception that one has lost the esteem of others in that context can be devastating.[107] The existing jurisprudence on Article 8 has adopted a similar line, indicating that harm to economic or professional reputations may indeed fall within the ambit of the Convention right. In *Niemietz* v *Germany*, for example, the Strasbourg Court asserted that:

> there appears . . . to be no reason of principle why [the] understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world . . . it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not.[108]

Moreover, almost all of the cases in the line of Article 8 reputation cases discussed above concern defamation of precisely this nature.

Notwithstanding the generality of this point, it must be recognised that a prima facie argument based on Article 8 may be weakened by the particular factual scenario involved. As explained in *Re S (a child)*,[109] cases involving the balancing of Articles 8 and 10 cannot be determined in the abstract; they must proceed on the basis of an intense scrutiny on the facts of the case. For example, it would be reasonable to assert that individuals acting in certain positions would expect to suffer "slings and arrows" as an occupational commonplace; that people operating in some contexts will often be inured by role and experience to the possibility of psychological harm deriving from even deliberately false

107 A parallel can be appreciated in the alienation and depression suffered by some individuals who experience unexpected and/or prolonged disengagement from the workplace, for example, on account of redundancy or unexpected incapacity.

108 *Niemietz* v *Germany* (1993) 16 EHRR 97, at [29]. The court proceeded to suggest, questionably, that this was particularly true of a person engaged in a liberal profession for whom "work . . . may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".

109 [2004] UKHL 47, at [17] (per Lord Steyn).

criticism. This may apply, for example, to politicians generally, although it would be wrong to preclude exceptions.[110] It would certainly apply to deliberate controversialists such as Jean-Marie Le Pen.[111] Such people positively invite antagonistic critique. Arguments ranged against them may well benefit from stronger protection under Article 10 (given the social value of responding to controversial political viewpoints), but, in addition, the expected weight of the reputation-based privacy interest on the other side of the balance may at the same time be weakened. Again, though, this cannot amount to a general rule that those performing public functions should be precluded from asserting arguments based on Article 8. Context must remain important.

Trivial libels

For defamatory statements to invoke Article 8 they must be such as to impact on the psychological integrity of the subject of the imputation. Not all defamation disputes will involve imputations that are sufficiently poignant to impinge upon a claimant's psychological integrity, and hence not all will invoke his or her Convention right to privacy. This fact has been acknowledged by both domestic and Strasbourg judges. For instance, as noted above, in *Karako* v *Hungary* the court concluded that while Article 8 had previously been deemed to cover defamation, this had been only "sporadically" and "mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life".[112] On the facts of that case, however, the applicant had been unable to demonstrate this effect.[113] A similar view was expressed by the court in its later decision in *A* v *Norway*: "in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life".[114]

Quite where this boundary will be drawn remains moot. Importantly, there may be some divergence between the respective rules developed to date at the supranational and the domestic courts. The British courts have long accepted that any impingement on privacy

110 So much was suggested in *Karako*, at least as regards comment on public performance. Similarly, in *Lingens* v *Austria* (1986) 8 EHRR 407, speaking in the context of Article 10(2), the court noted that "a politician . . . 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" (at [42]). It would be difficult to contend that such criticism might be personally debilitating for the politician in any but the most extreme scenarios. There is no double-counting in the strengthening through context of the Article 10 argument simultaneously with the weakening of any purported Article 8 argument. The former is based on the expectations of the public; the latter on those of the subject of the defamation.

111 In the dissenting judgment in *Lindon* (2008) 46 EHRR 35, four judges noted that "the status of the injured party is also a factor which comes into play in the determination of the admissible limits to the rights and freedoms protected . . . public figures and politicians, on account of the responsibilities they bear, are exposed to criticism as a matter of course and are therefore required to show greater tolerance towards polemical discourse or even insults directed against them . . . as regards Mr Jean-Marie Le Pen, it may reasonably be argued that he should accept an even higher degree of tolerance precisely because he is a politician who is known for the virulence of his discourse and for his extremist views" (at [O-II15]–[16]. As Millar has commented, "Jean-Marie Le Pen could perfectly well have answered the attacks by the characters of Lindon, a solitary novelist, in political debate. It was not necessary in a democracy for a court to render Lindon a criminal at Le Pen's behest." – "Whither the spirit?", n. 8 above, p. 288. In other decisions, similar points have been made by the court in respect of Austrian politician Jorg Haider – see, *Oberschlick* v *Austria (No 2)* (1998) 25 EHRR 357, at [29]; *Wirtschafts-Trend Zeitschriften-Verlags GmbH* v *Austria* [2006] EMLR 8, at [37].

112 (2011) 52 EHRR 36, at [23].

113 Ibid. The applicant, who had been a Member of Parliament standing for re-election, had been unsuccessful in bringing a complaint for criminal defamation against an adversary who had published a flyer during the election campaign criticising the applicant on the basis that he regularly voted against the interests of his district.

114 Application No 28070/06, unreported judgment of 9 April 2009, at [64].

must achieve a certain level of seriousness before it will warrant the protection of Article 8: "this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable".[115] Whereas the Strasbourg jurisprudence based on *Karako* would appear to insist on a libel being very grave before an argument based on Article 8 can be sustained, however, there are perhaps indications that domestic decision-making may exclude only those cases in which harm to psychological integrity is minimal or trivial.[116] This may be a preferable approach. In cases at the margin, it would avoid simply negating the existence of an Article 8 right, but would not prevent that factor from being accorded a suitably "light weight" in the balancing exercise such that any substantial Article 10 interest might see it outweighed.

6 Balancing expression and reputation: the impact on English law

While the prevailing influence in English libel law has long been freedom of expression, with the reputation of others posing only a potential limitation on that right, the expansion of Article 8 to cover reputation leaves such an approach no longer always tenable. The state is under a positive obligation to protect both freedom of expression and reputation. This requires the courts to engage in a careful balancing of the two rights with neither having a presumptive precedence over the other. The days when Article 10 could be considered a trump card are over.[117] The new requirement has begun to have an effect both on the way in which English judges approach their task in defamation cases and in the shape of the substantive law. While this has not led to a wholesale rowing back from the decisions reached in the 1990s and early 2000s, it is clear that a second rebalancing is underway. While Lord Nicholls spoke in *Reynolds* of the appropriate starting point being freedom of expression and the need for the common law to be developed and applied in a manner consistent with Article 10,[118] courts now articulate the need to find a balance between privacy and expression rights.

This "new approach" first found expression in *Greene* v *Associated Newspapers* in which the court was content to assume that the adequate protection of reputation falls within the positive obligations imposed on the state by Article 8.[119] It was not until the last two or three years, however, that it has come to be firmly reflected in the way in which courts now deal with defamation cases. The High Court,[120] the Court of Appeal[121] and the Supreme Court[122] have each affirmed that the correct approach is the application of the "ultimate balancing test" stated in *Re S*. This judicial recognition of reputation as a protected right under Article 8, and the correlative requirement not automatically to accord precedence to expression rights has now begun to impact on the shape of the substantive law. This

115 See, for example, *R (on the application of Wood)* v *Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, at [22].

116 See further text accompanying n. 147 below.

117 Often, the dictum of Lord Justice Hoffmann in *R* v *Central Independent Television plc* [1994] Fam 192, at 203, is cited in reflecting this erstwhile position. In fairness, however, the full dictum should be offered: "it cannot be too strongly emphasised that outside the established exceptions [in Article 10(2)], or any new ones which Parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins."

118 *Reynolds* v *Times Newspapers* [2001] 2 AC 127, at 200.

119 [2004] EWCA Civ 1462.

120 *Flood* v *Times Newspapers* [2009] EWHC 2375, at [141]–[2]; and *Thornton* v *Telegraph Media Group* [2010] EWHC 1414, at [25] (per Tugendhat J); *Brady* v *Norman* [2010] EWHC 1215, at [1] (per Eady J); *Ronaldo* v *Telegraph Media Group Ltd* [2010] EWHC 2710, at [31] (per Sharp J).

121 *Flood* v *Times Newspapers* [2010] EWCA Civ 804, at [21].

122 *Re Guardian News and Media Ltd* [2010] UKSC 1.

"re-centring" can already be seen in at least some areas, and can be expected to have broader ramifications as appropriate cases bring relevant questions to the courts. The existing defences in libel law have and will likely continue to come under scrutiny, but the new approach will also likely bear on a number of other areas.[123]

Revisiting defences: rebalancing *Reynolds*?

One area in which it has been mooted that Article 8 protection for reputation may have an impact is in respect of the *Reynolds* privilege for responsible journalism.[124] *Reynolds* serves to protect publishers from liability where the subject matter of a publication is of public interest and those involved in the publication have acted responsibly in seeking to determine its accuracy. Thus, even where statements made are factually incorrect and seriously defamatory, liability can be avoided. Such protections were one object of the ire of Judge Loucaides in *Lindon*:

> the case law . . . has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. Freedom of speech has been upheld as a value of primary importance which in many cases could deprive deserving plaintiffs of an appropriate remedy for the protection of their dignity.[125]

Coad, a noted London libel lawyer, concurs:

> [a] fundamental difficulty with the *Reynolds* defence is that . . . [it] entirely robs the victims of "untrue and defamatory statements" . . . of their well-established right to a reputation under UK law . . . [and] under Article 8 . . . while the sole "pressing social need" argument in favour of *Reynolds* is the "need" to preserve the media's profit margins.[126]

Such criticisms tend to undervalue the importance of publication of statements on matters of public interest which, at the time that they are made, are understood to be accurate contributions to public discourse. Nevertheless, the emergent jurisprudence on the right to reputation requires some reflection.

One minor change to the English law has already been introduced in response to the new privacy-based jurisprudence. In *Reynolds*, Lord Nicholls had explained that the appropriate starting point for the law was freedom of expression, and that the House of Lords was responding to a need for the common law to be developed and applied in a manner consistent with Article 10.[127] In particular, this entailed that, when considering whether a publication had been in the public interest or whether the non-exhaustive list of factors relevant to the question of whether the publisher had acted responsibly, "any

123 In what follows the focus is on aspects of the substantive law. The new jurisprudence may equally prompt revisionary consideration of procedural aspects of the law – consider, for example, the rules on interim injunctions as considered by the Court of Appeal in *Greene* v *Associated Newspapers* [2004] EWCA Civ 1462.

124 *Reynolds* v *Times Newspapers* [2001] 2 AC 127; *Jameel* v *Wall Street Journal Europe* [2006] UKHL 44.

125 (2008) 46 EHRR 35, at [O-I4]. Judge Loucaides further elaborated his critique by reference to harms caused by misinforming the public on matters of importance: "the opposite argument is equally strong: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information."

126 J Coad, "Reynolds and public interest: what about truth and human rights?" (2007) 18 *Entertainment Law Review* 75–85. See also, J Coad, "*Reynolds*, *Flood* and the king's new clothes" (2011) 22 *Entertainment Law Review* 1–10.

127 *Reynolds* v *Times Newspapers* [2001] 2 AC 127, at 200. Importantly, Lord Nicholls did not at all underplay the countervailing reputational interests at stake (at 201).

lingering doubts should be resolved in favour of publication".[128] In *Flood* v *Times Newspapers*, Tugendhat J contemplated whether this statement could stand in light of the recognition that reputation has the status of a Convention right and that as such it is of equal importance in principle to freedom of expression.[129] He determined that it could not: "the balance between protection of reputation and freedom of expression requires the same approach in whatever legal context it arises . . . there will be cases where following the course enjoined in [*Reynolds*] will or may make a difference to the fate of a *Reynolds* defence".[130] In other words, in a defamation claim – just as in a privacy claim – the court must carry out a "parallel analysis" and consider matters from the perspectives of both the claimant's Article 8 right to reputation and the defendant's Article 10 right to freedom of expression.

At first glance, it might reasonably be thought that the need to balance the expression and reputation interests in the context of what has proven to be a false – or at least not provably true – statement on a matter of public interest will require some amendment to the current law. By way of example, it may be that an additional hurdle requiring demonstration of a heightened public interest or proof of a higher degree of responsibility should be required in cases where the degree of Article 8 reputational harm has been very significant. On analysis, however, this would seem to be unnecessary. Notably, Tugendhat J expressed the view in *Flood* that "the approach of the House of Lords in *Jameel* [was] fully consistent with [the requirements of] *Re S*".[131] He considered that the need to accommodate the right to reputation was adequately met by existing factors already included explicitly in the analysis by Lord Nicholls.[132] This view was subsequently endorsed by the Court of Appeal.[133] It may be, however, that in future the enhanced juridical status of the harm caused to the claimant in this context will see a court require the responsibility of the publisher to extend post-publication so as to entitle the claimant to a declaration of falsity or a right of reply. 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, the claimant is left without vindication of reputation, and inaccuracies that misinform the wider public are not corrected. It might also present the claimant whose Article 8 rights have been restricted with a significant costs bill for his or her trouble.[134]

Revisiting defences: absolute and qualified privilege

A category of defences that may be peculiarly susceptible to revision under the right to reputation jurisprudence is that of privilege.[135] Where absolute privilege exists, no claim lies

128 *Reynolds* v *Times Newspapers* [2001] 2 AC 127, at 205. Lord Nicholls' comment related specifically to the former of this pair of issues; the analysis in *Flood* focused on the latter.

129 [2009] EWHC 2375 (QB).

130 Ibid. at [136]–[46].

131 Ibid. at [142].

132 Ibid. at [146]. In particular, Tugendhat J cited the requirements that the more serious the allegation in terms, inter alia, of the prospective harm that would be caused to the individual by publication the more that would be required to demonstrate responsibility; that the subject of the story should be given an opportunity to comment, and that the gist of his or her side should be given.

133 *Flood* v *Times Newspaper*s [2010] EWCA Civ 804, at [20] (per Lord Neuberger).

134 Elsewhere, the authors of this paper have suggested a design for a libel regime the practical effect of which would be that a *Reynolds* defence would be deployed only should the claimant be seeking special damages and only if the defendant was willing to bear the cost of running the defence – see A Mullis and A Scott, "Reframing libel: taking (all) rights seriously and where it leads" (2012) 63(1) *NILQ* 3, this volume.

135 For a complete discussion of the circumstances in which absolute and qualified privilege may arise see, W V H Rogers and P Milmo (eds), *Gatley on Libel and Slander* 11th edn (London: Sweet & Maxwell 2008), chs 13 and 14; Doley and Mullis (eds), *Carter-Ruck*, n. 18 above, chs 11 and 12.

in respect of any publication made on such an occasion. Under qualified privilege, the court seeks to identify whether a relationship exists between the maker of the statement and its recipient that gives rise to the necessity for communications between them to be protected. This might be either because the publisher acts under a duty to inform the recipient who in turn has a legitimate interest in receiving the information, or because the statement was made in furtherance or protection of some private or shared interest. Where such a relationship exists, then the occasion is privileged provided that the defendant was not malicious and that what was published was relevant and not excessive.

An area in which the new jurisprudence has already had some effect is that of the use of qualified privilege by public authority defendants. In *Clift* v *Slough Borough Council*, the fundamental issue was whether the usual principles of qualified privilege should still apply where the defendant is a public authority.[136] If they did, then the public authority need show only that an established relationship requiring the flow of free and frank communications existed between publisher and publishee to satisfy the "duty-interest" test. The alternative view was that as a public authority, the defendant must go further and demonstrate that it has complied with its public law duties under the Human Rights Act 1998 (and, incidentally, the Data Protection Act 1998). Both Tugendhat J at first instance, and the Court of Appeal held that the latter view was correct.[137] Under s. 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way that is incompatible with a Convention right. It followed that where a public authority publishes information about an individual that interferes with his or her right to reputation under Article 8(1), this could only be lawful if justified under Article 8(2). The publication must be necessary and proportionate in a democratic society in pursuit of a legitimate aim such as the protection of the rights of others. Given that a public authority does not possess human rights, there was no question in that case of balancing countervailing rights in line with the approach set out in *Re S*.[138]

Hence, the new jurisprudence on the right to reputation has dictated that a different approach must be taken to the existence of qualified privilege where the defendant is a public authority than has been the case as regards traditional qualified privilege. This may be only the first in a series of developments in this area of the law. Importantly, because

136 [2009] EWHC 1550. The claimant in *Clift* witnessed some anti-social behaviour in a park in Slough, and on the advice of the police rang the council's anti-social behaviour co-ordinator. This conversation went very badly, words were exchanged and Ms Clift terminated the call. She subsequently wrote a very strongly worded letter of complaint concerning the council officer's conduct. This complaint was rejected, and Ms Clift was informed that her own conduct on the phone and in subsequent letters amounted to "violent and threatening behaviour" as a consequence of which a "marker" was to be placed against her name for 18 months and shared with other council departments and government agencies within the borough by email and by placing her name on a "Potentially Violent Persons Register". Emails were sent to a wide range of council workers, including several who would be very unlikely to have any dealings with the claimant. Ms Clift commenced a claim for libel alleging that the communications meant that she was a violent person who had engaged in threatening behaviour on a number of occasions. The defendants sought to rely, inter alia, on qualified privilege but Tugendhat J held that the defence failed and his decision was affirmed by the Court of Appeal ([2010] EWCA Civ 1484).

137 Ibid.

138 *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley Warwickshire* v *Wallbank* [2003] UKHL 37, at [8]; R *(Mayor of the City of Westminster)* v *Mayor of London* [2002] EWHC 2440, at [93]–[6]. On the facts, while the council had acted with a legitimate aim of protecting the safety of its staff, the circulation of the publications was greater than was necessary to accomplish that objective. The risk was a very limited one and certainly did not exist to those who worked in departments which the claimant was not likely to approach ([2009] EWHC 1550, at [84]). Moreover, there was simply no evidence of risk in to the staff of partner organisations (at [86]). Had there been a real danger to the physical or psychological integrity of council employees, their Article 8 rights may have been engaged and a parallel analysis required.

Article 8 imposes positive obligations on the state to secure Article 8 rights to every person, it may be expected that the general development of the law on privilege must in future also be reviewed for coherence with the right to reputation.

Whether in the new era all the established categories of privilege can survive must be open to question. Generally, in the areas covered by privilege, there will be an expression right countervailing to the right to reputation. The essential problem is that the blanket nature of the privileges does not allow for any proper balancing exercise between rights. This general need for privilege to reflect an appropriate balance was recognised by Tugendhat J in *Clift*:

> the historical cases show that the values set down in the Convention in 1950 as rights under Articles 8 (including the right to reputation) and Article 10 (including the right of freedom of expression in the giving of references and warnings) were not invented in 1950. These and some other Convention rights can be traced back, not only to the American Bill of Rights and the French Declaration in the eighteenth century, but also to the very beginnings of English law. So one thing that [the Human Rights Act] has achieved is to provide a means through which the courts can review the relative priority that the common law gave to those rights (which it already recognised), and adjust those priorities to meet contemporary needs.[139]

Each privilege will require assessment to determine whether the policy reflected in its structure is now Convention compliant. An exercise of this type has been undertaken with regard to the absolute privilege granted to MPs in respect of statements made in Parliament, which found that the current rule is consistent with both Articles 6 and 8 of the Convention.[140] Even this review has been subject to criticism.[141] It is a moot point whether, for example, the according of absolute privilege to a complaint by a victim of crime,[142] or the according of qualified privilege to a person who responds to an attack,[143] would be found similarly to accord adequate weight to the right to reputation. Precisely how the courts will deal with this set of concerns remains to be seen, but it is likely that some categories of privilege will be subjected to challenge on the basis that the public policy that originally justified their existence does not apply today. The availability of privilege in any particular case must become more fact-sensitive, and the courts must find means of weighing the claimant's Article 8 rights in the balance.

Revisiting defences: re-thinking of truth as an absolute defence

It is trite law that, subject to the Rehabilitation of Offenders Act 1974, truth provides a complete defence in a defamation claim. The fact that the claimant might establish that they had suffered real distress or embarrassment as a consequence of the publication, or that

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139 [2009] EWHC 1550, at [112].

140 *A* v *United Kingdom* (2003) 36 EHRR 51. Notably, there was some measure of dissension among the judges of the Strasbourg court in their respective analyses of the justifiability of an absolute immunity.

141 One commentator, for example, has noted that "this might not be the final word on the compatibility of Parliamentary immunity with human rights. It is even arguable that a domestic court could reopen the question . . . the case should spur the Commons to consider reform, either by creating internal procedures that allow individuals some form of redress for serious abuses of privilege, or by creating a mechanism whereby privilege could be suspended in certain situations . . . there is much that could be done to square parliamentary immunity with Arts 6 and 8 without risking the freedom of debate within the Chamber." – see N Barber, "Parliamentary immunity and human rights" (2003) 119 *Law Quarterly Review* 557–60, pp. 559–60.

142 *Buckley* v *Dalziel* [2007] 1 WLR 2933; *Westcott* v *Westcott* [2008] EWCA Civ 818.

143 See, for example, *Adam* v *Ward* [1917] AC 309. For a full explanation of the ambit of the privilege, see Rogers and Milmo, *Gatley*, n. 135 above, at 14.48ff.; Doley and Mullis, *Carter-Ruck*, n. 18 above, at 12.64–71.

publication was not in the public interest is irrelevant. In a lecture in 2010, Eady J raised the question of whether the absolute nature of the justification defence could be sustained in the light of the new Article 8 jurisprudence.[144] Having explained how the "secrecy" permitted in relation to so called "spent convictions" under the 1974 Act could be justified in human rights terms, his lordship posed the question whether the philosophy behind the Act – namely that rehabilitation is a good in itself that in limited circumstances justifies restrictions being placed on freedom of expression – may find itself extended to other inconvenient facts. As he put it:

> compared with the distress and embarrassment it would occasion, the prospective exercise of freedom of speech [in publishing some true but seriously embarrassing fact] would not be sufficiently valuable or important. We might find ourselves losing one of our reasonably clear black and white distinctions (that between truth and falsehood).[145]

While it is clearly possible to construct an argument to this effect, and good reasons exist in some circumstances to allowing private and embarrassing information to be "forgotten",[146] truth should remain a complete defence to a defamation claim. Where the matter published is private or personal information, a claim already exists for misuse of private information. Little is to be gained by allowing a claimant also to sue in defamation. The international obligations of the state do not need to be satisfied in every particular in each cause of action, just satisfied somehow. Defamation law need not be considered in isolation. Where information published is true and not private, the public policy interest in always allowing publication is very strong.

Miscellaneous concerns: threshold of seriousness in defamation cases

In *Thornton* v *Telegraph Media Group Ltd*, Tugendhat J considered the question of what "defamatory" means.[147] His starting point was that "a review of the word defamatory… requires some consideration of … the tendency of each meaning to give effect to Article 8 and Article 10".[148] As a preliminary conclusion, he noted that whatever definition of defamatory is adopted, "it must include a qualification or threshold of seriousness, so as to exclude trivial claims".[149] Notwithstanding the early invocation of both Articles 8 and 10, Tugendhat J culminated his consideration by highlighting regard for the latter right only alongside the principle of proportionality.[150] While such an explanation is entirely tenable, an additional support can be afforded to it by noting that Article 8 is not engaged where the nature of any attack on the claimant's reputation is not sufficiently serious to impact upon his or her psychological integrity. Such an approach would have been consistent with other

144 Speech delivered at City University, London, 11 March 2010, transcript available at www.judiciary.gov.uk (accessed May 2011). The judge also stated that "it may prove to be a sufficient answer as a matter of public policy that, in the case of defamation, damages are more often likely to provide an adequate remedy, whereas in privacy cases they are not. But the question at least needs to be thought about." (p. 12)

145 Ibid. p. 9.

146 See further, V Mayer-Schonberger, *Delete: The virtue of forgetting in the digital age* (Princeton: Princeton UP 2009); P A Bernal, "A right to delete?" (2011) 2(2) *European Journal of Law and Technology*.

147 [2010] EWHC 1414 (QB).

148 Ibid. at [32].

149 Ibid. at [90].

150 In particular, he noted the accordance of his conclusions with the true interpretation of Lord Atkin's speech in *Sim* v *Stretch* [1936] 2 All ER 1237 and the development of the law recognised in *Jameel* v *Dow Jones* [2005] EWCA Civ 75 as arising from the passing of the Human Rights Act and its domestication of the expression right.

comments made in the case in relation to "business defamation" and also with the wider privacy jurisprudence.[151]

Miscellaneous concerns: business defamation

Business defamation has proved one of the most controversial issues in the current furore over libel reform. Lord Lester's Defamation Bill proposed that a body corporate would have to show that the publication "has caused or is likely to cause, substantial financial loss" before being allowed to bring a claim.[152] While the question remains open for consultation under the Draft Defamation Bill,[153] preventing corporates from suing has been a primary goal of some libel reformers. Whatever ultimately happens with the government's Bill, application of the new methodology is likely to prompt reconsideration of several issues relating to business defamation. The reason for this was identified by Tugendhat J in *Thornton* v *Telegraph Media Group Ltd*:

> there is a further reason why cases of business defamation require separate consideration, whether or not there is a separate tort of "business defamation". What is at stake in a defamation reflecting on a person's character is now likely to be recognised as engaging that person's rights under Article 8. On the other hand, if an alleged defamation engages only a person's professional attributes, then what is at stake is less likely to engage their rights under Article 8, but may engage only their commercial or property rights (which are Convention rights, if at all, under art. 1 of the First Protocol).[154]

A number of points can be drawn from this dictum. First, most obviously implicit is the idea that not all attacks on reputation engage Article 8. Where business defamation is concerned, Article 8 is not engaged and the only interest at stake is financial. Secondly, the concept of business defamation is extended from cases involving corporate parties,[155] sometimes to those – as in *Thornton* itself – where the claimant is a private individual concerned about allegations of a lack of competence in business or professional life.

The practical consequences of this for business defamation are difficult to predict but two issues can be noted. First, it does not automatically follow from the recognition that corporate claimants do not have Article 8 rights in this context that the rule allowing them to sue even in the absence of proof of damage should be reconsidered. Standing in the way of such a reconsideration is the relatively recent decision of the House of Lords in *Jameel* v *Wall Street Journal Europe*,[156] and the decision of the European Court of Human Rights in *Steel & Morris* v *UK*.[157] In the former, their Lordships held by a majority that a foreign company with a reputation in this jurisdiction could maintain a claim even in the absence of proof of any financial loss. In the latter case, the Strasbourg court held that allowing a multinational company to sue in defamation did not constitute a breach of Article 10. It

151 R *(on the application of Wood)* v *Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, at [22] (per Laws LJ); R *(on the application of Gillan)* v *Commissioner of Police of the Metropolis* [2006] UKHL 12, at [28] (per Lord Bingham).

152 Defamation Bill 2010, cl. 11.

153 Ministry of Justice, *Draft Defamation Bill: Consultation paper* CP3/11 Cm 8020 (Norwich: TSO 2011), pp. 139–46.

154 [2010] EWHC 1414 (QB), at [39].

155 In *Hays* v *Hartley* [2010] EWHC 1068, for example, Tugendhat J commented with regard to a claim brought by a corporate claimant as follows: "Companies enjoy certain rights under Art 8, and in some cases damage to reputation can be an interference with a person's rights under Art 8. But that is not this case. It follows that the only Convention right engaged in these proceedings is the right of the Defendant to freedom of expression under Art 10."

156 [2006] UKHL 44.

157 [2005] EMLR 314.

might be argued that the courts in these cases gave insufficient weight to the conceptual nature of the interest protected by Article 8 and as a consequence overemphasised the weight of "corporate" reputation. This was certainly the view of the minority judges in *Jameel*. Nevertheless, judicial reversal of the rule seems unlikely.

Second, the *Thornton* decision recognises that some claims though brought by a private individual are analogous to business defamation and as such do not engage Article 8 rights. *Thornton* itself was a decision of this type in that one of the allegations imputed that the claimant engaged in journalistic practices that other journalists considered disreputable. Tugendhat J stated in such a case that the test for what is defamatory is a different one than that which is applied where the libel is a personal one.[158] Such an approach makes sense in light of a conceptualisation of Article 8 as concerned with the protection of personal integrity. A practical consequence is that, in future, claims by private individuals that their business reputation has been impugned may be more difficult to sustain. That said, difficulties are likely to arise in drawing the line between what is, and what is not, a case of business defamation. As discussed above, we live in a world in which – rightly or wrongly – an individual's sense of self is often dependent not only on the perceptions of how highly regarded one is in the private sphere but also in one's work life. In that context, a damning indictment of professional competence will often be just as likely to affect an individual's self-esteem as one that imputes personal immorality. In consequence, while the distinction between business and personal defamation makes sense from an Article 8 perspective, care needs to be taken to avoid simplistically assuming that no attack on employment, professional, public or business competence engages Article 8.

Miscellaneous concerns: the single meaning rule

A final aspect of the extant general law of defamation that may come under scrutiny in light of the protection afforded to reputation by Article 8 is the single meaning rule. This rule requires the court to select one meaning from the range of those that are reasonably possible as that which would be discerned by a hypothetical ordinary, reasonable reader. It is aimed towards simplifying the task of the jury when determining the extent and value in damages of harm caused by a defamatory imputation. In his half-hearted, but seminal, affirmation of the rule, Diplock LJ acknowledged that:

> everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey . . . [and] where . . . words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings.[159]

158 [2010] EMLR 25, at [33] and [36]–[49]. The judge described cases of business defamation as follows (at [33]): "a) Imputations upon a person, firm or other body who provides goods or services that the goods or services are below a required standard in some respect which is likely to cause adverse consequences to the customer, patient or client. In these cases there may be only a limited role for the opinion or attitude of right-thinking members of society, because the required standard will usually be one that is set by the professional body or a regulatory authority; b) imputations upon a person, firm or body which may deter other people from providing any financial support that may be needed, or from accepting employment, or otherwise dealing with them. In these cases there may be more of a role for the opinion or attitude of right-thinking members of society."

159 *Slim* v *Daily Telegraph Ltd* [1968] 2 QB 157, at 171. The rule was subsequently affirmed by the House of Lords in *Charleston* v *News Group Newspapers* [1995] 2 AC 65, and its use was described as "unexceptional" by Lord Nicholls in *Bonnick* v *Morris* (Jamaica) [2002] UKPC 31, at [22].

In the context of this potential multiplicity of meanings, the pathological consequences of the rule have been highlighted by the Court of Appeal when obviating the rule in the context of claims for malicious falsehood:

> 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.[160]

Lord Justice Rimer considered that "if the single meaning rule did not exist, I doubt if any modern court would invent it, either for defamation or any other tort".[161] The single meaning rule is a legal fiction that pretends that the harm to reputation that results from all but the most likely meaning of those possible has simply not occurred. For this reason, it is unavoidably "unjust".[162] In the context of Article 8 protection of reputation, such wilful ignoring of the infringement of rights is not tenable. Especially at a time when cl. 8 of the government's Draft Defamation Bill proposes the effective end of the role of the jury in the determination of meaning,[163] there can be no justification for prolonging this artifice.

Miscellaneous concerns: a single publication rule

One likely revision to the law of defamation to arise out of the current legislative deliberations will be a move towards a "single publication rule". Clause 6 of the Draft Defamation Bill proposes the abolition of the existing multiple publication rule under which every new publication of a defamatory imputation gives rise to a separate claim. It has received widespread support.[164] A single publication rule would prevent an action being brought in relation to a publication of the same material by the same publisher after a one-year limitation period from the date of first publication of that material to the public or a section of the public. It is proposed, however, that the limitation period may be set aside under the discretion allowed to the court under s. 32A of the Limitation Act 1980.

The application of the multiple publication rule to the online context does generate some injustice and social detriment by creating perpetual liability. It is inappropriate, however, to address one admitted problem by pretending that another does not exist. Torts flow from harms caused. At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed. Indeed, secondary publication after the elapse of time may arguably, perhaps counter-intuitively, be more damaging than much initial publication. Often, only those with a particular interest in a subject or individual will be motivated to access the material at the later point in time, so that any impact on reputation may be especially poignant. In terms of damage to reputation, what often matters is *who* is reading material at a given time.

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160 *Ajinomoto Sweeteners Europe SAS* v *ASDA Stores Ltd* [2010] EWCA Civ 609, at [43] (per Rimer LJ). A similar point has been made in other jurisdictions: "to insist upon an innocent interpretation where any reasonable person could, and many reasonable people would, understand a sinister meaning is to refuse reparation for a wrong that has in fact been committed" – see *Entienne P/L* v *Festival City Broadcasters* [2001] SASC 60, at [39]–[42].

161 *Entienne P/L*, see n. 160 above.

162 Ibid. at [31] (per Sedley LJ).

163 Ministry of Justice, *Draft Defamation Bill*, n. 153 above.

164 A majority of the Ministry of Justice Libel Working Group and of respondents to a previous government consultation recommended this course. Abolition was also recommended by the House of Commons Culture, Media and Sport Committee, *Second Report: Press standards, privacy and libel*, HC 362-I (2009–2010), at [229].

On occasion, the proposed new rule will frustrate justice. It does not allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing Article 8 rights to reputation. Such occasions may be infrequent and they may be covered by the discretion of the court to set aside the limitation period for action under s. 32A of the Limitation Act 1980. At present, however, this is done only in exceptional circumstances, and it may not be reasonable to expect that judges will use this power to address the potential problems. Not every author of a defamatory statement – or every archivist of online content – is deserving of exoneration from liability. Yet, every victim of online libel does have a right to have his or her specific case considered and the legitimacy of the restricting of individual Article 8 rights to reputation assessed.

7 Conclusions

The Human Rights Act era has seen a re-centring of the law of defamation. Initially, this involved privileging freedom of expression over reputation as the courts sought to make English law Convention compliant. In more recent years, reputation has been recognised by the Strasbourg and English Courts as being potentially protected by Article 8, and this has required a new balancing methodology to be applied. In every case where both rights are engaged, the court must begin from the position that neither the claimant's Article 8 rights nor the defendant's Article 10 rights have precedence over the other. Instead, where these values are in conflict, an intense focus on the facts is necessary to determine the comparative importance of the specific rights being claimed in the individual case. The justification for interfering with or restricting either right must be taken into account, and the proportionality test must be applied to each.

While the basic framework of analysis has been restated, the shape that the English law will take is not easy to predict. Several reasons explain this. First, uncertainty is inherent in the methodology that English courts are now required to adopt. Every case in which Articles 8 and 10 are engaged would appear to require the courts to weigh their respective importance. In time, the weight the courts will apply to particular factors will become clear, as they have started to do in misuse of private information claims. It is worth remembering, though, that defamation is a much more complex cause of action than misuse of private information. Accordingly, it will take some time for this to happen. The foregoing discussion has sought to identify some of the factors that are likely to be treated as relevant by the courts, and offered some reflections as to the potential impact that the new methodology will have on the extant law. These reflections are necessarily tentative.

Second, while the courts have recognised that reputation may be protected by Article 8, they have yet to offer a consistent explanation of why and when attacks on reputation will fall within that provision. Until such an explanation is given, the courts will face difficulties in shaping the law in the light of the new methodology. As has been explained, the decision of the European Court in *Karako* offers the most satisfactory explanation. Only where the attack on reputation affects an individual's psychological integrity should Article 8 be engaged. Where it does not, reputation is relevant only under article 10(2) as a personal and societal interest that may potentially limit or restrict the right to freedom of expression. To the extent that the Supreme Court suggests a different explanation in *Re Guardian News and Media* as to why and when reputation falls within Article 8, the decision is not consistent with Strasbourg authority and is conceptually unsound.

Finally, it seems likely that a new Defamation Act will become law in 2012. Uncertainty exists as to the final form this Act will take, but there are real concerns whether those charged with producing the law will pay sufficient attention to the fact that reputation, when protected by Article 8, is prima facie of equal weight to Article 10. There is not much

evidence that they have done this so far. Instead, Parliament may pander to free speech interests and produce an Act that shifts the law in favour of freedom of expression. Such an approach would ignore our international obligations and would make it markedly more difficult for claimants to vindicate their Article 8 rights. That said, any new law would have to be interpreted in the light of the new methodology, and this may have the effect of taking the edge off any particularly egregious privileging of expression interests.

All in all, it 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, and the potential new Defamation Act mean that future shape of the law is in the balance. Elsewhere, the current authors have offered a blueprint for the law that does seek properly to triangulate the interests of claimants, defendants and the wider public.[165] In the absence of such wholesale and radical reform, English law is likely to carry on costing too much while satisfying no one.

165 Mullis and Scott, "Reframing libel", n. 134 above.

NILQ 63(1): 59–74

Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and reportage

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1 Introduction

The Law Lords in *Reynolds* v *Times Newspapers*[1] were fully aware of the importance of the two rights at stake in the case – the right to freedom of expression and the right to reputation – and the need to strike an appropriate balance between them. For Lord Nicholls in the Lords' leading speech, the "starting point is freedom of expression" and "[t]he high importance of freedom to impart and receive information and ideas", but he also brought out the significance of the right to reputation which is to be regarded as "an integral and important part of the dignity of the individual".[2] Its protection was not only in the public interest, but it further served the interests of the individual whose standing might be ruined for ever by the publication of defamatory allegations, whether they were true or false. Without an enforceable right to reputation a politician or other prominent figure might be unjustly hounded out of public life, while ordinary individuals might find it impossible to secure employment or do business unless they can clear their name.

In that landmark case, the House of Lords formulated an extended qualified privilege defence to a libel action, so that the defendant is not liable if he or she has published false defamatory allegations on a matter of public interest, provided that in publishing them the requirements of "responsible journalism" have been satisfied. It became clear in later decisions that this amounted to a new form of qualified privilege,[3] quite different from the traditional heads of this privilege where the question is whether the defamatory allegations have been published on a privileged occasion, for example, in the course of communications between civil servants or in a reference sent to a prospective employer. For the first time in English law the media may have a defence if it publishes untrue factual defamatory allegations on a matter of public interest, as long as it has behaved responsibly by, for example, relying on trustworthy sources and by checking the story with the claimant and others before deciding to publish it. *Reynolds* took greater account of freedom of

* I am indebted to Richard Rampton QC, Paul Mitchell, Jason Boland and an anonymous reviewer for their comments on a draft of this article.

1 [1999] 4 All ER 609.

2 Ibid. at 621–22.

3 See *Loutchanksky* v *Times Newspapers* [2002] 1 All ER 652, where Lord Phillips MR said, at para. 35, that "*Reynolds* privilege is . . . a different jurisprudential creature from the traditional form of privilege from which it sprang".

expression than the common law had previously done. Before the decision, English common law had generally been thought to be too solicitous of reputation rights and too little concerned with freedom of speech and press freedom.[4]

But it would be wrong to think that English libel law had altogether ignored freedom of expression before the decision in *Reynolds*. It is perhaps worth recalling how the freedom has been recognised in other aspects of this area of law:

(i) A public body cannot bring defamation proceedings at all, because its entitlement to sue for libel would be incompatible with freedom of expression.[5] The principle has been extended to bar defamation actions by political parties.[6]

(ii) Truth is a complete defence to a libel action. In English law it is assumed that the disclosure of true allegations is in the public interest, because otherwise the public would assess the standing of the claimant on the basis of a misconception. This is a freedom of speech argument, which can be linked to Mill's well known argument for liberty of discussion as a means for the discovery of truth.[7]

(iii) Similar arguments underlie the defence of fair comment (to be renamed under the government's recent Draft Defamation Bill as "Honest Opinion").[8] In this instance, the defence is based as much on the free speech rights of the speaker to express his/her honest views on the reputation of an individual or the quality of a play, film or other work, as it is on the interests of the public in assessing these views.[9]

(iv) Freedom of speech is the reason for the defences of both absolute and qualified privilege. This is perhaps most obviously the case for the absolute privilege of Members of Parliament to speak freely in the course of parliamentary proceedings, conferred by Article 9 of the Bill of Rights 1689. But it is also true of the absolute privilege, say, of parties and witnesses to legal proceedings to give evidence without the fear of libel proceedings[10] and of the numerous heads of qualified privilege. Notably, the recognition of the qualified privilege for fair reporting of parliamentary debates was explicitly justified by reference to the importance of free discussion of what was said in Parliament.[11] In all these cases, the common law recognises that defamation law may exercise a "chilling effect" on freedom of speech: it may deter the communication of information, which is valuable either to the general public or to a class of potential recipients (e.g. prospective employers) on future occasions, if the particular defendant can be sued for libel.

(v) Finally, freedom of speech is the principal reason why the courts are unwilling to grant an interim injunction to restrain the further publication of

4 See the remarks of Lord Hoffmann in *Jameel* v *Wall Street Journal Europe SPRL* [2007] 1 AC 359, para. 38.

5 *Derbyshire County Council* v *Times Newspapers* [1993] AC 534 HL.

6 *Goldsmith* v *Bhoyrul* [1998] QB 459 (Buckley J).

7 J S Mill, "Of the liberty of thought and discussion", *On Liberty and Other Essays* (Oxford: OUP 1961).

8 Draft Defamation Bill, cl. 4.

9 See the judgments of Diplock J in *Silkin* v *Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, at 745, and of Lord Denning MR in *Slim* v *Daily Telegraph Ltd* [1968] 2 QB 157, 170 (CA).

10 *Munster* v *Lamb* (1883) 11 QBD 588, 697 per Fry LJ.

11 See the judgment of Lord Cockburn CJ in *Wason* v *Walter* (1868) 4 QB 73, 89. Also see Lord Diplock in *Horrocks* v *Lowe* [1975] AC 135, 149–50.

> defamatory material before full trial. The grant of such an injunction would stop the publication of the truth or of allegations which could be successfully defended as fair comment or as covered by a defence of privilege, and that would infringe freedom of speech.[12]

Nevertheless it is through the defence of *Reynolds* privilege and the associated reportage defence that English law most clearly balances the rights to freedom of speech or expression on the one hand against the right to reputation on the other. It does this through a careful consideration of a number of factors, relevant to determining whether the defendant has satisfied the requirements of "responsible journalism"; they are set out in the famous "check-list" drawn up by Lord Nicholls in Reynolds and are now listed, albeit in slightly different terms, in cl. 2(2) of the Draft Defamation Bill which was issued by the Ministry of Justice in March 2011.

This article is concerned entirely with *Reynolds* privilege and the related reportage defence. The next section reviews the present common law, concentrating on the recent decision of the Court of Appeal in *Flood* v *Times Newspapers Ltd*;[13] and it then briefly examines the relevant provisions of the Draft Defamation Bill. Section 3 makes a number of general points about the approach in *Reynolds* (and under the new Bill) to balancing freedom of speech and reputation rights, while Section 4 explores three issues which have not yet been fully resolved, or even properly canvassed, in applying the defence. Section 5 discusses the reportage defence, usually treated as a variety of *Reynolds* qualified privilege, but which is sometimes regarded, notably in a stimulating recent article by Jason Boland,[14] as doctrinally distinct and as resting on quite different principles. One point to emerge from these reflections is that *Reynolds* privilege may not provide a coherent approach to the balancing of freedom of expression and reputation rights. Secondly, the reportage defence, whether or not it is regarded as a variety of *Reynolds*, should not be treated expansively, since that might allow the media too wide a freedom to report inaccurate stories and rumours.

2 The *Reynolds* defence in English common law

Any hopes that the decision in *Reynolds* would greatly expand the freedom of the media to publish untrue defamatory allegations of real interest to the public were soon dashed by the approach of the courts in the following five or six years. The defence failed in the vast majority of the cases in which it was argued. The courts treated the factors itemised by Lord Nicholls in *Reynolds*, to be considered when determining whether the media defendant had satisfied the requirements of "responsible journalism", as hurdles for it to clear. If the court found, for example, that a newspaper had relied on an untrustworthy source with an "axe to grind",[15] or alternatively that it had made no serious attempt to contact the claimant to get the other side of the story,[16] then the defence would fail, irrespective of the strength of other factors which might point to the conclusion that overall the story had been published responsibly.

However, the decision of the House of Lords in *Jameel* v *Wall Street Journal Europe SPRL* was generally thought to have corrected this approach and indeed to have tilted the scales a little in favour of freedom of expression.[17] In that case the claimants, a Saudi Arabian

12 *Bonnard* v *Perryman* [1891] 2 Ch 269, 283 per Lord Coleridge CJ.

13 [2010] EWCA Civ 804, [2010] EMLR 26, [2011] 1 WLR 153.

14 J Boland, "Republication of defamation under the doctrine of reportage – the evolution of common law qualified privilege in England and Wales" (2011) *Oxford Journal of Legal Studies* 89.

15 As in *James Gilbert* v *MGN* [2000] EMLR 680 (Eady J).

16 As in *Galloway* v *Daily Telegraph Group Ltd* [2006] EMLR 11 (CA).

17 [2007] 1 AC 359.

trading company and its general manager and president, brought proceedings in respect of an article in which they were named as among the persons whose bank accounts were being monitored by the Saudi Monetary Authority at the request of the US law enforcement agencies, to see whether they were being used, knowingly or not, to support terrorist organisations. The lower courts had rejected *Reynolds* privilege on the grounds that first, it was not in the public interest to name the claimants as persons whose accounts were being monitored, and, second, because Jameel had not been given a chance to comment on the story before its publication.[18] The House of Lords allowed the defendant's appeal, dismissing both these reasons for rejecting the defence. On the first point, whether the subject matter of the article was a matter of public interest, and therefore covered by the privilege (subject to satisfaction of the responsible journalism test) should be determined by considering the article *as a whole* and not by reference to the defamatory statement in isolation.[19] The overall story that the Saudi authorities were monitoring company accounts in cooperation with the US government was plainly a subject of public interest. It was then a matter for editorial judgment whether it was appropriate to name the claimants in order to give the story greater credibility. On the second point, the Lords ruled that the lower courts had applied the "opportunity to comment" requirement inflexibly; in this case it was pointless to delay publication of a responsibly researched, serious story until Jameel had been given an opportunity to comment on the allegation, for he would not have been able to say anything other than that he could see no reason why the Saudi authorities should be monitoring his accounts[20] More generally, the Law Lords emphasised that the factors listed by Lord Nicholls should be treated as flexible considerations, the precise weight and importance of which would vary according to the circumstances of each case.[21]

The courts have now adopted this more flexible approach to the *Reynolds* defence required by *Jameel*. But the significance of the later Lords ruling may have been limited by the decision of the Court of Appeal in *Flood* v *Times Newspapers*.[22] The newspaper in that case had published an allegation that the claimant, a Detective Sergeant (DS) in the Metropolitan Police Service (MPS), had taken bribes from a security company to supply it with information concerning attempts by the Kremlin to extradite opponents of the government in Russia. The MPS had issued a press release to the effect that an unnamed serving officer was under investigation for making unauthorised disclosures of information in return for money; the investigation subsequently cleared DS Flood, so that the allegations could not be justified. Tugendhat J held, following *Jameel*, that the story overall that a police officer is under investigation for bribery was one of public interest, and that it was within editorial discretion to name that officer to give it additional credibility.[23] The Court of Appeal reversed his decision. It held that publication of the *allegations* against DS Flood was not protected by *Reynolds* privilege; the newspaper had not made any real attempt to check or verify these serious allegations, which the newspaper had no urgent need to publish. So the requirements of responsible journalism were not met. The claimant conceded that reporting the police press office statement that a police officer was under investigation was covered by qualified privilege.[24] Further, it was legitimate to name the police officer, for that

18 [2004] EMLR 106, Eady J and [2005] QB 904 (CA).

19 See n. 17 above, para. 48 (Lord Hoffmann).

20 Ibid. para. 84 (Lord Hoffmann).

21 Ibid. paras 33 (Lord Bingham), 56 (Lord Hoffmann).

22 See n. 13 above.

23 [2010] EMLR 8.

24 Defamation Act 1996, s. 15(1) and para. 9 of the Schedule confers statutory privilege on reports of notices issued to the public by bodies exercising governmental functions.

did add credibility to the report. However, the Court of Appeal accepted the claimant's argument that this case was distinguishable from *Jameel*, where the article had merely reported that the bank accounts were being monitored; that article had not made any precise allegations, nor had it disclosed evidence to show that the accounts were being used to finance terrorism. In contrast in *Flood*, "the allegations *were* the whole story".[25] The Court of Appeal accepted the claimant's argument that it was not in the public interest to report the precise allegations against him, for otherwise the press would be free to publish unfounded, perhaps even malicious, allegations against police officers with the risks of trial by media.[26] (In October 2011 the appeal of *Times Newspapers* against the Court of Appeal's decision was heard in the Supreme Court. Unfortunately, the Supreme Court decision was not available at the time of going to press.)

A few significant points in the decision of the Court of Appeal in *Flood* are hard to interpret. As will be discussed in Section 5 of this article, some of its reasoning may be attributable to an anxiety not to extend the reportage defence. The major uncertainty concerns whether the Court of Appeal ruled that the publication of details of allegations of this kind against a named individual can rarely, if ever, be regarded as warranted, even when an editor understandably considered their publication necessary to give colour to the publication of a news report which itself would be covered either by statutory or by *Reynolds* privilege. Some passages in the judgments might be read to support that broad interpretation. In Lord Neuberger MR's view:[27]

> [it] would be tipping the scales too far in favour of the media to hold that not only the name of the claimant, but the details of the allegations against him, can normally be published as part of the story free of any right in the claimant to sue for defamation just because the general subject matter of the story is in the public interest.

But the fact that the court went on to consider how far the newspaper had made serious attempts to verify the details suggests it was not going as far as that. The implication is that if *The Times* had made such attempts, the *Reynolds* defence might have succeeded; in contrast, that defence would not have covered the case at all if the publication of detailed allegations of this kind against a claimant is never to be regarded as a matter of public interest. But even if strenuous efforts had been made to check the story, it is unclear that the defence would have succeeded. For it was also suggested that responsible journalism required the newspaper to refrain from putting allegations to DC Flood, when he could not properly comment on them at a time when the MPS investigation was being conducted.[28] That itself is a novel application of the responsible journalism test,[29] which normally requires defamatory allegations to be put to the potential claimant for comment and to provide his/her version of events.[30]

At this point it is worth emphasising an important feature of the *Reynolds* defence. There are two stages in its application. The first is the question whether it is in the public interest to publish the defamatory allegations, or after *Jameel* whether it is in the public interest to publish the story, of which the allegations form a part. That may be described as the

25 See n. 13 above at para. 100 per Moore-Bick LJ (emphasis in the original).

26 Ibid. para. 104.

27 Ibid. para. 63.

28 Ibid. para. 104 per Moore-Bick LJ and para. 116 per Moses LJ.

29 P Mitchell, "The nature of responsible journalism" (2011) 3 *Journal of Media Law* 19, pp. 26–7.

30 For a recent decision in Northern Ireland holding that *Reynolds* privilege could not be claimed, because the newspaper failed to invite comment from the claimant or at least obtain the gist of her side of the story, see *O'Rawe* v *Trimble* [2010] NIQB 135, paras 88–94 per Gillen J.

threshold inquiry.[31] It is relatively rare for the defence to fail at this stage; it is unclear that it did in *Flood* itself. The courts have taken a broad view of the scope of matters of public interest and concern, just as they have done when determining the scope of the fair comment defence. It would surely be difficult to justify an unqualified ruling that the publication of detailed allegations against police officers or other public officials can never, or virtually never, be a matter of public concern; there is a great deal of legitimate public interest in their probity. The second stage is the responsible journalism test. "[T]he extent to which the subject matter is a matter for public concern" is one of the factors listed by Lord Nicholls, which in conjunction with others determines whether freedom of expression or reputation should be given the greater weight on the facts of the case. The Court of Appeal in *Flood* was on firm ground insofar as it decided that the freedom of expression interest in disclosure of the detailed allegations against the claimant was of little weight when balanced against the impact of the disclosure on his reputation ("the seriousness of the allegation" – another consideration in the Nicholls check-list), particularly as it was clear that the defendant had not made any rigorous attempt to verify them. If that is all the court decided, the decision can be supported.

There is one point on which *Flood* is clearly right. In *Reynolds*, Lord Nicholls had said that "[a]ny lingering doubts should be resolved in favour of publication", because the courts should pay particular regard to the importance of freedom of expression.[32] Both Tugendhat J and the Court of Appeal in *Flood* considered this principle incompatible with the equal weight which must be attached to the Convention rights under Articles 8 and 10.[33] Neither the right to respect for private life (including the right to reputation) nor the right to freedom of expression is entitled to priority over the other – a proposition accepted by the House of Lords in *Re S (A Child)*.[34] So the balancing exercise required by *Reynolds* does not begin or end with any presumption in favour of freedom of expression, a strong contrast with the United States rule discussed in the next section of this article, under which the constitutional free speech and press rights trump the common law right to reputation.[35]

The provisions in the government Draft Defamation Bill on the defence of responsible publication on a matter of public interest reflect the common law position. Under cl. 2(1) "[i]t is a defence for the defendant to show that (a) the statement complained of is, or forms part of, a statement on a matter of public interest", and (b) he or she acted responsibly in publishing the defamatory allegations. Clause 2(2) then sets out the matters to which the court may have regard when determining whether the defendant had acted responsibly in publishing them. They reproduce the check-list drawn up by Lord Nicholls, albeit expressed in slightly different terms. Unlike Lord Lester's Private Members' Bill, drafted in 2010 and given a second reading in the House of Lords in July that year, the clause explicitly mentions the "tone of the statement (including whether it draws appropriate distinctions between suspicions, opinions, allegations, and proven facts)".[36] So tabloid newspapers and bloggers must be careful not to present a suspicion of wrong-doing as if it were a proven fact, nor should they give it excessive prominence or present it in a

31 See the analysis in D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008), pp.109–13

32 See n. 1 above, at 626.

33 See n. 13 above, para. 21, per Lord Neuberger MR, approving the remarks of Tugendhat J, n. 23 above, para. 146.

34 [2005] 1 AC 593.

35 See s. 3(i) below.

36 The Joint Committee of the House of Lords and House of Commons on the Draft Defamation Bill (12 October 2011, HL Paper 203, HC 930-1) has recommended that the words in parentheses should be removed, as they would lead to excessive analysis of any text containing defamatory allegations (see para. 65d).

sensational manner, if they want to claim the statutory defence.[37] The clause in the government Bill wisely does not include the provision in the Lester Bill, which seems to have required courts to have regard to the extent of the defendant's compliance with any relevant code of conduct, such as that of the Press Complaints Commission (PCC); the provision might have complicated court cases by encouraging arguments over the interpretation of the PCC or other code, so spawning what is termed "satellite litigation". Interestingly, cl. 2 of the Bill, unlike its provisions reformulating the defences of truth and fair comment, does not abolish the common law; presumably, therefore, the leading decisions in *Reynolds* and *Jameel* remain authoritative. Indeed, it is conceivable that, if the Bill is enacted, the media might argue in appropriate cases that it has a defence either under the provisions of the new Defamation Act or under the common law *Reynolds* privilege;[38] it is more likely that the courts will interpret the provisions against the background of the leading common law rulings.

3 An assessment of *Reynolds* from a comparative perspective

(i) Detailed ad hoc balancing

One important aspect of the decision in Reynolds was its rejection of a wide generic privilege for the publication of political information. That privilege would not do justice to the right to reputation, and moreover it would inappropriately distinguish the treatment of untrue allegations about politics from similar statements of equivalent public concern about other topics.[39] Instead, it was better, in the view of the House of Lords in *Reynolds*, for the courts to weigh the importance of freedom of expression against the reputation right in the light of all the factors of the case, which showed whether the defendant had satisfied the requirements of responsible journalism. As Lord Nicholls put it in *Bonnick* v *Morris*, "[r]esponsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals".[40] This is detailed, ad hoc balancing, with full consideration given to a range of factors, the weight of which will vary from case to case. The same approach seems to have been taken recently by the Court of Appeal in a traditional qualified privilege case, when it ruled that all the facts should be considered in determining whether the defendant local authority had a duty to communicate defamatory allegations about the claimant to a wide range of its employees; the fair balancing of reputation and freedom of expression meant that the defendant could not claim that any communication to all its staff is necessarily made on a privileged occasion.[41]

This approach contrasts with that of some other courts, most notably that of the United States Supreme Court which has adopted what is termed rule or "definitional" balancing.[42] Under the rule in *New York Times* v *Sullivan*,[43] as extended in later decisions, if a defamatory allegation is made of a public official or figure, that person must prove actual malice for a libel action to succeed, that is, he or she must show that the defendant knew

37 *Grobbelaar* v *News Group Newspapers* [2001] 2 All ER 437, where the Court of Appeal held that *Reynolds* privilege could not be claimed for sensational articles in *The Sun* alleging that a goalkeeper was guilty of match-fixing would surely be decided the same way under these provisions.

38 The Joint Committee recommended that the common law defence should be repealed: n. 36 above, para. 63.

39 See Lord Nicholls in *Reynolds*, n. 1 above, at 625.

40 [2003] 1 AC 300, para. 23.

41 *Clift* v *Slough Borough Council* [2010] EWCA Civ 1171, [2011] EMLR 13.

42 The distinction between definitional and ad hoc balancing is drawn and defended in a classic article by M B Nimmer, "The right to speak from *Times* to *Time*: First Amendment theory applied to libel and misapplied to privacy" (1968) 56 *California Law Review* 935.

43 376 US 254 (1964).

that the allegation was false and defamatory of the claimant, or that the defendant was reckless about its truth. It is immaterial how damaging the allegation was, how careful the defendant had been in investigating and publishing the story, or whether the story was really of great concern to the public. The only material factor is the status of the claimant: public official or figure on the one hand, or private person on the other. The publication of a story about a candidate for a local office – hardly a person whose conduct is of great interest to the public – was therefore caught by the *New York Times* rule, even though the newspaper had made a shocking mistake and its coverage may have ruined the life of the claimant.[44] Of course English law takes a rule-based approach with regard to the justification (or truth) defence; the publication of an accurate defamatory allegation can always be defended successfully, whether or not it concerns a matter of public interest and however much it damages the standing and feelings of the claimant.[45]

The English approach in *Reynolds* is much less crude than that adopted by the United States Supreme Court, which can only be explained in terms of the priority given in the United States to freedom of speech. That freedom is as a matter of constitutional law entitled to much greater weight than the rights to reputation (or for that matter to personal privacy in media cases) which are not protected at all as constitutional rights. Two points may be made, however, against the approach in *Reynolds*, which is now consistently followed by the courts in England and Northern Ireland.[46] The second is considered later in this section of the article.[47] The first is that ad hoc balancing does not remove the "chilling effect" of English libel laws, or at least remove it as much as the media had hoped. This point was made by the New Zealand Court of Appeal, when it declined to adopt a responsible journalism test as a condition for upholding a broad qualified privilege defence in respect of the publication of defamatory allegations about politicians and candidates for elected office.[48] A broad rule like that adopted in New Zealand or the *New York Times* actual malice rule provides much more certainty for the media and therefore better protects freedom of expression.

Though *Reynolds* is regarded as a valuable addition to the range of defences which the media may invoke when faced with defamation proceedings, they have have found the courts generally unsympathetic to it and its application to be unpredictable.[49] Journalists, editors and others have to determine what steps they must take to satisfy the requirements of responsible journalism, generally at times when they are under intense pressure to meet deadlines and when it may be hard to contact potential claimants to ask for their comments and to find out their side of the story. Moreover, journalists must determine not only whether they have taken what they, or their profession, regard as reasonable steps, but they must predict whether the libel judge will find that they have complied with the requirements of responsible journalism. So *Reynolds* clearly does not remove the chilling effect of libel law, but, of course, claimants, and others anxious to defend reputation rights, will argue that this is no bad thing. In their view, newspapers and other defendants ought to be very cautious

44 See *Ocala Star Banner Co.* v *Damron* 401 US 295 (1971), where the newspaper mistakenly reported that a candidate for local office faced perjury charges, when in fact the charges related to his brother. This irresponsible journalism was covered by the *New York Times* rule, so the claimant could only bring a successful defamation action if he proved actual malice.

45 The same is true to some extent of the fair comment defence, though the public interest requirement enables the court in principle to consider a range of factors.

46 See *O'Rawe* v *Trimble*, n. 30 above, for a Northern Ireland decision closely following *Reynolds*.

47 Section 3(iii) below.

48 *Lange* v *Atkinson (No 2)* [2000] 3 NZLR 385. The New Zealand courts had been invited by the Privy Council ([2000] 1 NZLR 258) to consider the principles in Reynolds, but rejected them.

49 See the study by A T Kenyon, *Defamation: Comparative law and practice* (London: UCL Press 2006), pp. 223–31.

before publishing defamatory allegations; it is right for libel law to chill, or deter, the publication of sloppy or over-hasty journalism.[50]

(ii) *Reynolds* and the approach of other courts

The ad hoc, detailed factual balancing approach of *Reynolds* is taken by many other top courts, although, as we have seen, the United States Supreme Court and the New Zealand Court of Appeal have formulated rules which give significantly greater protection to the publication of defamatory allegations about public officials and figures (United States) or about politicians and election candidates (New Zealand). But the High Court of Australia[51] and now the Supreme Court of Canada take a similar approach to that taken by the English courts. In *Grant* v *Torstar Corporation*, the Supreme Court of Canada formulated a new constitutional defence of responsible communication on a matter of public interest to defamation actions.[52] The defence is to apply when the publisher was diligent in attempting to verify the allegations, having regard to eight factors, some of them formulated in terms strikingly similar to those listed by Lord Nicholls and now set out in the UK government's Draft Defamation Bill.

Of greater relevance for defamation law in the United Kingdom is that the *Reynolds* approach reflects that taken by the European Court of Human Rights in its extensive defamation jurisprudence. In determining the balance between the Convention right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and the right to respect for private life, now embracing the right to reputation, under Article 8 ECHR, the court considers how the national courts have weighed a number of factors: the character of the allegations (fact or value-judgment), their wording and seriousness, the steps taken by the defendant to verify the allegations, and the sources or other evidence for the story.[53] The status or position of the libel claimant is a factor,[54] though not, as in the United States or New Zealand, decisive. The seriousness of the penalty or level of damages is also relevant in determining whether there has been a disproportionate interference with the right to freedom of expression.

The European jurisprudence is important, of course, because courts in the United Kingdom must adopt a similar approach, if recourse to Strasbourg is to be avoided. They would infringe the Convention if they adopted the US approach, under which priority is given to freedom of speech at the expense of reputation and privacy rights. A rule such as that in *New York Times* would not strike a fair balance between freedom of expression and the right to respect for private life (including now the right to reputation), or put another way, it would amount to a disproportionate infringement of the latter right. An approach like that taken in *Reynolds* is therefore mandatory, as a matter of UK human rights law, irrespective of whether it is the best approach to balancing these two fundamental rights.

(iii) The coherence of the *Reynolds* approach to balancing

The principal argument against the approach in *Reynolds* raises some complex issues. A fundamental question is whether responsible journalism is the most appropriate point at which to strike a fair balance between the right to reputation and freedom of expression, as

50 This was also the view of Lord Hoffmann in *The Gleaner* v *Abrahams* [2004] 1 AC 628, para. 72, PC.

51 *Lange* v *Australian BroadcastingCorporation* (1997) 189 CLR 520.

52 [2009] 3 SCR 640.

53 See the cases discussed in E Barendt, "Balancing freedom of expression and privacy: the jurisprudence of the Strasbourg court" (2009) 1 *Journal of Media Law* 49, pp. 60–6, 70–2.

54 *Lingens* v *Austria* (1986) 8 EHRR 407, paras 41–3.

was maintained by Lord Nicholls in *Bonnick*.[55] There can be little doubt that the threshold question in *Reynolds* – whether the statement was on a matter of public concern or interest – is highly relevant to striking this balance. If the defamatory allegation concerns private behaviour of no real public concern, there is very little to put in the scales to weigh against the reputation right. Equally, it can be argued that an irresponsible newspaper, or other defendant, has only a weak claim to freedom of expression, so it is legitimate to take the requirements of responsible journalism into account when balancing its rights against those of a libel claimant.

But the argument is quite different if we conceive freedom of expression as guaranteeing the right of the *public* to be informed on matters concerning politics and other matters of legitimate public concern. The effect of the responsible journalism test is that the balance between the public's right to receive information and the right to reputation is determined by focusing to a large extent on the *conduct* of the media – which may be the public's watchdog, but is hardly its agent. Sometimes that might be thought right. As Lord Hobhouse pointed out in *Reynolds*, there is no public interest in publishing or communicating misinformation – "there is no interest in being misinformed".[56] The responsible journalism test is intended to avoid that danger by ensuring, so far as possible, that the public receives information believed on good grounds by the media to be true, though it later turns out to be false. The problem, however, with this justification for the responsible journalism test is that some of the criteria for its application do not appear to be clearly relevant to the importance, or even the reliability, of a public interest story, the dissemination of which *Reynolds* is intended to protect. A failure by the journalist to verify the allegations or to wait for the claimant's comments certainly has nothing to do with the significance of the story which the public has a free speech right to read or hear.[57] It is not even clear that these failures necessarily shake its reliability. These criteria bear on the conduct of the press or other media, but not on the public's right to freedom of expression.

Moreover, the responsible journalism test hardly does justice to the chilling-effect argument. There is surely sometimes a public interest in receiving information which the press considers, albeit wrongly, to be accurate, but which it may decide not to publish, as it lacks confidence that a court would hold it had satisfied the requirements of responsible journalism. It may fear that the court will decide that the journalist investigating the story has carried out too few checks or that he or she should have waited longer to make contact with an elusive claimant before publishing the story. In summary, the responsible journalism test in these circumstances does not operate satisfactorily to balance the interests of the public and those of the libel claimant. Moreover, defamation law may still exercise an undesirable chilling effect on freedom of expression.

The solution to this conundrum, if it is one, surely lies in reformulating, or perhaps simply a more sensitive application of, the *Reynolds* balancing formula. If the information is of clear public interest and publication is really urgent – an important vote in the House of Commons or at a shareholders' meeting may go one way if it is released and the other way if it is not – it would seem wrong to require satisfaction of the other requirements of responsible journalism. Other solutions are also available which would provide some remedy, or compensation, for libel claimants, without inhibiting the freedom of the media to publish stories of real public interest. It might, for instance, be made a condition for

55 See n. 40 above.

56 See n. 1 above, at 657.

57 On the other hand, the first two factors in the Nicholls check-list – the seriousness of the allegation, and its nature and the extent to which the subject-matter is one of public concern – are clearly relevant to freedom of expression.

Reynolds privilege that the media subsequently publishes a correction of its false story, perhaps agreed with the claimant who would otherwise be entirely without redress for the publication of an inaccurate and defamatory story. A right of reply or correction for defamation victims would arguably exercise less of a chilling effect than large damages awards and the attendant legal costs of fighting a libel action, though it would be resisted very strongly by the media owners and editors on free press grounds. There is, of course, a precedent for this sort of provision in the Defamation Act 1996; in some instances the qualified privilege defence is available for a fair report only if the defendant has complied with the claimant's request to publish a reasonable "statement by way of explanation or contradiction".[58] Alternatively, in those cases where *Reynolds* privilege is upheld and the press (or other defendant) declines to publish a reply or correction, some modest compensation might be awarded to the claimant for the injury to his/her reputation rights. Availability of these remedies would not interfere disproportionately with freedom of expression, while it would show some respect for the claimant's reputation rights.[59] The weakness of the present law is that it provides an all-or-nothing solution: if the *Reynolds* defence is upheld, the claimant's reputation is entirely sacrificed to freedom of expression and the press, while if the defence is rejected – perhaps because the journalist has not carried out enough checks – the media must pay damages in respect of a story, even if it has real public interest, and freedom of expression loses.

4 Unresolved questions

I have identified three sets of circumstances in which it may be difficult to determine how the *Reynolds* responsible journalism test should be applied. In two of them there is some authority, but the caselaw does not resolve all the difficulties, while on the third there is virtually no authority at all. There are probably other issues to resolve. On them, as on those discussed below, further enlightenment is to be expected as the caselaw develops.

(i) Opportunity to comment

When is it unnecessary to ask the claimant for his comments on the story which the media would like to publish and for his side of the story? Normally this is required under the *Reynolds* check-list; indeed the failure to put the story to Albert Reynolds was one of the factors which persuaded the majority of the House of Lords to dismiss the appeal of the *Sunday Times* in that case. On the other hand, in *Jameel* the Law Lords held it was unnecessary to wait for Jameel's comment on the story, as it was most unlikely he would have been able to say anything of value about it. It is clear from one later case that the failure to put allegations to the claimant is not necessarily decisive for rejection of the defence.[60] But it is for the defendant to show that it was responsible for the media not to ask for comment from the claimant, not for the latter to show that he or she would have been able to add something of value.[61]

The question may often be how long the defendant ought to try to track the claimant down before publishing its story, particularly when it believes on perhaps reasonable grounds that the claimant could only issue an anodyne denial of its truth. There are of course good free speech grounds for the conclusion that, generally, the media should delay publication until it has managed to contact the claimant; after all the claimant's comments provide his/her version of events, amounting in effect to the exercise of a right of reply

58 S. 15(2).

59 See the arguments of F Schauer, "Uncoupling free speech" (1992) 74 *Columbia Law Review* 691.

60 *Armstrong* v *Times Newspapers* [2005] EMLR 33, para. 82 (CA).

61 *Prince Radu of Hohenzollern* v *Houston* [2009] EMLR 13 (CA).

issued contemporaneously with, rather than after, the media publication. On the other hand, the media may be under considerable pressure to get its story out; there may be much less public interest in a delayed publication.

In some circumstances, a claimant may prefer not to comment on the allegations at all, fearing that this would give them greater publicity or perhaps because any comments might prejudice an inquiry into the claimant's conduct. Further, as already mentioned,[62] the Court of Appeal in *Flood* said it was against responsible journalism to expect DS Flood to comment on the unsubstantiated allegations which had been made against him, pending an MPS investigation of their truth. His "right to silence" at that stage was used to reinforce the court's conclusion that it was against the public interest to publish the detailed allegations which had been made against him. It is unclear whether the Court of Appeal would have taken the same view if *The Times* had obtained clearly reliable sources for its story and had made rigorous attempts to check the accuracy of that story – so that most of the requirements of responsible journalism would have been amply satisfied. In those circumstances it would surely be wrong for the newspaper not to give the claimant an opportunity to comment on the story – even though he might not be able to say much until the police investigation had been completed.

(ii) The seriousness of the allegations

This was the first of the 10 factors in Lord Nicholls' check-list. He added that the more serious the allegation, the more the public is misinformed and the greater the harm to the individual if the charge is untrue. Equally it can be said that the public has a greater interest in hearing of serious allegations against, say, a politician or other prominent figure, at least if the media believes them on good grounds to be true. So the factor arguably cuts both ways. In privacy cases, the courts take into account the type of expression: does it concern politics or other matter of public concern or does it amount to no more than celebrity gossip? In defamation cases too, the character of the overall story may be crucial, as in *Jameel*, to striking the balance between freedom of expression and reputation rights. Arguably the courts should take account not only of the seriousness of the allegations in themselves – whether for example they concern the claimant's public life, or only a minor aspect of the claimant's social or personal relationships – but also of the likely extent or level of damage to the claimant's self-esteem and feelings resulting from the publication. In some cases, notably in *Reynolds* itself and recently in *Flood*,[63] the courts have emphasised the damage to the claimant's standing likely to result from the publication as a factor to be considered when striking the balance between the two rights.

Indeed, a greater focus on the likely repercussions of the allegations on the claimant's reputation is probably required by European Court jurisprudence. The Grand Chamber of the Court in *Pedersen* emphasised that the television documentaries alleged that the claimant, a police superintendent, had deliberately suppressed evidence – a grave accusation, not just one of general incompetence.[64] Charges against the integrity of a politician may destroy his public life and should be justified by the evidence or made only on the basis of very reliable information.[65] It is therefore right to take account of the seriousness of the allegations and their likely impact on the claimant when striking a fair balance between the right to respect for private life and the exercise of the right to freedom of expression.

62 See the text at n. 28 above.

63 *Flood*, n. 13 above, para. 75 (per Lord Neuberger MR).

64 *Pedersen* v *Denmark* (2006) 42 EHRR 24.

65 *Rumyana* v *Bulgaria*, Decision of 14 February 2008, para. 61.

(iii) The application of *Reynolds* to the internet

The *Reynolds* defence does not apply only to the traditional mass media. That was decided by the Privy Council in *Seaga* v *Harper*.[66] It would clearly be wrong for the press and broadcasting media to enjoy defences to defamation actions which are not shared by ordinary individuals and by the publishers, for example, of academic and scientific journals or of leaflets circulated in a local community. Indeed, for that reason, the Supreme Court of Canada concluded that the term "responsible communication" should be used, rather than "responsible journalism", because the latter suggests the defence is (largely) confined to the traditional media.

It is more difficult to decide how the requirements of the responsible journalism test should be applied to bloggers, the controllers of websites and to the senders of emails. As yet, there is little authority on the application of the test to these defendants, although in *Flood* the Court of Appeal upheld Tugendhat J's decision that the failure of *The Times* to remove the defamatory allegation from its website after the MPS inquiry had cleared the claimant was not responsible journalism: once the newspaper had become aware of the result of that investigation, it should either have removed the defamatory material or attached an appropriate qualification.[67] The author of the leading book on the application of libel law to the internet has suggested that the requirements of responsible journalism should be applied to take account of the limited resources enjoyed by bloggers – compared with those of professional journalists – to check their stories and to contact potential defamation claimants.[68] But any latitude would be of little comfort to the victims of defamatory attacks whose reputation may be destroyed instantaneously and globally by an email or on a website. Another point is that the public interest requirement may be difficult to apply, when the readership is international,[69] though there is no obvious reason why publication on the internet should in this respect be treated differently from publication in a journal or magazine with an international circulation.[70]

These questions will surely have to be answered soon by the courts. The report of the Joint Committee of the House of Lords and the House of Commons examining the government's Draft Defamation Bill recommended that the "resources" of the publisher should be added to the list of factors to be considered by the courts when determining whether the defendant has acted responsibly. It would be wrong in its view to expect an individual blogger (or for that matter a local newspaper) to carry out as many pre-publication checks as a national newspaper or broadcaster, in order to satisfy the requirements of responsible publication.[71] On the other hand, there is no reason why the online version of a national paper should not be treated in the same way as the print version for the purposes of the test. The point is that the requirements should be applied flexibly, taking account of the defendant's practical ability to verify the truth of the allegations.

5 *Reynolds* and reportage

The courts have developed a defence of reportage, usually regarded as a variant or species of *Reynolds* privilege, under which the media (or other defendant) can argue that it is in the

66 [2009] AC 1.

67 See n. 13 above, paras 77–83.

68 M Collins, *The Law of Defamation and the Internet* 3rd edn (Oxford: OUP 2010), para. 13.43.

69 Ibid. para. 13.40–41.

70 The High Court of Australia in *Dow Jones* v *Gutnick* (2002) 210 CLR 575 rejected the argument that there should be special rules for the internet with regard to jurisdiction in libel actions.

71 See n. 36, para. 65a.

public interest for it to report neutrally the allegations in a dispute between two (or more) parties.[72] In these circumstances it is the fact that certain allegations have been made which is important, not whether they are true or false.[73] There is no duty in this context for the media to check the accuracy of the allegations it is reporting, for their truth is irrelevant. But in the leading case on reportage,[74] it was said that the other elements of *Reynolds* privilege have to be satisfied; for example, the information published must be in the public interest, while the seriousness of the allegations and whether it was urgent to report them should be considered. But they may be applied in a different way in a reportage case. In *Roberts* v *Gable*, it was unnecessary for the reporter to ask for the claimants' comments, since their side of the dispute (between leading members of the British National Party) could be inferred from the report.

There are a number of odd aspects to the development of a common law reportage defence, now incorporated in the government's Draft Defamation Bill.[75] First, as has been pointed out,[76] it weakens the impact of the repetition rule, under which the defendant cannot justify the republication of a defamatory allegation by showing that it has been reported accurately. The defendant must prove the truth of the allegation that has been republished. Reportage provides a qualified privilege defence in these circumstances, if the republication is in the public interest – because the general public has an interest in knowing that an allegation has been made in the course of a dispute. Logically, the availability of the qualified privilege defence can be regarded as compatible with the repetition rule, an aspect of the defence of truth, but it certainly weakens the impact of that rule.

What has less often been discussed is the impact of reportage on statutory qualified privilege. Under the Defamation Act 1996 there is qualified privilege for the fair and accurate reports of a number of proceedings, statements, notices and other matters itemised in the Schedule to the Act; in some circumstances, the privilege is subject to the condition that the defendant had published a reasonable explanation or contradiction of the publication when called on by the claimant to do this.[77] What is surprising is that the courts have developed a common law qualified privilege defence for reports of defamatory allegations, at least if made in the course of a dispute, when Parliament has specifically listed a set of proceedings and other statements and notices for which a fair reporting defence can be invoked. It can surely be argued that the implication of these specific provisions is that in other circumstances fair and accurate reports are not covered by qualified privilege. Moreover, the common law reportage defence may be claimed whether or not the media has published any explanation of the report which may have been requested by the claimant.

Arguably the conservative decision of the Court of Appeal in *Flood* was partly influenced by its anxiety not to extend further the statutory reporting defences provided by the Defamation Act 1996. Reportage itself was not invoked; it probably could not have been, since *The Times* was not explicitly reporting a dispute and it did not name the source who had made the detailed allegations against DS Flood which the newspaper was

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72 In *Galloway* v *Daily Telegraph Group Ltd* [2006] EMLR 11 the Court of Appeal might have been prepared to allow the reportage defence if the paper had not embellished the allegations against Galloway found in a document. That suggests the defence is not confined to the reports of disputes; also see Sedley LJ in *Charman* v *Orion Publishing Ltd* [2008] 1 All ER 750, para. 91.

73 See Latham LJ in *Al-Fagih* v *HH Saudi Research and Marketing Ltd* [2002] EMLR 13, para. 65 (CA).

74 *Roberts* v *Gable* [2008] QB 502, (CA), para. 61.

75 Cl. 2(3).

76 See I Loveland, "The ongoing evolution of *Reynolds* privilege in domestic libel law" (2003) 14 *Entertainment Law Review* 178, p. 179, and Bosland, "Republication of defamation", n. 14 above, pp. 96–7.

77 Defamation Act 1996, s. 15.

reporting. (It is arguable that *The Times* was reporting, implicitly, a dispute between Flood and its source,[78] but that point perhaps shows how open-ended the concept of a "dispute" is in this context.) The Court of Appeal did hold that *Reynolds* privilege could be invoked in principle for a report of allegations made to the police (about a police officer), in addition to the statutory privilege covering the report of the police statement that an investigation was being conducted into these allegations.[79] But Lord Neuberger MR was explicitly reluctant in effect to extend the statutory privilege "by refracting [the report of the police statement] through the prism of editorial control, so that the report of the allegations which gave rise to the investigation are also privileged" at common law.[80]

It would be wrong to extend the reportage defence too far. If it covered, as the Court of Appeal in *Galloway* has suggested, the neutral reporting of defamatory allegations made outside the context of a dispute, or if it covered the reporting of any "private" dispute between celebrities, of no real public interest, it would provide the media with very generous protection from libel proceedings. In his recent article on the defence, Jason Boland is right to argue for a narrow scope for reportage, which should in his view be confined to the neutral reporting of allegations where there is a public interest in the fact that they have been made.[81] I am not convinced, however, that it is necessary, as he argues, to divorce reportage entirely from *Reynolds*, so that the factors itemised by Lord Nicholls are to be treated as irrelevant. In the first place, it is surely right to require that the allegations made in the course of the dispute raise a matter of public concern – the first threshold requirement for the *Reynolds* defence.[82] It is difficult to see what real public interest there could be in a dispute – even one between two celebrities – unless the allegations reported as being made in the course of that dispute are of public concern. It is not easy to see what the public interest might be in the making of allegations as such, entirely divorced from their nature or subject-matter. Secondly, to take one of the *Reynolds* factors, the reliability of the source of the report may sometimes be important. It is not necessary, as it is in the ordinary *Reynolds* case, for the reporter to believe the truth of any of the allegations made in the reported dispute, but it is surely reasonable to expect the reporter to believe that the allegations were actually made in the course of the dispute and that the dispute was not wholly invented. The factors in the *Reynolds* check-list for responsible journalism may need to be modified for reportage, but they should not be discarded or treated as altogether irrelevant.

The larger questions are, however, these. First, should a reportage defence have been developed at all by the courts, given the provision of some fair reporting defences by the Defamation Act 1996? The statutory privilege typically covers the fair and accurate reports of a range of public meetings, fair and accurate copies of documents circulated to members of a public company, and comparable reports of decisions taken by various associations formed to promote, for example, learning, a trade or profession, sports or charitable objects.[83] In contrast, the common law reportage defence provides protection for the reporting of "disputes" of an informal character, which may be conducted largely in private, but which are nevertheless of public interest. The reporting of disputes of this kind is the concern of the press and other media in the course of investigative journalism. But if that provides some argument for the development of reportage, the second question

78 I am indebted to Paul Mitchell for this point.

79 *Flood*, n. 13 above, paras 30–7.

80 Ibid. para. 65.

81 Bosland, "Republication of defamation", n. 14 above

82 See the text at n. 31 above.

83 Defamation Act 1996, Sch. 1.

arises: would it not be right to treat the reportage cases simply as instances of *Reynolds* qualified privilege, where it would be wrong to insist on the duty to verify or check every defamatory allegation? It would be a mistake to take reportage any further, particularly as it might well encourage lazy and sloppy journalism to the cost of reputation rights.[84] In this context it is interesting to note that the Joint Committee on the Draft Defamation Bill has recommended that cl. 2(3) of the Bill (the statutory version of the reportage defence) should be reformulated to make it clear that the neutral reporting of a dispute should form one of the factors in determining whether the defendant acted responsibly in publishing a defamatory allegation. Reportage as part of an accurate and impartial account of a dispute should not, as the Draft Bill provides, necessarily be treated as a responsible publication.[85] In short, the reportage defence should not be divorced entirely from consideration of the other factors taken into account in determining responsible journalism.

Two conclusions can be drawn from these rather diffuse reflections on *Reynolds* and reportage – two new, closely related, heads of qualified privilege defence. The first is that while *Reynolds* privilege represents a laudable attempt to enhance freedom of expression and of the press in the context of libel actions, it hardly removes the chilling effect of libel law. Moreover, when it is successfully invoked, it leaves the claimant without any redress, even though the claimant has probably been the victim of an inaccurate defamatory allegation. This is surely very unsatisfactory. Secondly, reportage fits uneasily with both the repetition rule and with the provision of specific, but limited, defences for fair and accurate reports by the Defamation Act 1996. That does not, of course, mean that the defence is an aberration. But it shows perhaps the difficulties of judicial reform of this complex area of law, and how hard it is to strike a fair balance between freedom of expression and the right to reputation.

84 See G Busitill, "Reportage: a not entirely neutral report" (2009) *Entertainment Law Review* 44.

85 Joint Committee, n. 36 above, para. 66.

NILQ 63(1): 75–83

The internet – making a difference?

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The early days of internet law paid huge attention to the status of the subject and to the question of the difference between online and offline worlds. Did the same laws which apply offline also apply in cyberspace? How connected is the virtual world to the real world, and can the governments which so effectively assert control over the latter do the same for the former? If they do, should we rejoice at the extension of the rule of law to another realm, or should we mourn lost freedoms? Should we be looking for analogies between online and offline activities, or insisting on the distinctiveness of the virtual? And where does all of this leave the claim that there is such a thing as "internet law"?

These questions are still asked, but with diminishing emphasis. Information and communications technology and its many uses do not represent a different world so much as a set of additional dimensions of our existing world, and are no less "real" than any other aspect of it. As for analogies, they press themselves upon us – where offline and online activities are similar, it is natural to use the same language for each. Whether the analogy holds up, and to what extent it deceives us, may vary. It is unsurprising that the more authoritative news distribution sites are often called "online newspapers", and it would be pedantic to insist that "paper" has nothing to do with it; yet this new technology has already dealt heavy blows to the economic prospects of its offline counterparts, so much so that we are already having to contemplate a world in which newspapers go the way of the dodo, as an obviously hopeless attempt to keep up with the electronic stream of news.

As to defamation law, the attempt to regulate the new technology in the same old way has had successes and failures. Before reviewing the relevant law, it seems best to sketch out first some of the main respects in which we might expect the law to be different in the online world.

How the internet changes things

It has always been the case that information can cross vast distances, if it is interesting enough and if enough time is allowed. And anyone with the resources and the determination to do so would always have been able to read, say, the *Wall Street Journal* no matter where they were located. The most obvious change made by the introduction of the internet is the reduction of cost and time involved in the transmission of information, and the effective increase in range thus provided for. Reading the *Wall Street Journal* on the day of publication is certainly a different thing from reading it weeks or months later.

And many of the new cases turn simply on this increased ease and speed of access, facilitated by the trail of electronic evidence left by those who put new information into circulation. It is perhaps possible to think of offline analogies to *Applause Stores* v *Raphael*,[1] where the defendant created a false Facebook profile in the name of the second claimant and used it to defame him; but it was the online nature of the exercise that ultimately did for the defendant, as it led to incontrovertible evidence that it was his computer that was used to create the profile, and the judge found the suggestion that some random houseguest had done so without the defendant's knowledge "utterly implausible from start to finish".[2] While in principle the rules applied are the same as in offline cases, clearly the nature of the disputes will be rather different, not least in the quality of the evidence available.

Many writers stress the informality of the internet as necessitating a different approach, and indeed a different mind-set for evaluating meaning. In pre-internet days, the more widely disseminated publications tended to a certain formality, though these things were relative. Whether existing rules can accommodate this is an open question. Some judges are beginning to confront questions such as whether reasonable readers are presumed to follow hyperlinks in the text as part of the process of understanding its meaning,[3] and the "presumed knowledge of the reader" is becoming a more doubtful concept given the diversity of possible readers:

> What of a case where the subject matter of the comment is not within the public domain, but is known only to the commentator or to a small circle of which he is one? Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out . . .[4]

Some, indeed, have suggested that defamation law should simply be dis-applied from the internet, at least where we are dealing with statements that "do not undergo any middle person, filtering or editing process and which do not pretend to be based on a reliable source or which do not deal with exact facts".[5] Bluntly, sensible people do not take apparently unsubstantiated internet gossip seriously, and neither should the law. This undoubtedly points to a problem – the courts have always insisted that statements should be assessed as reasonable people assess them, even in contexts where there are manifestly plenty of unreasonable people about – but it seems too extreme a solution for most. A more plausible suggestion is that the low credibility of many internet sources should feature more strongly as a factor when damages come to be assessed.[6]

More generally, there seems to be a growing body of opinion that more explicit reference needs to be made to the processes through which statements propagate on the internet. This may not be a universal view – it seems to put in doubt the principle of technological neutrality, and "inevitably places the government in the position of picking technological

1 *Applause Store Productions Ltd* v *Raphael* [2008] EWHC 1781 (QB) (24 July 2008).

2 Ibid., Richard Parkes QC, para. 62.

3 *Islam Expo Ltd* v *The Spectator* (1828) Ltd [2010] EWHC 2011 (QB) (30 July 2010).

4 *Spiller* v *Joseph* [2010] UKSC 53 (1 December 2010), Lord Phillips, para. 99.

5 Y Kamiel, "A new proposal for the definition of defamation in cyberspace" [2008] *Communications Law* 38, p. 44.

6 M Nied, "Damage awards in internet defamation cases: reassessing assumptions about the credibility of online speech" (2010) *Alberta Law Review*.

winners and losers",[7] which does not sound like either a sound industrial policy or a good way to promote freedom of speech. But ignoring the complex workings of the online world does not sound sensible either, and the traditional concerns of defamation law (not to mention its emphasis on money damages as remedy) may not be serving us well. "Perhaps we are asking defamation law to do too much: protect individual honor, dignity, and property; define community boundaries; enforce existing norms; validate new norms; and determine which communities are right-thinking and respectable."[8]

With these general considerations in mind, I briefly review some of the major difficulties that have so far resulted from the application of traditional defamation principles in the new online context.

Jurisdiction

Much attention has recently been focused on "forum shopping", and particularly on libel actions brought in English courts against US defendants. The actions have been striking ones, not least because the US often seems at first blush the more natural forum, but also because those actions would be extremely hard to maintain there in the light of *New York Times* v *Sullivan*, which insists that a public figure must demonstrate "actual malice" before an action will lie.[9] The limits of who may be regarded as a "public figure" are not absolutely established, but the concept is not restricted to public officials, and to a great extent may cover even those who become public figures despite their own wishes or intentions ("involuntary public figures"). In the view of many, English cases such as *Berezovsky* v *Michaels*,[10] *Richardson* v *Schwarzenegger*[11] and *Polanski* v *Condé Nast*[12] were thought to show insufficient attention to whether England was an appropriate forum for the dispute – startlingly so in the last case, where the claimant dared not enter the UK, and would very probably have been arrested and extradited to the US if he had.

The case which proved the most egregious in American eyes was one which initially passed almost unnoticed in England. Rachel Ehrenfeld, a US researcher resident in New York, published widely on issues relating to the financing of international terrorism. In her book *Funding Evil*, she accused Khalid bin Mahfouz, a Saudi businessman, of financing al-Qaeda. Mahfouz sued Ehrenfeld in London. Ehrenfeld refused to acknowledge the jurisdiction of the English court, and default judgment was entered against her. She subsequently sued Mahfouz in the US Federal courts, seeking a declaration that the English judgment could not be enforced there, but this action failed for lack of personal jurisdiction over Mahfouz. The resulting furore led in short order to the passage of both state[13] and federal[14] legislation preventing the enforcement of defamation judgments in US courts, unless the substantive and procedural protections afforded to defendants under the foreign jurisdiction are comparable to those available in the US. Such legislation naturally attracted attention in the UK, with a House of Commons Select Committee concluding that "it is a

7 C S Yoo, "Free speech and the myth of the internet as an unintermediated experience" (2010) 78 *George Washington Law Review* 697, p. 772.

8 D Ardia, "Reputation in a networked world: revisiting the social foundations of defamation law" (2010) 45 *Harvard Civil Rights–Civil Liberties Law Review* 261, p. 326.

9 *New York Times Co.* v *Sullivan*, 376 US 254 (1964).

10 *Berezovsky* v *Michaels*, *Glouchkov* v *Michaels* [2000] UKHL 25 (11 May, 2000).

11 *Richardson* v *Schwarzenegger* [2004] EWHC 2422 (QB).

12 *Polanski* v *Condé Nast Publications Ltd* [2005] UKHL 10 (10 February 2005).

13 Libel Terrorism Protection Act 2008 (NY). A number of other states subsequently passed similar laws.

14 The Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010.

humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts".[15]

Yet the simple comparison of the US and UK systems, to the latter's disadvantage, seems overly simplistic. There seem to be too few examples of "libel tourism" to conclude that it is a significant issue, and many commentators seem much too ready to label it "a growing problem" on the basis of a handful of cases. Most references to it are vague, and do not call any particular legal rule into question. The broad freedom which US law affords to those who criticise public figures is not an obvious model for others to follow, and (for what the point is worth) it is the US, not the UK, that is out of step with what is normal in democratic societies. A more plausible criticism would be that English law is too ready to assume jurisdiction in such cases, though it cannot be said to take a uniquely broad view,[16] and again it seems to be the US that is unusual here, not the UK.[17] There seems to be relatively little appreciation in the US that the law has been reconsidered since *Berezovsky*, the House of Lords in *Jameel*[18] placing renewed emphasis on the question whether the injury to the claimant's reputation was substantial, making it more difficult to invoke the court's jurisdiction where the connection between the defamatory utterance and the local jurisdiction was a vague one. Recent cases suggest that, at the very least, the sharper edges have now been smoothed off the *Berezovsky* doctrine. Thus, in *Amoudi* v *Brisard*,[19] it was argued that there was a rebuttable presumption of law that articles appearing on a website were read by a substantial number of people, by analogy with the offline rule that if a defendant publishes a statement to the world at large then the claimant need not plead or prove publication to any particular individual. Gray J held that there was no such presumption, and that substantial publication within the jurisdiction would have to be proved as a matter of fact. In *Lonzim* v *Sprague*,[20] again the court was asked to infer that a substantial publication within the jurisdiction had taken place. The article in question had been downloaded 65 times, on a site which on average received 6.8 per cent of its traffic from the UK over the relevant period. Tugendhat J declined, noting that all the UK visits might have been from the same individual, and that there was nothing to apportion any visits to the English/Welsh jurisdiction in preference to other UK jurisdictions.

Persistence

As more information becomes available online, and searching it becomes ever easier, problems emerge which either did not exist before or took very different forms. Information willingly revealed in one online context may be embarrassing if published in another; social networking sites and discussion groups of all kinds put our ideas of privacy under a sharp spotlight. Persistence of private information across time is an element of this: a statement which it seemed sensible, praiseworthy or even obligatory to make at one time may seem like a major mistake at a later one. This has relevance to many areas of law. For defamation, one particular instance stands out. If a defendant makes a potentially defamatory statement, in the belief that it is true or privileged or both, subsequent events may call this into question. Obviously, it would be a rash defendant who then repeats the

15 House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* HC 362-I (9 February 2010), p. 6.

16 The English approach is in broad terms very similar to that taken by the High Court of Australia in *Dow Jones and Company Inc.* v *Gutnick* [2002] HCA 56 (10 December 2002).

17 For the history of the emergence of the US "single publication" rule see I Maytal, "Libel Lessons from across the pond" (2010) 3 *Journal of International Media and Entertainment Law* 121.

18 *Jameel* v *Wall Street Journal Europe SPRL* [2006] UKHL 44 (11 October 2006).

19 *Amoudi* v *Brisard* [2006] EWHC 1062 (QB) (12 May 2006). See also *Brady* v *Norman* [2008] EWHC 2481 (QB).

20 *Lonzim plc* v *Sprague* [2009] EWHC 2838 (QB) (11 November 2009).

statement. The difficulty is that a failure to remove a statement from an internet site may be regarded as a republication of that statement each time it is downloaded.

So, in the *Loutchansky* case, allegations were made in the London *Times* against the claimant; their truth could not subsequently be established by the journalists involved, but they were nonetheless able to plead the *Reynolds* "responsible journalism" privilege. However, the Court of Appeal refused to hold that this privilege protected the retention of the story in the newspaper's online archive. Making that story available to all-comers amounted to repetition of material the site owner knew to be libellous, and it was nothing to the point that at an earlier stage they could have pleaded privilege for the earlier publication. "The failure to attach any qualifications to the articles published over the period of a year on *The Times*' website could not possibly be described as responsible journalism."[21] The European Court of Human Rights was not prepared to regard this as a disproportionate infringement of the defendants' right of free speech.[22]

It is important to avoid oversimplification of the issues. At first glance the legal issue is simply over whether continual repetition of the same article should be regarded as a series of multiple publications or merely as aspects of a single publication, with the preference for the former analysis being based on the venerable *Duke of Brunswick* case.[23] But the issue is not really conceptual so much as one of policy, and *Brunswick* is not a case of great authority – if its facts were to recur and action were brought today, a modern court would "condemn the entire exercise as an abuse of process".[24] Neither is it true as a generalisation that "the internet never forgets". Once a particular item ceases to be topical, it will usually sink very rapidly in the search rankings, to the point where few will ever find it – much as in the offline world, it will for most practical purposes disappear from view, unless there are extraordinary circumstances to give it current relevance.

The problem is therefore narrower than it might at first sight seem, and it would be extravagant to address it by such a fundamental conceptual shift as treating multiple publications as single, with all the attendant uncertainty that such a shift would bring. Ireland has decided to make this experiment, enacting recently that "a person has one cause of action only in respect of a multiple publication",[25] and perhaps this will generate experience in the matter, but the case for such a provision is not compelling. It is another question whether the precise issue in *Loutchansky* might not be addressed in some other way, whether by modifications to the relevant limitation period, or by creating a distinct privilege for recognised archives. But while there may be strong arguments for allowing a "paper of record" to maintain an accurate and seamless archive available to all, it is not obvious why this should extend to a freedom not to qualify the item in any way, so that those who consult it might have no clue that its veracity had been challenged before a court. This is especially so in a case where, as in *Loutchansky*, there was no attempt to defend the allegations in the article as being true.

Intermediaries

The law of defamation is technically framed in terms of individual communications – publication occurs each time a fresh individual hears or sees the defamatory utterance, and all the people responsible for that publication might be liable for it – and so in principle the complexity of modern media could create an utterly convoluted pattern of liability.

21 *Loutchansky* v *Times Newspapers Ltd* [2001] EWCA Civ 1805 (5 December 2001), at 79.

22 *Times Newspapers Ltd (Nos 1 and 2)* v *UK* (Applications 3002/03 and 23676/03) (10 March 2009).

23 *Duke of Brunswick* v *Harmer* (1849) 14 QB 185.

24 *Dow Jones and Co. Inc.* v *Jameel* [2005] EWCA Civ 75 (3 February 2005), Lord Phillips MR, at 56.

25 Defamation Act 2009 (Ireland), s. 11(1). The following subsection nonetheless allows a court to grant leave to bring more than one action "where it considers that the interests of justice so require".

Following a single newspaper story from its early stirrings in the mind of a journalist, through all the editorial and production processes and on through its distribution, would typically bring in a number of potential defendants. In practice, however, the courts' approach is well settled.

Dissemination of libellous material over the internet is typically rather less complex than this, but its relative novelty has led to an unsettled state for the law.

National legislation tackles this problem by providing a defence to those involved only as intermediaries. By the Defamation Act 1996, s. 1, the defence is established if the defendant can show that he or she was not "the author, editor or publisher of the statement complained of", took "reasonable care in relation to its publication" and "did not know, and had no reason to believe" that the statement was defamatory. The first requirement is deemed to be satisfied if the defendant's only involvement was "in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded" or "in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form".[26] The section deals expressly with various cases, and also empowers the courts to deal with novel cases by analogy with those provisions.[27]

Running parallel to this is the "mere conduit" defence in European Union law, which exempts the provider of an "information society service" from liability for transmitted information, so long as the provider "(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission".[28] There is considerable uncertainty as to which services are covered by this protection. In the *Betfair* case, a gambling exchange website provided various services for its customers, including a chat forum; the issue was whether its owners could plead the mere conduit defence when one user of the forum made defamatory statements. Clarke J held that they could. Gambling activities are excluded from the relevant directive, but the chatroom was thought sufficiently distinct from the site's gambling activities to be protected nonetheless; and running a chatroom "clearly" attracts the protection of the directive.[29]

The result in *Betfair* seems sensible, but the legislation is not as clear as all that, and so this ruling can only be accepted with some caution. Clearly the legislation seeks to draw a line between those who exercise control over the content of electronic transmissions and those who do not. But forum operators are in an awkward middle position. As a technical matter they have complete control over all aspects of the forum. If the forum is to work as intended, they must in practice renounce that control almost completely. Yet for a number of reasons that renunciation cannot be absolute – whatever may be the position in defamation law, other legal doctrines would forestall any attempt to give up all responsibility for what happens on a site, particularly in relation to harassment, child pornography and copyright. The issue is whether the site operator is permitted to do in relation to defamation what they are most definitely *not* permitted to do in relation to more serious infractions, namely ignore all wrongdoing that does not expressly come to their attention, while taking all possible steps to ensure that nothing ever does.

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26 Defamation Act 2009 (Ireland), s. 27 is in very similar, though in many respects simpler, terms.

27 Defamation Act 1996 (UK), s. 1(3).

28 Directive 2000/31/EC (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on Electronic Commerce), Article 12.

29 *Mulvaney* v *The Sporting Exchange Ltd t/a Betfair* [2009] IEHC 133 (18 March 2009). A similar English ruling, though like *Betfair* containing no serious argument on the point, is *Karim* v *Newsquest Media Group Ltd* [2009] EWHC 3205 (QB) (27 October 2009).

Betfair holds that the operator may do precisely this, so that site operators may insist on their ignorance of any defamation unless it is expressly brought to their attention. But this was a very brief ruling, which relies heavily on the earlier English case of *Bunt* v *Tilley*.[30] *Bunt*, a more carefully considered judgment, certainly gives encouragement to defendants in these cases, as Eady J refused to find the defendants liable for statements made on bulletin boards and insisted that the claimant's remedy, if any, was against those who made the statements. But the defendants in *Bunt* were merely internet access providers, and when looked at in detail the judgment gives little joy to those who operate the bulletin board itself. There is an obvious difference between a mere service provider (who does not control content and could only with great difficulty do so) and the actual operator of a forum (who can control content quite easily, though he or she will have no reason to do so unless aware of a legal risk). None of that proves that the result in *Betfair* is wrong, but it is clear that further justification is needed, especially given that a degree of control does seem to have been exercised by the operators through its terms and conditions.

Recent cases relating to the platform Blogger.com have left a confused picture. If remarks are made on such a platform (whether by a blogger or by someone commenting on a blog post) which the claimant says are defamatory, does that render the platform's owner liable? And does it make a difference if the claimant calls the owner's attention to the allegedly defamatory remarks? In *Davison* v *Habeeb*,[31] HH Judge Parkes QC thought it arguable that the platform's owner was a "publisher", though he also considered that the "mere conduit" defence applied. The defence did not dissipate once the complaint was received, because the platform owner had no easy means of discovering the truth of the matter, and so could not be said to have actual knowledge of any defamation.[32] The same result was reached on similar facts in *Tamiz* v *Google Inc.*,[33] but Eady J there went further: he did not accept that the owners of the platform were even "publishers" of the remarks in question, being properly regarded as mere facilitators.[34] While the hostility to claimants in such cases is clear, there are evidently difficult conceptual questions to be worked out here.

A more readily justifiable result was reached in *Carrie* v *Tolkien*, where the defendant posted remarks defaming the claimant on a website which the claimant himself operated under a pseudonym. The claimant discovered the remarks later that day, and made a minor change to them. It was held that no action lay in respect of the period after the claimant saw the remarks; in principle it could lie in respect of the short period before, but publication to others would not be presumed, and in the absence of evidence that a substantial number of people had seen it, no substantial tort was proved.[35] Once the claimant knew of the remarks and could remove them if he wished, a defence of consent was available if he chose not to remove them.

In one sense, these cases seem very positive, in that the courts seem to have a good grasp of the relevant technology, and to have developed an intuitively convincing allocation of responsibility in the light of that understanding. But the lack of any serious legal analysis is plain, and these cases are of little assistance in predicting how this area will evolve as the technology develops.

30 *Bunt* v *Tilley* [2006] EWHC 407 (QB) (10 March 2006).

31 *Davison* v *Habeeb and Others* [2011] EWHC 3031 (QB) (25 November 2011).

32 Para. 68.

33 *Tamiz* v *Google Inc. and Google UK Ltd* [2012] EWHC 449 (QB) (2 March 2012).

34 Para. 39.

35 *Carrie* v *Tolkien* [2009] EWHC 29 (QB) (15 January 2009).

Search engines

Similar remarks apply in respect of search engines. To modern eyes, a search engine is the classic "intermediary" service, creating nothing original but simply providing facilities for linking to material of interest. It would be strange if such engines were treated as "publishers" of any data they link to, and while it seems more natural to treat them as publishers of the search results themselves, it seems harsh to treat them as asserting the truth of any statement that appears in those results.

Yet on any natural reading of the intermediary defences, it is hard to see how search engines receive any protection at all. It seems hard to deny that the operator of the engine is the "author, editor or publisher" of the search results themselves, which rules out any defence under national law.[36] And while guidance from the European Court is desperately needed, it is quite unclear how search facilities can be an "information society service", as they are not "normally provided for remuneration".[37] (Search engines are certainly not operated on charitable lines, but there is no direct remuneration in respect of individual searches.) In any event, if either defence applied, its effect would vanish as soon as the engine's owner was made aware of the injury to the claimant's reputation – even though it might not be technically possible to prevent the defamation occurring without removing essentially inoffensive material from the search engine's database.

Considerations of this type recently led Eady J to what might at first sight seem an odd conclusion, that the results of a search query are not published by the search engine operator at all, or at least not insofar as they consist of material quoted from other websites:

> It is fundamentally important to have in mind that [Google Inc.] has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user's request unless it has taken some positive step in advance. There being no input from [Google Inc.], therefore, on the scenario I have so far posited, it cannot be characterised as a publisher at common law. It has not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.[38]

Once again, the result is intuitively appealing, but the reasoning unsatisfying. It is simply not true – indeed, it is rather bizarre to claim – that a search engine operator does not "authorise or cause" search results to appear. It has never been a defence in defamation that the defendant had chosen to act merely as a facilitator, particularly if that role involves widespread dissemination of information regardless of its accuracy. Libel does not cease to be libel simply because the defamatory statement was a response to a query. And Eady J's reliance on the point that the results are "automatic" does not seem to lead us towards anything that has traditionally been recognised as a defence.

None of this is to suggest that a properly run search engine should attract liability – very much the contrary. And it is a tribute to the high standards we set for, and usually get from, search engines that we are reluctant to drag them into the net of defamation law. But a

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36 See Defamation Act 1996 (UK), s. 1; Defamation Act 2009 (Ireland), s. 27.

37 "Service" in Directive 2000/31/EC is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services": see Directive 98/34/EC, Article 1(2) as amended by Directive 98/48/EC, Article 2.

38 *Metropolitan International Schools Ltd* v *Designtechnica Corp.* [2009] EWHC 1765 (QB) (16 July 2009), Eady J, at [51]. Given that the search engine operator is not liable for these snippets, it would be surprising if anyone else were; it was subsequently held that the original author of an article is not responsible for a Google snippet from that article, at least if it conveys a different meaning from the original: *Budu* v *British Broadcasting Corporation* [2010] EWHC 616 (QB) (23 March 2010).

fiction that search engines are not engaged in any activity that the law regards as publishing is rather hard to stomach. It seems more rational to admit that they publish their results but to craft a specific privilege for search engines, which would be on generous terms if there was no reason to doubt the fairness of the search algorithm and other internal procedures, but which could in principle be defeated by proof of misconduct. Eady J's discussion of what a search engine could do to accommodate complaints without compromising the objectivity of the search results[39] could be a model for later judgments. But it is doubtful whether this result can be reached without legislation.[40]

39 *Metropolitan International Schools*, n. 34 above, at [56]–[9].

40 For discussion of some relevant legislation in other European jurisdictions, see *Metropolitan International Schools*, n. 34 above, at [97]–[110].

NILQ 63(1): 85–96

Libel tourism – a solution in sight?

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Introduction

"Libel tourism" is the name given to forum shopping in libel actions.[2] A "libel tourist" is a claimant who chooses an inappropriate forum in order to secure a better outcome. This may be because the substantive law is more favourable, because the procedure is more favourable or because the cost of defending is so great that many defendants will give in rather than fight.

The reason libel tourism is more objectionable than other forms of forum shopping is that libel proceedings involve a conflict between two important human rights: the right to defend one's reputation and the right of free speech. These rights have to be balanced, and countries do this according to their own scale of values. Some give greater protection to free speech, others to reputation. If the parties both live in a country which places a greater value on free speech, and the claimant brings the action in a country which puts more weight on the protection of reputation, the result will be unfair. By shifting the forum to the latter country, the claimant will have deprived the defendant of the right of free speech that would normally be enjoyed. Unless there is some objectively justifiable reason for the claimant's choice of forum – for example, the defendant expressly aimed the defamatory material there – the proceedings ought not to be allowed to go ahead.

The United States is a country which places a high value on free speech. This is enshrined in the US Constitution under the First Amendment. Although there are limits to what may be published, there is more freedom than in England[3] to say things that could be regarded as defamatory.[4] The Americans feel that political freedom and democracy require

1 This paper was written on the basis of the law as it stood in August 2011. Although introduced in Parliament some time ago, the Defamation Bill (which does not apply in Northern Ireland) has yet to become law.

2 The leading treatment of defamation in English conflict of laws is R Morse, "Rights relating to personality, freedom of the press and private international law: some common law comments" (2005) 58 *Current Legal Problems* 133. See also R Balin, L Handman and E Reid, "Libel tourism and the duke's manservant—American perspective" (2009) *EHR Law Review* 303; R Garnett and M Richardson, "Libel tourism or just redress? Reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases" (2009) 5 *JPIL* 471. For an earlier study by the present author, see T C Hartley, "Libel tourism and conflict of laws" (2010) 59 *ICLQ* 25.

3 This article is written in terms of English law, but much of what is said will apply to Northern Ireland as well.

4 For a discussion of the differences between US and English law, and the historical context of the First Amendment, see *Telnikoff* v *Matusevitch* 347 Md 561; 702 A 2d 230 (Court of Appeals of Maryland, 1997).

a wide measure of free speech; the English recognise this, but consider that individuals need protection against the abuse by the press of its power. The result is that libel law is more favourable to the claimant in England, while the press enjoys greater freedom in the US. The pro-claimant bias of English law will be mitigated once the Defamation Bill is enacted; even then, however, England will remain an attractive forum for libel litigants. The jurisdictional problem will not disappear.

Examples

At this point, it would be desirable to give some examples.[5] In 2008, Rinat Akhmetov, a Ukrainian oligarch, sued a Ukrainian newspaper, the *Kyiv Post*, in England for libel after it published details of murky activities allegedly carried out by him. The newspaper was forced to print an apology. Though written in English, the *Kyiv Post* had only 100 subscribers in England. Emboldened by this success, Akhmetov then brought proceedings in England against a Ukrainian news internet site that did not even publish in English.[6] The owners of the site could not afford to defend the case and a default judgment for £50,000 was given against them in June 2008. In both these cases, there was no possible justification for bringing the proceedings in England: Ukraine was the appropriate forum.

English law and European Union law

We must now consider the interaction of English law and European Union (EU) law. Under the Brussels I Regulation[7] (the Regulation) as it stands at present,[8] jurisdiction in civil and commercial matters (including defamation) depends on EU law when the defendant is domiciled in an EU member state[9] and on national law when the defendant is domiciled outside the EU.[10] Consequently, EU law applies to jurisdiction in defamation actions against EU defendants, and English law to actions against other defendants. Although the most notorious cases have almost all been against non-EU defendants, we will have to give separate consideration to these two situations. There is also a proposal, put forward by the EU Commission, to extend EU jurisdiction to cover proceedings against all defendants, irrespective of domicile. If this is adopted, the English rules of jurisdiction will cease to apply.

The rule in the *Duke of Brunswick's* case

It is not possible to discuss libel tourism without coming to grips with the rule in the *Duke of Brunswick's* case.[11] Under this rule, which is a peculiarity of the law of libel in England and those countries that follow it,[12] a separate tort is committed each time the offending

5 See *The Economist*, 8 May 2008 and 8 January 2009.

6 The site is www.obozrevatel.com/. "Obozrevtel" means "Observer". The material is written in what seems to be Ukrainian and the site is still going strong (last visited in March 2011).

7 Regulation 44/2001, OJ 2001, L 12/1.

8 There are plans to revise it.

9 The Lugano Convention applies when the defendant is domiciled in a non-EU state that is a party to that convention. At the present time, these latter states are Iceland, Norway and Switzerland. The Lugano Convention extends the system under the Brussels I Regulation to these other states, though there are a few minor alterations. In the following paragraphs, everything said about the EU applies to these three states as well.

10 For the meaning of "domicile" in this context, see the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, para. 9 (individuals) and the Brussels I Regulation, Article 60 (companies). This concept is not very different from residence. It is much more flexible than the traditional English concept of domicile.

11 *Duke of Brunswick* v *Harmer* (1849) 14 QB 185.

12 It does not apply in the United States, where a "single-publication" rule has been adopted.

material is communicated to another person.[13] Thus, if a million copies of a newspaper are distributed, the publishers of the newspaper will have committed a million torts if the newspaper contains defamatory material. It should also be said that in English law "publish" means "communicate"; so each time the offending material comes to the attention of another person, there is a separate publication. Continental lawyers do not use "publish" in this sense. As a result, confusion can ensue when these matters are discussed in an EU context. For this reason, it is better to say "distribute" or "communicate" rather than "publish" when discussing the law of libel.[14]

Although a separate tort is committed each time the material is communicated (published), claimants may, if they so wish, bring one action for all of them. However, although the claimant may do this, it is not obligatory. Consequently, the claimant is entitled to limit the claim to torts resulting from the communication of the material in England, and not to claim (in that action) for torts resulting from communication abroad. As we shall see below, this has the effect of emasculating the doctrine of *forum non conveniens*.

Jurisdiction

The basic principles of jurisdiction that apply to actions for defamation are similar under English and EU law. The two most important principles in this context are, first, what may be called "home-court" jurisdiction and, secondly, what may be called "claim-based" jurisdiction.

Under the principle of home-court jurisdiction, a defendant may be sued in the courts of his or her home country. Under EU law, this means the courts of the defendant's domicile;[15] under English law, it means in courts of the country in which the defendant is served with a claim form. However, since the United Kingdom is a member state of the EU, jurisdiction over persons domiciled in England (in all matters covered by the Brussels I Regulation) is governed by EU law; so it is only with regard to persons domiciled outside the EU that the English rule of jurisdiction based on service can apply.

Under the principle of claim-based jurisdiction, a court has jurisdiction if there is a reasonable relationship between the claim and the country of the forum. In the case of a claim in tort, both English[16] and EU law[17] agree that the rule is that a court has jurisdiction if the tort was committed in the country of the forum. In view of the rule in the *Duke of Brunswick's* case, this means that an English court will have jurisdiction over all torts resulting from communication to a person in England.

One can summarise the rules of jurisdiction in defamation as follows: where the defendant is domiciled in an EU country, an English court will have jurisdiction if the

13 One of the consequences of this rule is that the period of limitation runs afresh each time there is a new communication of the material. This application of the rule will be abolished by s. 6 of the Defamation Bill.

14 In the leading European case on the subject, *Shevill* v *Presse Alliance SA*, Case C-68/93, [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EC) 289, the Court of Justice of the European Union (CJEU, the new name for the ECJ) speaks of "distribution", rather than "publication".

15 Brussels I Regulation, Article 2(1).

16 Civil Procedure Rules r. 6.36 and Practice Direction 6B, para. 3.1(9).

17 Brussels I Regulation, Article 5(3). This uses the term "harmful event", which has been held by the CJEU to cover both the act which gives rise to the damage and the damage itself: *Bier* v *Mines de Potasse*, Case 21/76, [1976] ECR 1735. In the context of defamation, the damage consists of harm to the claimant's reputation. This occurs when defamatory material is communicated to another person. The place where the damage occurs is the place where the communication is received. In the case of a defamatory radio broadcast, for example, the act giving rise to the damage occurs in the place where the broadcast is transmitted; the damage occurs where the broadcast is received. The courts of both these countries have jurisdiction under EU law.

defendant is domiciled in England or if the material is communicated (published, in the English-law sense) to a person in England; where the defendant is not domiciled in the EU, it will have jurisdiction if the defendant is served with a claim form in England or if the material is communicated (published) in England.[18] Where jurisdiction is based on communication in England, it is limited to claims arising from that communication: claims cannot be brought on the basis of communication (publication) abroad. So the claimant must limit the claim to those torts: this applies under both EU and under English law.

Forum non conveniens

Forum non conveniens refers to the discretionary power of a court to stay proceedings over which it has jurisdiction, if it considers that a foreign court would be a more appropriate forum. *Forum non conveniens* is not permitted where the court derives its jurisdiction from EU law;[19] so it applies only to proceedings against defendants not domiciled in the EU. Even here, however, it fails to work effectively in defamation cases because of the rule in the *Duke of Brunswick's* case. The reason is that if the claimant restricts the claim to those torts resulting from communication in England, the question before the court in deciding questions of *forum non conveniens* will be whether a claim *regarding communication (publication)* in England should be heard in England. If the question is put in this form, the answer is bound to be that it should be heard in England. The court cannot consider which court is best suited to consider the claim with regard to publication in general. This point was made by Lord Steyn in *Berezovsky*:[20]

> [Counsel] said that when the court, having been satisfied that it has jurisdiction, has to decide under Order 11 whether England is the most appropriate forum "the correct approach is to treat the entire publication – whether by international newspaper circulation, trans-border or satellite broadcast or Internet posting – *as if* it gives rise to one cause of action and to ask whether it has been clearly proved that t*his action* is best tried in England." If counsel was submitting that in respect of trans-national libels the court exercising its discretion must consider the global picture, his proposition would be uncontroversial. Counsel was, however, advancing a more ambitious proposition. He submitted that in respect of trans-national libels the principles enunciated by the House in the *Spiliada* case . . . should be recast to proceed on assumption that there is in truth one cause of action.

This "more ambitious" proposition was rejected by Lord Steyn. This rejection is the reason *forum non conveniens* fails to put a stop to libel tourism.

The result is that, under the present law,[21] *forum non conveniens* has little effect on libel tourism: where jurisdiction depends on EU law, it does not apply; where jurisdiction depends on English law, it is rendered ineffective by the rule in the *Duke of Brunswick's* case. The only exception is that if the claimant is completely unknown in England – if he or she

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18 For EU law, see *Shevill* v *Presse Alliance SA*, Case C-68/93, [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EC) 289. In *Shevill*, the CJEU held that, in addition to the courts of the country in which the material is communicated, the courts of the country in which the publisher is "established" also have jurisdiction under Article 5(3). It is not entirely clear what "established" means; in any event, this ground of jurisdiction is of little importance in practice since it will usually coincide with the place of the publisher's domicile.

19 *Owusu* v *Jackson*, Case C-281/02, [2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm) 577; [2005] 1 Lloyd's Rep 452 (CJEU.)

20 *Berezovsky* v *Michaels* [2000] 1 WLR 1004, p. 1012 (HL). This passage was quoted by the Court of Appeal in *King* v *Lewis* [2004] EWCA 1329, para. 28. *King* v *Lewis* was itself a prime example of libel tourism.

21 For the position under the Defamation Bill, see below.

has no reputation there – the proceedings will be stayed.[22] However, libel claimants are usually international businesspersons or celebrities: if they do not have a great deal of money they will not be able to bring proceedings in England. Such people can usually claim to be known in England. In the case of businesspersons, they would merely have to show that they had business interests in England. So the claim will usually be heard.

The traditional argument

The argument in favour of the status quo (the position prior to the enactment of the Defamation Bill) is that if the claimant has a reputation in England, he or she should be entitled to defend it there. The flaw in this argument is that, in most cases, any remedy granted for communication (publication) in England will necessarily and inescapably impact on the right to communicate (publish) in other countries. This can be shown by taking as examples different forms of publication.

First, let us consider newspapers and news magazines. Leading newspapers from all over the world – for example, *El País* (Spain), *Le Monde* (France), the *New York Times* (USA), as well as German, Russian, Japanese and Turkish newspapers – are widely available in England. It would be unrealistic to expect them to stop distribution in England because of English libel laws, nor could one expect them to withhold publication of a particular edition in England just because it contained an article that might infringe English libel law: that would probably constitute a breach of the distribution agreement with the English seller; in any event, it would be too burdensome. It would be even more unrealistic to expect them to produce a special expurgated edition just for the British market. The same applies to foreign news magazines. Moreover, England would be a much less desirable place to live in if foreign newspapers and news magazines were not available here. We (the English) would be the losers if this happened.

The same is true with regard to printed books. Internet booksellers like Amazon are usually willing to send books worldwide. It would be unrealistic to expect them to restrict sales of particular books in particular countries because of the libel laws in force there. If the publishers requested them to do this, they would probably refuse to carry the book at all. So a foreign publisher can only avoid publication (distribution) in England by restricting sales elsewhere.

Similar arguments apply to internet publication. Where an item is put on the internet, it is regarded by English and Commonwealth courts as being communicated (published) everywhere that it can be downloaded.[23] In practice, it is not reasonably possible to block availability in one particular country. So a ban on publication in England means a ban or publication everywhere. Moreover, all major newspapers, magazines and TV networks have an internet edition, available from their websites; so even if material does not reach England by other means, it will come over the internet. Even words spoken at an academic or scientific conference are likely to be published on the internet.

The consequence is that, except in the case of marginal and unimportant forms of publication, any restriction on communication (publication) in England imposed by a court in a libel judgment will also constitute a restriction on communication in the world as a whole. This is true even if, in the case of an injunction, the injunction is limited to publication in England: it is often not commercially possible to stop publication in England

22 Under a different principle, the court might strike out the proceedings for abuse of process if publication in England was minimal: *Jameel (Yousef)* v *Dow Jones & Co. Inc.* [2005] QB 946; [2005] 2 WLR 1614 (CA).

23 *King* v *Lewis* [2004] EWCA Civ 1329 (CA); *Dow Jones & Co. Inc.* v *Gutnick* (2003) 210 CLR 575; 77 ALJR 255; 194 ALR 433 (High Court of Australia).

without also restricting it in other countries. This is why the traditional argument breaks down: it is not possible to isolate publication in one country from that in the world as a whole. The only solution is to balance the defence of reputation (worldwide) with the right to free speech (worldwide).

Assume, for example, that one American makes a statement about a second American in an American newspaper – perhaps the *New York Times* – which is on sale in England. If the second American sues for libel in England, and the English courts decide to hear the case, the effect will be that the limits of free speech and freedom of the press in the United States will be subject to determination by the courts of England. This cannot be right.

Choice of law

So far, we have been considering the problem from the point of view of jurisdiction. The reason is that in practice English courts never apply foreign law to defamation. Choice of law in defamation is outside the scope of the Rome II Regulation[24] and the Private International Law (Miscellaneous Provisions) Act 1995.[25] So the common law applies. The common law rule is the so-called "double-actionability" rule, originally laid down in *Phillips* v *Eyre*[26] and refined in *Boys* v *Chaplin*.[27] Under this, a tort committed in a foreign country is actionable in England if, and only if, it is actionable under the foreign law (it must be civilly actionable: it is not enough if it is a criminal offence) and it is actionable as a tort under English law.[28] Where the tort is committed in England, on the other hand, English law alone will be applied.[29]

At least as regards the core issue of whether the statement is defamatory, it would not be practical to apply foreign law, since what is regarded as defamatory depends on the attitudes and values current in a given society at a given time. A judge or jury from one country would find it difficult to apply the attitudes and values of a foreign country. Although the EU Commission is still trying to find an acceptable choice-of-law rule for defamation, it is doubtful whether this will ever be possible. For this reason, a solution must be found on the basis of jurisdiction.

The problem

Assume that a person living in a foreign country (the defendant) publishes material concerning another person (the claimant) who lives in the same country or in a third country (not England). Assume that there is no remedy under the law of the claimant's country or the defendant's country. The claimant sues in England, where there may be a remedy. If the material is published on the internet, or in a newspaper, magazine, book or TV programme, it will almost certainly be regarded by English courts as having been communicated (published) in England. So jurisdiction in defamation will be established as long as the claimant limits the claim to torts resulting from communication (publication) in England; *forum non conveniens* will not pose any obstacle, provided the claimant has a reputation in England.

To make the problem more concrete, assume that a website owned by a locally based organisation in the imaginary state of Ruritania publishes an item asserting that a Ruritanian

24 Regulation 864/2007, OJ 2007, L199/40, Article 1(2)(g).

25 Ss 9(3), 10 and 13.

26 (1870) LR 6 QB 1 (Exchequer Chamber).

27 [1971] AC 356; [1969] 3 WLR 322; [1969] 2 All ER 1085 (HL).

28 Sir Lawrence Collins (ed. with specialist editors), *Dicey, Morris and Collins: The conflict of laws* 14th edn (London: Sweet & Maxwell 2006) (hereinafter *Dicey, Morris & Collins*), r. 235, pp. 1957 et seq.

29 *Dicey, Morris & Collins*, p. 1960, text to, and cases cited in, note 2.

businessman bribed an official in Ruritania to avoid prosecution. The businessman, though not widely known in England, does business there and has a circle of business associates. He sues the website owner in England. Under current English law (prior to the enactment of the Defamation Bill), the English courts will assume jurisdiction. Any challenge on the basis of *forum non conveniens* will fail.

In this situation, the defendant will be faced with a choice. It can do nothing and allow a default judgment to be given, or it can accept that the limits of free speech in Ruritania are to be determined by an English court applying English law. If it decides to defend the case on the merits, it will be in for a nasty shock if it contacts a firm of London solicitors specialising in libel law. Since it is resident abroad, it will probably be told that the firm will not take on the case unless it provides a guarantee that its fees will be paid. This may be for as much as £100,000.[30] Many defendants cannot find this kind of money. So the defendant may have to admit defeat and accept the terms offered by the claimant (a withdrawal of the assertion, coupled perhaps with damages) or allow the case to go by default and hope that the resulting judgment will not be enforced in its home country. This is not a happy state of affairs and has caused resentment in foreign countries.

Reaction in the United States

One such country is the United States, where legislation has been adopted in a number of states to prohibit the enforcement of foreign libel judgments, unless the result would have been the same under the First Amendment. The first such Act was passed by the New York State Legislature. This is rather provocatively entitled "The Libel Terrorism (*sic*) Protection Act".[31] It amends the New York legislation for the recognition of foreign judgments to provide that a foreign defamation judgment will not be recognised unless the defamation law applied by the foreign court provided at least as much protection for free speech as would be provided by the constitutions of the United States and New York. The legislation also confers jurisdiction on the New York courts to hear actions brought by New York residents (and certain other persons) for declaratory judgments[32] against persons who have obtained defamation judgments against them in foreign countries. Similar legislation has been adopted in other states.[33]

30 See *The Economist*, 8 January 2009, "Are English courts stifling free speech around the world?" where the initial outlay is said to be $200,000, rising to over $1m if the case is strongly contested. According to research conducted in Oxford, the average costs of libel proceedings in England are 140 times higher than the European average: Centre for Socio-Legal Studies, University of Oxford, *A Comparative Study of Costs in Defamation Proceedings Across Europe* (University of Oxford, December 2008), p. 3 (see further at para. 146 in the *MGN* case, below). In *MGN Limited (Daily Mirror)* v *United Kingdom* (ECtHR, 18 January 2011), the European Court of Human Rights held that the costs in the *Naomi Campbell* case – over £1m was claimed (a sum subsequently reduced in a settlement) while the damages were only £3500 – were excessive and constituted a breach of the defendant's freedom of expression under Article 10 of the European Convention on Human Rights. See, however, D Howarth, "The cost of libel actions: a sceptical note" (2011) *CLJ* 397, where it is said that too little is known for it to be possible to assert that costs in libel actions in England are too high. The methodology of the Oxford study (above) is also criticised. However, this uncertainty is itself a powerful deterrent for defendants, who may be unwilling to risk financial ruin in order to defend their right to publish what they believe to be the truth.

31 Laws of New York, 2008, Chapter 66.

32 Including a declaration that the defamation judgment will not be recognised in New York.

33 See California Statutes, 2009, Chapter 579 (amending ss 1716 and 1717 of the California Code of Civil Procedure); Utah, 78B-5-320 to 322 of the Utah Code Annotated 1953 (2010); Laws of Maryland, 2010, Chapter 658 (House Bill 193); Florida Statutes, 2009, ss 55.605 (2)(h); 55.6055; Illinois, 735 Ill. Comp. Stat. 5/12-621 (B)(7) (2009); 735 Ill. Comp. Stat. 5/2-209 (B-5) (2009), enacted August 2008.

Where the state legislatures led, Congress followed. In 2010, President Obama signed into law the SPEECH Act,[34] which bars the enforcement of foreign libel judgments unless the defendant would still have been liable under the First Amendment. Unusually, this measure was passed unanimously in both Houses of Congress, something which shows the strength of feeling on the matter.

The Act contains a congressional finding which reads as follows:

(1) The freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.

(2) Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.[35]

(3) These foreign defamation lawsuits not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit.

(4) The threat of the libel laws of some foreign countries is so dramatic that the United Nations Human Rights Committee examined the issue and indicated that in some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work. The advent of the internet and the international distribution of foreign media also create the danger that one country's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.

(5) Governments and courts of foreign countries scattered around the world have failed to curtail this practice of permitting libel lawsuits against United States persons within their courts, and foreign libel judgments inconsistent with United States first amendment protections are increasingly common.

Although Congress was too polite to say so expressly, this measure was principally aimed at the United Kingdom.

Like the state statutes, the SPEECH Act was enacted in response to the *Ehrenfeld* case. Rachel Ehrenfeld was an Israeli-American who wrote books on terrorism. In one of her books, she claimed that Khalid Mahfouz, an eminent Saudi businessman, was responsible for financing international terrorism. The book was published in the US. It seems that it was not marketed in the United Kingdom: Ehrenfeld claimed that neither she nor her publisher, an American firm, had ever taken steps to make it available there. However, a number of

34 Its official title is the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010.

35 This paragraph does not read easily. The phrases "free expression" and "first amendment to the Constitution of the United States" are phrasal or compound adjectives. The relevant nouns are respectively "rights" and "interest". The paragraph would have read better if hyphens had been used: "Some persons are obstructing the free-expression rights of United States authors and publishers, and in turn chilling the first-amendment-to-the-Constitution-of-the-United-States interest of the citizenry in receiving information on matters of importance".

copies were sold in England – the English judgment mentioned 23 – and the first chapter was available on an American website which could be accessed in England.[36]

Mahfouz and his two sons brought proceedings in England for libel against Ehrenfeld and her publisher. Jurisdiction was based on communication (publication) in England. Ehrenfeld did not defend – she said she did not have the financial resources to do so – and a default judgment was obtained. A declaration of falsity was made, and the claimants (Mahfouz and his two sons) were granted damages of £10,000 each. Ehrenfeld was also ordered to pay costs. The total sum awarded is said to have been $250,000.[37] In addition, an injunction was issued requiring Ehrenfeld and her publisher not to publish the material in England.

Ehrenfeld then brought proceedings in a federal court in New York (SDNY) for a declaration that, under federal and New York law, Mahfouz could not prevail on a libel claim against her based upon the statements at issue in the English action and that the English default judgment was unenforceable in the United States. Mahfouz claimed that the American courts lacked jurisdiction to hear the case. This claim was upheld by the New York Court of Appeals, to which the matter was referred by the Second Circuit: Mahfouz lacked sufficient contacts with New York to justify the assertion of jurisdiction.[38]

Mahfouz does not appear to have taken steps to enforce the judgment in the United States. Nevertheless, Ehrenfeld then began a political campaign, which was supported by media interests. The SPEECH Act and the state statutes were the fruit of this campaign.

Despite its great symbolic importance, the concrete effects of the SPEECH Act are probably not significant: even before any of the legislation was adopted, foreign libel judgments would probably have been unenforceable in the United States for reasons of public policy (unless the result would have been the same under the First Amendment).[39]

A fair balance

Although libel tourism is wrong, one should not go to the opposite extreme of preventing a claimant from bringing proceedings in a legitimate forum. Nor should one accept the view, championed by some American commentators, that the First Amendment should apply throughout the world, at least where the defendant is American: foreign courts with an acceptable basis of jurisdiction should be entitled to apply their *lex fori*, just as American courts do. As was said at the beginning of this article, a fair balance must be struck between the right to protect one's reputation and the right of free speech. This should apply with regard to jurisdiction as well as substantive law.

If the claimant sues the defendant in the latter's country (the country in which he or she is resident or domiciled),[40] the defendant can hardly complain about libel tourism. Likewise, claimants should have a right to defend their reputation in their own country, provided that the material is communicated (published) there.

If these two propositions are accepted, we are left with the situation in which the action is brought in a country in which neither party is resident or domiciled. This is quintessential

36 ABCNews.com.

37 A Specter and J Lieberman, "Foreign courts take aim at our free speech", *Wall Street Journal*, 14 July 2008.

38 *Ehrenfeld* v *Mahfouz* 9 NY 3d 501; 881 NE 2d 830; 851 NYS 2d 381 (2007).

39 *Telnikoff* v *Matusevitch* 347 Md 561; 702 A 2d 230 (Court of Appeals of Maryland, 1997). Although this judgment was based on the law of Maryland, the position would probably have been the same in other states.

40 In this paper, "domicile" is used in the sense in which it applies for the purpose of jurisdiction under the Brussels I Regulation. See n. 10, above.

libel-tourism territory, though even here the action should be permitted if the defendant specifically targeted that country.[41]

If the claimant is allowed to sue in his or her own country, in the defendant's country, or in a country that has been specially targeted, the claimant's interests will be protected. Anything more should be regarded as illegitimate and not allowed.

The solution – English law

As far as jurisdiction under English law is concerned,[42] the problem will be solved once the Defamation Bill becomes law. The provision dealing with jurisdiction is cl. 7(2), which reads:

> A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

Two points should be made: although this contains a test reminiscent of *forum non conveniens*, it is clearly stated that it is a rule of jurisdiction; secondly, it does not say that England and Wales must be the most appropriate place to hear the claimant's claim – it says that it must be the most appropriate place (of all the places in which the statement complained of has been published) in which to bring an action in respect of the statement.[43] This will solve the problem created by the rule in the *Duke of Brunswick's* case. Once the Bill is enacted, the "more ambitious" proposition rejected by Lord Steyn in *Berezovsky*[44] will become the law.[45]

To show how the new provision changes the law, we can give an example based on the facts of the Court of Appeal's decision in *King* v *Lewis*.[46] The claimant, Don King, was a boxing promoter. He was a US citizen, resident in the United States. There were three defendants. One was a British citizen, but all were resident in the United States. The alleged libel was a statement on a California-based website devoted to boxing. The statement was that King was anti-Semitic. The context of this statement appears to have had nothing to do with England. However, King, who had promoted a number of boxing matches in England and was well known in boxing circles there, sued in England. The action was challenged on the ground of *forum non conveniens*, but the Court of Appeal held that since he clearly had a reputation in England, he should be entitled to protect it there.

As it would have been difficult in practice to communicate the material in the US (and the rest of the world) without also communicating it in England, the effect of the judgment was that the right of US residents to put material about another US resident on the internet in the US would be judged by an English court applying English law: free speech for US residents in the United States would be governed by English law.

Under cl. 7(2), on the other hand, the question would not be whether England was the appropriate forum for the claimant's claim, but whether, of all the places in which the statement had been published (in effect, the whole world), England was clearly the most

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41 As to what might constitute "targeting", see paras (b) and (c) of the proposed draft for an EU rule on jurisdiction in defamation put forward below ("The solution – EU law").

42 The Bill will apply only to England and Wales: it will not apply in Northern Ireland.

43 Cl. 9 gives a wide definition to "statement".

44 See n. 20 above.

45 The only improvement to cl. 7 which might be suggested is that it should be made clear (as is done in cl. 6, the provision dealing with limitation of actions) that a statement that is substantially the same as the statement complained of should be regarded as the same statement.

46 [2004] EWCA Civ 1329.

appropriate place in which to bring an action in respect of the statement. There can be little doubt that the answer would be negative: the United States was more appropriate.

The solution – EU law

Clause 7(2) does not apply where the defendant is domiciled in the United Kingdom, another member state of the EU, or a contracting party to the Lugano Convention.[47] This is because EU law applies in these situations. Moreover, if – as proposed by the EU Commission[48] – the scope of the Regulation is widened to apply irrespective of domicile, cl. 7(2) will be deprived of effect. So it is essential to deal with the problem in the revised Brussels I Regulation.

There appear to be three ways in which this might be done. The first possibility would be to have a provision in the revised Regulation permitting member states to adopt their own jurisdictional requirements (in addition to those laid down in the Regulation) in the case of defamation. This might read:

> In order to curb abuse, Member States may impose additional jurisdictional limits on the right to bring claims in their courts arising out of violations of privacy and rights relating to personality including defamation.[49]

If adopted, this would allow cl. 7(2) of the Defamation Bill to apply even in situations governed by the Regulation. This would mean that libel tourism would be curbed in England in all situations. Such a result would be highly satisfactory from the English point of view; unfortunately, however, it might be regarded as going contrary to the EU policy of uniformity.

The second possibility would be to include a provision in the revised Regulation to the effect that the extension of the scope of the Regulation to cover defendants domiciled outside the EU would not apply in the case of defamation. This would mean that libel tourism would be curbed in England where the defendant was domiciled outside the EU (and the states that are parties to the Lugano Convention), but not where the defendant was domiciled within these states.

The third possibility would be to have an EU rule on libel tourism. This might look like the following:

> Except for Article 2(1), no provision of this Regulation conferring jurisdiction on the courts of a Member State shall apply to claims arising out of violations of privacy and rights relating to personality including defamation, unless, in addition to the requirements of the provision in question, either—
>
> (a) the claimant is domiciled in the country of the forum; or
>
> (b) the defendant deliberately took special steps to target the country of the forum so that the material was communicated there to a greater extent than would otherwise be the case; or
>
> (c) the material in question was communicated to a greater extent in the country of the forum than in any other country of the world.

Article 2(1) of the Regulation is the provision granting jurisdiction to the courts of the member state in which the defendant is domiciled. This would not be affected by the proposed amendment. The result of the proposal would, therefore, be to restrict libel proceedings to the courts of the defendant's domicile, to the courts of the claimant's

47 Cl. 7(1).

48 For the Commission proposal, see COM(2010) 748/3, 14/12/2010, para. 3.1.2 (p. 9).

49 The phrase "violations of privacy and rights relating to personality including defamation" is the formula used in the Rome II Regulation to exclude defamation: see Regulation 864/2007, OJ 2007, L199/40, Article 1(2)(g).

domicile (provided the other requirements of jurisdiction were satisfied) and the courts of a member state which was targeted (provided again that the other jurisdictional requirements were satisfied). Paragraph (b) gives a subjective definition of targeting, while paragraph (c) contains an objective definition. If adopted, this would curb libel tourism in all circumstances.

Conclusions

Once the Defamation Bill becomes law, the problem of libel tourism will be solved with regard to proceedings in England in so far as the matter lies within the jurisdiction of the United Kingdom. However, a solution will also have to be found at the EU level. Until this is done, the problem will remain.

Postscript

After the above was written, the CJEU gave judgment in the *eDate Advertising* case.[50] This concerned cross-border privacy injunctions against EU defendants in internet cases, but will also apply to internet libel actions. The court confirmed that, in internet cases, material is to be regarded as distributed (published) wherever it is or has been "accessible". This would allow the claimant to sue wherever the material can be downloaded – in practice, in any member state – but only for damage suffered in that member state. Secondly, it established a new head of jurisdiction (also derived from Article 5(3) of the Brussels I Regulation) which is available (so far) only in online libel or privacy cases. Under this, the claimant may bring proceedings (for the totality of the damage) in the member state in which the centre of the claimant's interests is located. This will normally correspond to the claimant's domicile or habitual residence, though it will be flexible enough to take account of his or her commercial and professional activities. However, in all proceedings regarding online publication (both libel and privacy), the publisher must not be subject to "stricter requirements" than apply under the law of the member state in which it is established. This rule, which is based on the Electronic Commerce Directive,[51] will give the publisher a significant level of protection. However, it applies only if the publisher is established in another EU state.

The judgment constitutes a significant advance. However, it is unfortunate that the CJEU did not abolish the rule that proceedings can be brought in any member state in which the online material is accessible: this ground of jurisdiction is open to abuse and, in view of the new ground, unnecessary.

50 Joined Cases C-509/09 and C-161/10 (25 October 2011, Grand Chamber).

51 Directive 2000/31/EC, OJ 2000 L 178, p. 1.

NILQ 63(1): 97–117

British defamation reform: an American perspective

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For many years, there have been considerable differences between US and British defamation law. The rift developed in the 1960s when the United States Supreme Court rendered its landmark decision in *New York Times* v *Sullivan*,[1] thereby constitutionalising the tort of defamation and making it much more difficult for public officials (and, ultimately, others) to recover for defamation.[2] Despite recent developments in Britain, in particular the House of Lords' decisions in *Reynolds* v *Times Newspapers*[3] and *Jameel* v *Wall Street Journal Europe SPRL*[4] there is still a wide gulf between US and English defamation law.

One aspect of the divide that may gall the British is the fact that US courts generally refuse to enforce British defamation judgments on public policy grounds.[5] I have heard British academics take great offence at the idea that US courts would reject British judgments as repugnant to public policy. And, of course, those who take offence have considerable arguments on their side. The usual expectation is that countries will enforce foreign judgments based on principles of comity.[6] Indeed, unless courts respect foreign judgments, they can hardly expect foreign courts to respect their own judgments.[7] A British academic argued at an academic conference a couple of years ago that there is no reason why the US should reject British defamation judgments. After all, Britain respects the rule of law, has a tradition of protecting freedom of expression, and has every right to expect that its judgments will be enforced in the United States.

My sense is that US courts have essentially gotten it right, and they should not enforce British defamation judgments. As I explain more fully below, in formulating its defamation

1 376 US 254 (1964).

2 See *New York Times* v *Sullivan*, 376 US 254 (1964).

3 [2001] 2 AC 127 (HL).

4 [2006] UKHL 44, [2007] 1 AC 359.

5 See *Bachchan* v *India Abroad Publications Inc.*, 154 Misc 2d 228, 585 NYS2d 661 (Sup Ct 1992); *Telnikoff* v *Matusevitch*, 347 Md 561, 702 A2d 230 (Md App 1997). US courts have also refused to enforce non-defamation foreign free speech judgments. See e.g. *Sarl Louis Feraud International* v *Viewfinder Inc.*, 406 F Supp 2d 274 (SDNY 2005) (refusing to enforce a default judgment by a French high-fashion clothing designer obtained in France against a US corporation for unauthorised use of intellectual property and unfair competition).

6 See *Hilton* v *Guyot*, 159 US 113, 144 (1895): "Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice."

7 Ibid.

rules, the US Supreme Court recognised that defamation litigation involves a balance between speech and reputation, and decided to strike a constitutional balance that cuts decidedly in favour of free expression. Based on the available evidence, if the US enforces British defamation judgments, it runs a very serious risk of completely undermining the *New York Times* decision and the pro-free-speech balance that was struck in that case. No society should be required to compromise its fundamental values in order to enforce a foreign judgment.

1 The evolution of US defamation law

Until 1964, US defamation law did not differ fundamentally from British defamation law. Before that time, defamation liability rules were determined largely by the individual states who were free to strike the balance they deemed appropriate between speech and protection of reputation, and the balance they struck could (if they wished) differ markedly from the balance struck in other states.[8]

Of course, for much of US history, the First Amendment to the United States Constitution (which contains the guarantee of free speech) did not apply to the states, and therefore the states possessed broad authority to determine the content of defamation liability rules. This situation changed in 1940 when the Supreme Court decided *Cantwell* v *Connecticut*[9] incorporating the First Amendment into the Fourteenth Amendment, and making it applicable to the states. Nevertheless, in its post-Cantwell decisions, the court flatly rejected the idea that defamatory speech was entitled to any constitutional protection. For example, in *Chaplinsky* v *New Hampshire*[10] the court held that there are:

> certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[11]

Likewise in *Smith* v *People of the State of California*[12] the court held that the First Amendment does not "prohibit the States from abridging free speech by the enactment of defamation or libel laws."[13]

Until the decision in the *New York Times* case, most US states continued to adhere to the common law and to (more or less) follow British precedent.[14] As a result, for nearly two centuries, the differences between US and British defamation law were not great. Of course, because the US eventually expanded to 50 states, and each state was free to define the tort of defamation in the way that it chose, there were undoubtedly variances between the states. However, on balance, US defamation law was not hugely different than British defamation law.

US divergence from British law came in two landmark decisions handed down by the United States Supreme Court in 1964. In the first, *Garrison* v *Louisiana*[15] the court flatly rejected the idea that individuals (or the media, for that matter) could be criminally

8 See *New York Times* v *Sullivan*, 376 US 254 (1964).

9 310 US 296, 303 (1940).

10 315 US 568 (1942).

11 Ibid. at 571–2.

12 361 US 147, 157 n. 2 (1959).

13 Ibid.

14 See R L Weaver, A T Kenyon, D F Partlett and C P Walker, *The Right to Speak Ill: Defamation, free speech and reputation* (Durham NC: Carolina Academic Press 2006), pp. 35–6 (hereafter *The Right to Speak Ill*).

15 379 US 64 (1964).

prosecuted for libellous statements. *Garrison* was followed by the *New York Times* decision which imposed constitutional restrictions on the tort of defamation for the first time. In particular, the court held that public officials could not recover for defamation unless they could prove that the defendant had acted with "actual malice."[16] The court defined actual malice to mean that the defendant knew that the defamatory statement was false, or had acted with reckless disregard for whether it was true or false.[17]

In subsequent cases, the Court held that "public figures" were also required to satisfy the actual malice standard in order to recover in a defamation case.[18] Although the court refused to apply the actual malice standard to defamation actions brought by private individuals, it did hold that enhanced protections should apply to them, depending on whether the individuals were regarded as "purely private individuals"[19] or as private individuals not involved in matters of public interest.[20]

In order to understand the social and constitutional implications of the *New York Times* decision, it is important to realise that the case grew out of the social ferment of the 1960s, and the civil rights protests that occurred during that era. The lawsuit was filed in response to an advertisement published in the *New York Times*, which discussed an incident that occurred between police and students in Montgomery, Alabama, and allegedly defamed the police commissioner, Sullivan.[21] Even though only 394 copies of the advertisement were circulated in Alabama,[22] a jury awarded Sullivan $500,000 in damages.[23] It did so under an

16 376 US, at 277: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."

17 Ibid. at 279–80: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

18 See *Curtis Publishing Co.* v *Butts*, 388 US 130, 154–5 (1967); *Associated Press* v *Walker*, 388 US 130, 154–5 (1967): "[T]he public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. [B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements. [L]ibel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard."

19 See *Dun & Bradstreet Inc.* v *Greenmoss Builders Inc.*, 472 US 749 (1985): holding that states retained substantial discretion regarding the liability standards to be applied to defamation actions brought by purely private individuals.

20 See *Gertz* v *Robert Welch Inc.*, 418 US 323 (1974): holding that private individuals could recover in a defamation action based on standards lower than the actual malice standard.

21 The advertisement, entitled "Heed Their Rising Voices", was signed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and stated that "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal." Among other things, the advertisement alleged that: "thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity" and "are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern [freedom]". The advertisement also referred to a "wave of terror" in the South, and concluded with an appeal for money to support various civil rights causes, including "the struggle for the right to vote" and the "legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery".

22 *Sullivan*, 361 US at 260, note 3.

23 Ibid. at 267.

Alabama law that required the defendant to prove the truth of its assertions, and that allowed the jury to presume damages without any showing of pecuniary injury.[24]

In reversing the judgment, the court rejected the common law presumption of damages, and struck the balance between speech and reputation firmly in favour of freedom of expression.[25] The court emphasised that the nation had made "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open", and that speech on public issues "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials".[26] Indeed, the court noted that the advertisement in question had been placed as part of an "expression of grievance and protest on one of the major public issues of our time."[27] Since a certain amount of erroneous statement is inevitable in public debate, the court held that constitutional liability standards must be limited in order to provide "breathing space" for freedom of expression.[28]

In order to create that breathing space, and avoid the potential "chilling effect" of defamation judgments, the court articulated the actual malice standard. The court's stated intent was to make it much more difficult for public officials to recover for injury to reputation. The court took particular note regarding the repressive effect of earlier seditious libel prosecutions, and emphasised that libel judgments could have a similarly repressive effect on freedom of expression.[29] In the court's view, the mere fact that an official's reputation had suffered injury "affords no more warrant for repressing speech".[30]

2 The contrast with British defamation law

With the decision in the *New York Times* case, the US had moved decisively away from British defamation law. At the time, British defamation law was decidedly more pro-plaintiff, and tended to cut the balance between reputation and freedom of expression decisively in favour of reputation.[31] As a British commentator noted, "English law has in the main been too jealous of defending the reputations of politicians and insufficiently alert to the legitimate interests of the electorate in consuming political information about those who govern us."[32]

Given the necessity for brevity, I will make no effort to summarise the state of British defamation at the time of the *New York Times* decision. That is done quite competently and fully elsewhere. It is fair to say that, while British law provided some protections for speech, those protections were decidedly more limited than the expansive protections provided by the *New York Times* decision. Indeed, until the decisions in *Reynolds* and *Jameel*, the chasm between US and British defamation law was quite wide.

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24 *Sullivan*, 361 US at 260, note 3.

25 Ibid. at 270–1.

26 Ibid. at 271.

27 Ibid.

28 Ibid. 271–2.

29 Ibid. at 273: "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment."

30 Ibid. at 272.

31 Ibid. at 17–18.

32 I Loveland, *Political Libels* (Oxford: Hart Publishing 2000), p. ix.

3 The impact of the *New York Times* decision and the contrast to the United Kingdom

Because of the *New York Times* decision, the US media began to function quite differently than the British media. For those familiar with the British press, this observation may seem counter-intuitive. Indeed, I taught at the University of Leeds in the late 1980s, and even I began to question whether there was a meaningful difference between the way in which the British media functioned and the US media functioned. Indeed, if anything (as I discuss below) I might have argued that the British press was *more* aggressive than the US press.

At the time, there was considerable debate regarding the content of US defamation law, and major debates about whether the *New York Times* decision was providing enough protection for speech. Indeed, the Libel Resource Defense Center was disseminating information suggesting that defamation litigation and defamation judgments were on the rise in the United States[33] and also suggesting that defamation judgments were being awarded in the United States with much higher frequency and in much higher amounts.[34]

Because of the data, as well as because of a perception that the cost of defamation litigation was skyrocketing in the United States,[35] some very thoughtful commentators began to express serious concerns about the state of US defamation law. Professor Richard Epstein of the University of Chicago Law School proclaimed that "the onslaught of defamation actions is greater in number and severity than it was in the 'bad old days' of common law libel".[36] Professor Rodney Smolla (now President of Furman University), stated that "an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money".[37] As a result, some commentators began to view the *New York Times* decision as not providing sufficient protection for the US media, and to argue that US law should provide even greater protection to newspapers and broadcasters. One commentator suggested that public officials not be allowed to recover in defamation actions unless they can prove that the defendant intentionally defamed them (in other words, a reckless disregard for the truth would be insufficient).[38] Others argued for a complete ban on defamation actions by public officials.[39]

During my year at Leeds, I frequently read British newspapers, and was struck by the seeming aggressiveness and boldness of the British press, although not always the accuracy.[40] As a result, I began to think about the seeming inconsistency between what I thought that I was seeing in the United Kingdom, and the concerns being raised by prominent US commentators. The *New York Times* decision was premised on the idea that harsh defamation laws would chill reporting and have an undesirable impact on the press and its efforts to report on matters of public interest. If the British media could function

33 See R A Epstein, "Was *New York Times* v *Sullivan* wrong?" (1986) 53 *University of Chicago Law Review* 782.

34 Libel Defense Resource Center, press release 1 (26 September 1991).

35 See *Herbert* v *Lando*, 443 US 159 (1973): suggesting that $6m was spent on discovery in a defamation case.

36 Epstein, "*New York Times*", n. 33 above, p. 783.

37 R A Smolla, "Let the author beware: the rejuvenation of the American law of libel" (1983) 132 *University of Pennsylvania Law Review* 1.

38 See M Garbus, "25 years after '*Times* v *Sullivan*': what remains to be done" (1989) 201 *NYLJ* 2–3 (attributing the idea to Professor Theodore Silver).

39 See ibid; A Lewis, "*New York Times* v *Sullivan* reconsidered: time to return to 'the central meaning of the First Amendment'" (1983) 83 *Columbia Law Review* 603, p. 625

40 I stopped reading one of the "quality" newspapers after it published a completely hopeless piece on the US Constitution. My letter to the editor produced only a curt reply: "Thank you very much. Unfortunately, we will be unable to publish your letter."

under far less protective defamation laws, and still report quite aggressively and boldly, then had the United States Supreme Court simply "got it wrong" in the *New York Times* decision? Do we really need to be fearful about the chilling effect of defamation law on free speech? Or was there some other factor that caused the British press to function far more differently than the US press?

In an effort to resolve the seeming inconsistency between the concerns being raised in the United States, and what I thought that I perceived in the United Kingdom, I began a multi-year empirical project designed to gain greater insight into how the media was functioning in both the United States and the United Kingdom. The goal was to interview journalists, editors, producers and defamation lawyers, in an attempt to learn more about what they decide to publish, and, more importantly, what they decide not to publish. Over time, the research project was expanded to Australia.

When the project began, although the *New York Times* decision was settled law in the United States, both England and Australia were about to undergo major upheavals in the state of their defamation law. In England, neither *Reynolds* nor *Jameel* had been decided, and therefore there had been no extension of common law qualified privilege. In addition, although the developments in Australia preceded *Reynolds*, they had not occurred yet either, and the developments in Australia were momentous. Initially, the Australian High Court decided two cases articulating an "implied" constitutional right to free expression[41] (interesting decisions since the framers of the Australian Constitution had deliberately chosen not to include a Bill of Rights, or protections for free expression, in the Australian Constitution),[42] and then articulated constitutional protections against defamation liability in *Theophanous* v *The Herald & Weekly Times Ltd.*[43] The Australian High Court followed these decisions with its landmark decision in *Lange* v *Australian Broadcasting Corporation*[44] which extended common law qualified privilege to matters relating to political and governmental matters. Lange provided a defence against defamation liability when the plaintiff had reasonable grounds to believe that the defamatory allegations were true, did not believe that they were false, and had made proper inquiry to verify the allegations.[45]

Even though the interviews began before either *Reynolds* or *Lange* was decided, they continued over enough years to allow conclusions to be drawn regarding the impact of those decisions. Indeed, in Australia, interviews were conducted before the *Theophanous* decision, after that decision but before *Lange*, and then after *Lange*. As a result, the interviews produced a solid basis for evaluating the impact of those decisions. In the United Kingdom, interviews were conducted before *Reynolds* was decided, as well as a few years afterwards, but have not been conducted following the decision in *Jameel*. As a result, although it is possible to draw conclusions about how *Reynolds* affected British media practices, the evidence is incomplete regarding *Jameel*. I hope to conduct the post-*Jameel* interviews in the near future.

The early interviews (in other words, the interviews that were conducted prior to *Reynolds* and *Lange*) suggested that many of my impressions and concerns were simply wrong. After conducting extensive interviews in both the United States and the United Kingdom, I found that the British media was nowhere near as aggressive or bold as I had

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41 See *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; see also *Stephens* v *Western Australian Newspapers Ltd* (1994) 182 CLR 211.

42 See R L Weaver and K Boehringer, "Implied rights and the Australian Constitution: a modified *New York Times Inc.* v *Sullivan* goes down under" (1998) 8 *Seton Hall Constitutional Law Journal* 10.

43 (1994) 182 CLR 104.

44 189 CLR 520, 562–4 (Aust HC 1997).

45 See *The Right to Speak Ill*, n. 14 above, pp. 82–7.

assumed, and indeed that its reporting was significantly affected by British defamation law.[46] By contrast, any fears that I might have had regarding the impact of American defamation law on the US media were almost completely dissipated.[47] Indeed, as the interviews continued (over a period of years), my research ultimately confirmed that the underpinnings of the *New York Times* decision were essentially correct. In other words, although the British media seemed quite chilled by the possibility of defamation liability, US media outlets were not chilled at all.[48]

A. General statements regarding the impact of defamation laws on reporting

At the outset of each interview, I usually allowed the interviewee to provide an overview statement regarding the effect of defamation law on his/her reporting. Quite frankly, I did not expect to learn much from these overview statements. Indeed, I expected both the British and US media to complain about the oppressiveness of the defamation laws to which they were subject. On this score, my expectation was fulfilled in the English interviews. A solicitor for *The Times* (London) complained that British law gave plaintiffs an "easy run" by making papers "guilty [of defamation] until proven innocent".[49] An editor complained that even quite small errors could lead to judgments.[50] A programming director for Thames Television stated that defamation cases are high risk because juries almost always find against media defendants, even though only the strongest cases are ever litigated, and often render relatively large judgments.[51]

Although I expected US interviewees to feel similarly oppressed by US defamation law, this expectation turned out to be unfounded. US interviewees expressed far less concern about the possibility of defamation litigation than their British counterparts. For example, a presenter for National Public Radio's *Morning Edition* flatly stated that defamation laws had no impact on his coverage.[52] Other interviewees expressed similar sentiments, including reporters for national news programs and local television stations.[53] In fact, only one interviewee, a lawyer for a major network, expressed any concerns at all about the impact of US defamation laws, and those concerns were quite limited.[54]

B. Suits and threats of suit

Of course, the general questions could reveal only so much, and I was much more focused on how the media would respond to more pointed questions on a variety of topics. When I began to probe with more specific questions about how the media

46 See *The Right to Speak Ill*, n. 14 above, pp. 131–50.

47 Ibid. pp. 183–200.

48 Ibid. pp. 131–200.

49 Interview with anonymous solicitor for *The Times* (London) (29 May 1992) (hereafter Anonymous *Times* (London) Solicitor Interview).

50 Interview with an anonymous editor for *The Guardian* (29 May 1992) (hereinafter Anonymous *Guardian* Editor Interview).

51 Interview with anonymous programming director for Thames Television (London) (4 June 1992) (hereafter Anonymous Thames Director Interview).

52 Interview with anonymous presenter, National Public Radio's *Morning Edition*, at Washington DC (23 July 1992) (hereafter Anonymous NPR Presenter Interview); telephone interview with anonymous *60 Minutes* producer (13 October 1992) (hereafter Anonymous *60 Minutes* Producer Interview).

53 Telephone interview with anonymous NBC *Nightly News* producer (22 September 1992) (hereafter Anonymous NBC *Nightly News* Producer Interview); telephone interview with anonymous local news anchor in Louisville KY (8 July 1992) (hereafter Anonymous Local News Anchor Interview); telephone interview with anonymous CBS vice president (hereafter Anonymous CBS Vice President Interview) (22 September 1992).

54 See *The Right to Speak Ill*, n. 14 above, p. 185.

functioned, it rapidly became clear that the general statements made by the British media were backed up by considerable substance. At the time, British newspapers and broadcasters were receiving a fairly large number of defamation complaints. Even quality newspapers, which were less inclined to sensationalise, regularly received threatening letters from solicitors regarding their coverage. These letters could average two or more per week.[55] If the paper or broadcaster felt that a statement was inaccurate, it would usually offer to retract the statement[56] and might even offer a small damages payment.[57] Some papers made such retractions in response to about one-third of the letters they received.[58] Of course, some matters could not be settled, and about 5 to 10 per cent of all letters ultimately resulted in litigation.[59]

By contrast, the reason that US newspapers and broadcasters were less concerned about defamation liability was because they were being threatened with suit, and actually sued, far less frequently than their British counterparts.[60] The *Louisville Courier-Journal* was, for example, being sued only once every two years or so.[61] The *Washington Post* was receiving only three or four letters a year from lawyers threatening suit,[62] and was rarely sued.[63] Although the *New York Times* might have received one letter a month from lawyers, it was sued only about once a year.[64] A presenter for a national radio program was simply unaware of whether his broadcasting corporation had ever received threatening letters or had been sued.[65] One of the executive producers for *60 Minutes*, an investigative news program, had only been sued twice in his eight years with that program.[66]

C. The involvement of lawyers

The threat of defamation actions, and more importantly the threat of having to pay costs if a media outlet lost a defamation action, had a major impact on day-to-day news coverage in the United Kingdom. As a rule, the British media found that the most efficient way to avoid retractions and damages settlements was by acting with caution. Although newspapers and broadcasters could insure themselves against defamation losses, few found it feasible to

55 Anonymous *Times* (London) Solicitor Interview, n. 49 above (2–3 letters a fortnight, and a writ a month); Anonymous Legal Manager, News International (London) (4 June 1992) (hereafter Anonymous News International Legal Manager) (3–4 letters per week); Anonymous *Guardian* Editor Interview, n. 50 above (100–120 letters from solicitors per year); Anonymous Lawyer, Thames Television (London) (4 June 1992).

56 Ibid.

57 Ibid.

58 Anonymous *Guardian* Editor Interview, n. 50 above. However, if Thames Television found that they had an adequate defence, and were able to convince opposing solicitors of this fact, in nearly 99% of all cases. Anonymous Thames Director Interview, n. 51 above.

59 Anonymous News International Legal Manager, n. 55 above; Anonymous Thames Director Interview, n. 51 above.

60 Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous Local News Anchor Interview, n. 53 above (2 letters from lawyers a year and hardly ever sued); Anonymous CBS Vice President Interview, n. 53 above.

61 Interview with anonymous *Louisville Courier-Journal* editor, in Louisville KY (1 July 1992) (hereafter Anonymous *Courier-Journal Editor* Interview).

62 Telephone interview with anonymous *Washington Post* counsel (6 July 1992) (hereafter Anonymous *Washington Post* Counsel Interview).

63 Ibid.

64 Telephone interview with Anonymous *New York Times* legal counsel (7 July 1992) (hereafter Anonymous *NY Times* Legal Counsel Interview).

65 Anonymous NPR Presenter Interview, n. 52 above. NPR receives threatening letters very infrequently, perhaps once a year. Anonymous Interview with NPR counsel at Washington DC (23 July 1992) (hereafter Anonymous NPR Counsel Interview).

66 Anonymous *60 Minutes* Producer Interview, , n. 52 above.

do so.[67] Insurance was often expensive[68] and usually carried a very high deductible.[69] So, virtually all British publishers found that the best way to protect themselves against liability was through careful reporting and careful review practices.

The thoroughness of the British review process was startling by American standards. Most newspapers and broadcasters employed teams of lawyers who would review each day's paper or programme for material that might be defamatory. *The Guardian*, for example, had several lawyers who would review each day's paper before it was published.[70] *The Times* had an in-house staff of three solicitors who performed this task, and also employed a barrister who came in during the evening to make spot checks.[71] Thames Television had two lawyers who spent up to 70 per cent of their time on defamation issues.[72] These two lawyers could not review all programmes, but they tried to review as many as they could, and they made a special point of reviewing high-risk investigative programmes.[73]

The situation in the US was markedly different. Unlike their British counterparts, US newspapers and broadcasters did not have teams of lawyers that combed through copy searching for material that might be defamatory,[74] and did not seem so focused on avoiding defamation liability. Most US papers and broadcasters allowed editors and producers to decide for themselves whether material was potentially defamatory,[75] and to also decide for themselves whether to consult or involve counsel.[76] If an editor or producer felt comfortable with a piece, he or she might simply decide to publish or air it without any input from counsel.[77] Undoubtedly, this more nonchalant approach (compared to the British media) related to the fact that the US newspapers and broadcasters were threatened with defamation suits and actually sued far less frequently than their British counterparts.

D. The "legally admissible evidence" standard

Of course, the differences noted thus far (regarding threats of litigation, actual litigation and the involvement of lawyers in the editorial process) are important, but these differences take us only so far in evaluating how the British and American media were functioning. However, as the interviews continued, there was mounting evidence of major differences in the reporting process, as well as in terms of outputs.

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67 Anonymous *Guardian* Editor Interview, n. 50 above.

68 Ibid.

69 Anonymous Thames Director Interview, n. 51 above.

70 Anonymous *Guardian* Editor Interview, n. 50 above.

71 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above (News International which controls a number of papers including *The Sun* and *The Times* also has a lawyer who comes in at night to review "every sentence with legal danger").

72 Anonymous Thames Director Interview, n. 51 above.

73 Ibid.

74 There are some exceptions. CBS routinely asks legal counsel to review investigative programs. Anonymous CBS Vice President Interview, n. 53 above. In addition, those who publish internationally may be more inclined to use pre-publication lawyer reviews as a matter of routine. Telephone interview with an anonymous staff counsel for Cable News Network (CNN) (9 July 1992) (hereinafter Anonymous CNN Counsel Interview). But they do so because of the risk under foreign laws. Ibid.

75 Telephone Interview with Anonymous Legal Counsel for Central Broadcasting System (CBS) 12 October 1992) (hereafter Anonymous CBS Legal Counsel Interview); Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous *Washington Post* Counsel Interview, n. 62 above; Anonymous Local News Anchor Interview, n. 53 above; Anonymous CBS Vice President Interview, n. 53 above; Anonymous *Washington Post* Counsel Interview, n. 62 above.

76 Ibid.

77 Ibid.

In Britain, if a lawyer flagged a piece as "potentially defamatory", at most media outlets, the lawyer's action would then trigger a secondary review process in which newspapers, editors (and sometimes lawyers) would meet with the reporters who wrote the story in an effort to determine the basis for allegations.[78] Throughout the process, the focus was on legal sufficiency.[79] Counsel for News International stated that he focused on three basic issues: 1) Is the statement true? 2) Can he prove it? 3) Is the person mentioned likely to file suit?[80] Other organisations used similar criteria.[81]

All British media organisations indicated that, as a matter of journalistic ethics, they did not want to print or broadcast anything that was untrue. However, all stated that they were not able to publish everything that they believed was true. Most focused on whether, if it was called on to account for a story, their organisation would have "legally admissible evidence" with which to defend itself.[82] At Thames Television, one of the solicitors would meet with the editor and reporter in an attempt to determine the basis for any allegations that were being made.[83] This was a cooperative process under which the solicitor tried to understand and accommodate the needs of programme makers.[84] However, the process was also pragmatic. Editors considered whether, even if evidence was admissible, the sources were willing to go "into the box" and testify. Editors might be reluctant to rely on information learned from a source that they could not expose[85] or who was likely to go "wobbly" on them.[86] Editors would also consider whether information was learned under the "lobby system" and was therefore deemed to be off the record.[87]

After considering this melange of factors, editors would decide whether to publish. This decision was often a "team" decision which involved the editor and the reporter as well as, perhaps, the head of the department.[88] This process could produce a variety of results. Although editors sometimes decided to scrap a piece,[89] this option was rarely chosen.[90] More commonly, editors tried to save a piece by rewriting or altering it in a way that would limit their legal exposure.[91] In rewriting a piece, editors might delete segments that were not legally supportable,[92] attempt to present the subject in a more balanced fashion,[93] or change

78 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above.

79 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above.

80 Anonymous News International Legal Manager, n. 55 above.

81 Anonymous Thames Director Interview, n. 55 above.

82 Ibid.

83 Ibid.

84 Ibid.

85 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above.

86 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

87 Anonymous News International Legal Manager, n. 55 above.

88 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

89 Anonymous *Guardian* Editor Interview, n. 50 above.

90 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above (the interviewee could only remember one instance in which Thames Television was forced to "kill" a programme in its entirety).

91 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous *Guardian* Editor Interview, n. 50 above.

92 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

93 Anonymous Thames Director Interview, n. 51 above.

a statement of fact to an opinion in order to make the statement a "comment" and thereby invoke the privilege of fair comment.[94]

When US editors or producers involved their lawyers, they used a process that was similar to that used by their English counterparts. The attorney examined the statement, and examined the reporter's sources in an effort to ascertain whether there was adequate evidence to support the assertion.[95] In some instances, the attorney might even have urged the paper to do additional investigative work.[96] In other instances, the lawyer might have recommended that part of a piece be rewritten or softened,[97] or that an effort be made to present something in a more balanced way.[98] Nevertheless, if there was adequate evidence to support a claim, something would have been printed or broadcast even though it contained hard-hitting allegations.[99]

Thus, the possibility of defamation suits had some impact on reporting in the United States. However, most interviewees indicated that the impact was minimal. Few editors or producers reported that they had ever killed a story for fear of defamation liability.[100] Moreover, few indicated that they were unable to make a statement for fear of liability. They were often reluctant to rely entirely on confidential sources.[101] In addition, if they had inadequate support for a piece, they might seek additional support.[102] Alternatively, they might soften a statement[103] or attempt to present it in a more balanced way. But there was a very good chance that the allegation would still be made. Moreover, the overall focus was on journalistic integrity rather than on legal sufficiency.

E. The impact of particularly litigious individuals

Even though few stories were scrapped, Britain's defamation laws took an inevitable toll on reporting, especially when rich and litigious individuals were involved. The media would print allegations against public officials and others, but they rarely did so except when there was strong supporting evidence.[104] One editor referred to the Mills tidal basin incident that occurred in the United States (where then-Congressman Wilbur Mills was found drunk and naked, late at night, with a stripper, in the tidal basin next to the Jefferson Memorial).[105] The editor suggested that the facts in that case were so strong that, had a similar incident occurred in Britain, it would have been widely reported and commented on. Indeed, the British Wilbur would probably have been the subject of much derisive comment.

However, a very different picture emerges when British editors were asked about a case like Watergate. That case was slow developing, and was initially based on inside sources. In some instances sources were unknown even to the reporters themselves and were unwilling to be publicly revealed. Thus, it was difficult for editors and publishers to produce legally

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94 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

95 Anonymous *Washington Post* Counsel Interview, n. 62 above; Anonymous Local News Anchor Interview, n. 53 above.

96 Anonymous *60 Minutes* Producer Interview, n. 52 above; Anonymous CBS Legal Counsel Interview, n. 75 above.

97 Ibid.

98 Anonymous *60 Minutes* Producer Interview, n. 52 above.

99 Ibid. Anonymous CBS Legal Counsel Interview, n. 75 above.

100 Anonymous *60 Minutes* Producer Interview, n. 53 above.

101 Anonymous CBS Legal Counsel Interview, n. 75 above.

102 Ibid.

103 Ibid.

104 Anonymous *Guardian* Editor Interview, n. 50 above.

105 Ibid.

admissible evidence substantiating their allegations of misconduct. Nevertheless, the Watergate story was published in the United States. Would the same type of story have been reported in England? British editors and defamation lawyers uniformly stated that, without legally admissible evidence, they would have been unable to print such allegations.[106] Even *The Sun* newspaper, one of the tabloids, suggested that it would have been "reluctant to run" such a story.[107] Moreover, if a libel suit had been brought, news sources might have "dried up". The sources, who in the case of Watergate were governmental insiders, might have feared retaliation and refused to provide further information. As a result, the investigation might not have continued to conclusion and the full extent of the scandal might never have been revealed.

In deciding whether to publish, British editors routinely considered whether the subject of the article was someone who was likely to sue.[108] Some individuals were regarded as particularly litigious[109] and British editors were less inclined to take risks as to these individuals.[110] The chilling effect of British defamation law was dramatically revealed by the case of Robert Maxwell, the British publishing magnate who died mysteriously off the coast of the Canary Islands in 1991. Following his death, it was discovered that Maxwell had suffered serious financial reverses, and had looted his companies, thereby causing major losses to British pensioners. Some suggested that Maxwell's financial problems would have come to light earlier except for Maxwell's litigious nature which caused the British press to be reluctant to make allegations against him.[111]

British editors confirmed that Maxwell's litigious nature affected their reporting on him.[112] British editors and lawyers flatly stated that they were well aware of Maxwell's litigious nature[113] and that they were quite careful about reporting on him.[114] One defamation lawyer stated that the British media was "scared" of Maxwell because he used the libel laws "savagely".[115] Another lawyer indicated that Maxwell routinely demanded proof that "one hundred per cent" of all allegations made against Maxwell were accurate.[116] A solicitor for the London *Times* stated that Mr Maxwell was quick to serve defamation writs, and that he would do so if the newspaper got so much as a word wrong.[117] The British media made statements suggesting that Maxwell's threats had a

106 Anonymous *Guardian* Editor Interview, n. 50 above.

107 Anonymous News International Legal Manager, n. 55 above.

108 Ibid.

109 Ibid.

110 Anonymous Thames Director Interview n. 51 above.

111 Columnist Anthony Lewis argued that Maxwell evaded "proper scrutiny" because of "Britain's stringent libel law, which makes it dangerous to write critically about a scoundrel like Maxwell. Whenever anyone suggested wrongdoing by Maxwell, he sued . . . The threat of a libel suit is so potent in silencing critics in Britain because the law is so favorable to libel plaintiffs. Nearly everyone who sues the press gets a cash settlement or wins a jury verdict at trial – and keeps it on appeal." A Lewis, "Britain's plaintiff-friendly libel laws shielded Maxwell's scams from scrutiny", *LA Daily Journal*, 16 December 1991, p. 2; see R O'Connor, "The debate over Britain's libel laws: discussions have intensified since the death of Robert Maxwell", *Editor and Publisher*, 29 February 1992, p. 22.

112 Ibid.

113 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

114 Ibid.

115 Anonymous Thames Director Interview, n. 51 above; see also Anonymous News International Legal Manager, n. 55 above (media was "afraid" of Maxwell).

116 Anonymous News International Legal Manager, n. 55 above.

117 Ibid.

chilling effect which prevented them from publishing allegations that could not be easily proved in court.[118]

Publishers would make allegations against Maxwell when they had strong evidence to support their allegations. But, when the media lacked compelling proof, it would not publish. Thus, the media withheld items that would have been aired against someone who was less litigious.[119] For example, editors were much more willing to print allegations against Rupert Murdoch, another British publishing magnate who was regarded as less litigious.[120] The net effect is that many things that were known about Maxwell went unreported, including his financial reverses.[121] Although Maxwell is now dead, later interviews confirmed that there were other litigious individuals about whom the British media would report gingerly, if at all.[122]

Consistent with the much lower level of defamation litigation, there was no Maxwell parallel in the United States. In other words, there was no particularly litigious individual who scared newspapers and stunted their coverage of him.[123] Some media reported that they received threats designed to discourage them from airing allegations.[124] For example, CBS's *60 Minutes* was routinely threatened that it would be sued if it aired particular stories.[125] But those threats did not have much effect on coverage.[126] In rare instances, editors would soften or alter stories to protect themselves, but they rarely killed a story.[127] Moreover, they did not seem to fear any particular individual like the British media feared Maxwell.[128] Interestingly, while Maxwell was alive, the US media did not fear him, and he made no attempt to bully the US press in the way that he did the British press.

F. The absence of a plaintiffs' defamation bar

Reflective of the lower level of defamation litigation in the United States, one simple fact stands out: lawyers who specialise in defamation litigation are virtually non-existent in the United States. In some respects, this fact is absolutely astounding. In many other countries, the United States is perceived as an extremely litigious country, and this perception of litigiousness relates primarily to torts litigation. Plaintiffs' lawyers in the United States can take cases on a contingency fee basis, and therefore have an incentive to take good cases even though the plaintiff may be impecunious. So, if there was a significant amount of defamation litigation, and the litigation were economically worthwhile, one would expect to find a significant number of plaintiff defamation lawyers.

So, why are plaintiffs' defamation lawyers a rare and endangered species in the United States? In fact, there is very little incentive for a lawyer to take a defamation case on a contingency fee basis. The *New York Times* decision creates a daunting standard of proof,

118 Anonymous News International Legal Manager, n. 55 above.

119 Ibid.

120 Anonymous Thames Director Interview, n. 51 above.

121 Ibid.

122 See *The Right to Speak Ill*, n. 14 above, pp. 233–4.

123 Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous CBS Vice President Interview, n. 53 above.

124 Anonymous Local News Anchor Interview, n. 53 above.

125 Anonymous *60 Minutes* Producer Interview, n. 52 above.

126 Anonymous *60 Minutes* Producer Interview, n. 52 above; Anonymous Local News Anchor Interview, n. 53 above. Again, the one major exception is provided by those who publish internationally. CNN will consider an individual's litigious nature in deciding what to publish. Anonymous CNN Counsel Interview, n. 74 above.

127 Ibid.

128 Ibid.

and the burden falls squarely on the plaintiff.[129] Moreover, that decision limits the quantity of damages that an individual can receive, and precludes the imposition of punitive damages.[130] Finally, defamation judgments are subject to independent appellate review.[131] As a result, even when an attorney is able to obtain a trial court judgment in a defamation case, the judgment is usually overturned on appeal. Even for plaintiffs who are not subject to the actual malice standard, post-*New York Times* decisions limit the scope of recovery in defamation cases, and a lawyer simply cannot expect to obtain a huge award in a defamation case that is anything like one that might be obtained in a personal injury case. As a result, most plaintiffs' lawyers find greener pastures outside of the defamation arena.

Of course, attorneys could agree to handle defamation cases on a fee-for-service basis. However, few plaintiffs have any real incentive to pay out of pocket to finance defamation litigation. Such litigation is expensive. And, under the American rule, the prevailing party cannot recover its costs. So, the plaintiff might spend enormous amounts of money out of pocket and the possible financial returns are likely to be minimal. Moreover, the allegedly defamatory allegations will be front page news for years until the case is resolved. Few plaintiffs willingly make such an investment under such circumstances.

The *New York Times* decision does not prevent all defamation litigation. Some plaintiffs' lawyers do file defamation lawsuits on behalf of outraged plaintiffs. However, the attorney is usually someone who does not understand the intricacies of defamation law, or the economics of defamation litigation. Once the lawyer begins to learn more about defamation litigation today, the case usually disappears.

G. Costs: the three hundred pound gorilla

Of course, one of the critical differences between the US and Britain is the British rule requiring the losing party in litigation to pay the other party's costs. In the US, by contrast, costs are rarely recoverable. In a British defamation case, legal representatives' fees can be quite high, and indeed can dwarf the defamation damage award. As a result, Britain's defamation rules do not function in isolation, but rather operate in conjunction with the cost rules.[132] Moreover, as noted earlier, the media often feared that it was "required to prove that it got everything right or it faced the prospect of being ordered to pay costs".

Costs rule have had a significant effect on publication decisions.[133] In deciding what to publish, the media considers the likelihood that the plaintiff will sue and whether the defendant has the resources to fund a legal action. Even people of moderate means might legitimately be concerned about the financial impact of having to pay costs and may not have the means to fight back. As a result, the media can use lawyers to delay and intimidate a person of moderate means who is aggrieved by an article. In contrast, the rich and powerful can use the costs rule to intimidate the media. The rich know that the media often makes commercial decisions about what to publish and whether to settle suits, and they can use this information to bully the media into submission. If a case involves an important political story, and the media believes that it has "got it right" and has the evidence to support the story, then the media will as a general rule publish the allegations. Otherwise, the cost calculations can influence publication decisions.

129 See *New York Times* v *Sullivan*, 376 US, at 277.

130 Ibid.

131 Ibid.

132 See *The Right to Speak Ill*, n. 14 above, pp. 177–80, 237–9.

133 Ibid

Nevertheless, the costs rule forces the British media to make sophisticated business judgments about which cases to fight, and which cases to settle. If the media has got it wrong on a particular story, then it is usually quick to issue a retraction and, in some instances, to offer costs and, perhaps, a small amount in compensation. The media was generally reluctant to issue corrections, especially if it believed that it had got it right, because it felt that the correction might reflect adversely on media credibility. As a result, the media was sometimes willing to litigate, especially when the allegedly defamatory piece involved investigatory allegations against a politician. On the other hand, if a case was regarded as having insignificant news impact, such as a gossip column, then the media might have paid a small amount simply to avoid the potential for costs. Of course, whether the media would fight ultimately depended on whether legally admissible evidence was available to support its allegations.

Once defamation litigation commenced, the costs rule could create a quagmire that made it difficult for either party to extricate itself from the litigation. In "small" cases, both parties might have been desperate to get out of the case. Once costs had been incurred, however, both parties would have been reluctant to admit error, as well as reluctant to offer a small sum to get out of the case, for fear of having to pay the other side's legal fees.

4 The impact of extensions of common law qualified privilege

There can be no doubt that the decisions in *Reynolds* and *Jameel* have moved British defamation law closer to US law. However, it is not clear that the extension of common law qualified privilege in those cases (or, for that matter, the prior extension of common law qualified privilege in the *Lange* decision from Australia) has sufficiently closed the gap to justify US enforcement of British or Australian defamation judgments.[134]

We concluded our empirical interviews in 2005. Since *Reynolds* was decided in 2001, enough evidence was available to allow us to draw conclusions about how that decision had affected the British media. In addition, since *Lange* was decided by the Australian High Court even earlier (1997), it was possible for us to draw conclusions about how that decision had affected Australian media practices. In other words, there was considerable evidence on the question of how expanded common law qualified privilege had affected media practices in the two countries.

The evidence suggested that neither *Lange* nor *Reynolds* had significantly altered how the Australian and English media reported on matters of public interest. In regard to Australia, the evidence suggested that virtually all Australian media companies continued in the same way after *Lange* was decided as before.[135] As Dean David Partlett and I concluded in 2004: "While *Theophanous* and *Lange* have had some impact on reporting in Australia, most reporters, editors, producers and defamation lawyers agree that the decision has not 'come up to expectations'."[136] Even though the Australian media was slightly more willing to take risks after *Lange* was decided, it continued to apply a legally admissible evidence standard in deciding what to publish.[137] As a result, the Australian media remained "fairly reluctant to publish allegations that it believes to be true when it lacks legally admissible evidence, either because it is unable to obtain that evidence or because its only sources have chosen to remain anonymous".[138]

134 See *The Right to Speak Ill*, n. 14 above, pp. 201–37.

135 See R L Weaver and D F Partlett, "Defamation, the media and free speech: Australia's experiment with expanded qualified privilege" (2004) 36 *George Washington International Law Review* 377.

136 Ibid. p. 430.

137 Ibid. p. 431.

138 Ibid.

Even though *Reynolds* marked a sea change in British defamation law, the evidence suggests that it did not have a huge impact on British media practices either. Although one British newspaper decided to chart a new journalistic course following that decision[139] the overwhelming majority of British newspapers and media outlets continued to function as before.[140] In other words, they continued to apply the legally admissible evidence standard in deciding whether to publish or to withhold information.

The bottom line is that, as positive as the *Lange* and *Reynolds* decisions might have been, they have not provided the level of protection to the Australian and English media that was provided to the US media by the *New York Times* decision.[141] The net effect is that neither the Australian nor the English media feels as free to report matters that it believes to be in the public interest as does the US media.[142] Moreover, neither *Lange* nor *Reynolds* altered the prevailing rules on cost recovery.

5 Enforcement of British judgments

Based on the evidence, a very strong argument could have been made prior to the holdings in *Reynolds* and *Jameel* for refusing to enforce British (and, for that matter, Australian) defamation judgments. Unlike the US, which had chosen to strike the balance between speech and reputation decisively in favour of free expression, Britain had moved decisively in the opposite direction. In the balance between speech and reputation, Britain had opted to provide greater protection to reputation.

In the United States, the right to freedom of expression has usually been treated as a "preferred" right. While US courts have not always been consistent in their approach to free expression, the general trend is towards preferring speech. As a result, US free speech jurisprudence differs from the rest of the world in important respects.[143] For example, although many European countries permit restrictions on hate speech, usually with an eye towards protecting human dignity and promoting other values such as equality,[144] US decisions have generally been hostile to hate speech restrictions.[145] Likewise, even though many European countries make it a crime to deny the Holocaust,[146] or to exhibit or display Nazi symbols, the United States does not criminalise Holocaust denial,[147] and does not make it illegal to display Nazi regalia, advocate Nazi ideas,[148] or march on behalf of Nazi principles.[149]

The justifications offered for protecting speech are not necessarily much different in the US than in other countries. In the US, references are made to the "marketplace of ideas"

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139 Weaver and Partlett, "Defamation", n. 135 above, pp. 226–7.

140 Ibid.

141 Ibid.

142 Ibid.

143 See R L Weaver and D E Lively, *Understanding the First Amendment* 2nd edn (Los Angeles: LexisNexis 2006) (hereafter *Understanding the First Amendment*).

144 The right to human dignity receives explicit protection under French law. See Law of 29 July 1881, Article 35-quater. It is also protected by the European Union. Article VI of the Charter of Fundamental Rights provides that "dignity for every human being is not merely a fundamental right in itself, it in fact constitutes the very foundation of all fundamental rights".

145 See *RAV* v *City of St Paul*, 505 US 377 (1992); *Dawson* v *Delaware*, 503 US 159 (1992); see also *Understanding the First Amendment*, n, 143 above, pp. 131–43.

146 See R L Weaver, N Delpierre and L Boissier, "Governmentally imposed truth: an examination of France's Holocaust denial law" (2009) 41 *Texas Technical University Law Review* 495 (hereafter "Governmentally declared truth"), www.ihr.org/books/harwood/dsmrd01.html.

147 Ibid.

148 See *Hess* v *Indiana*, 414 US 105 (1973); *Brandenburg* v *Ohio*, 395 US 444 (1969).

149 See *Village of Skokie* v *National Socialist Party of America*, 69 Ill 2d 605, 373 NE2d 21 (Ill 1978).

metaphor as a justification for protecting speech. This theory, propounded by Justice Holmes in a dissenting opinion in *Abrams* v *United States*[150] states that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[151] Despite the impressiveness of Justice Holmes' rationale, the marketplace theory has its critics (including me). One problem with the theory is that there is no assurance that the marketplace of ideas will lead us to "truth".[152] As Professor C Edwin Baker has recognised, truth is not always "objective", and therefore there can be no assurance that speech has led us to the truth, and various factors (e.g. media monopolies) can distort the free-speech marketplace.[153] Moreover, in the US, we do not have a Truth Commission or other body which tells us what is true or untrue. As a result, even if the marketplace of ideas could lead us to truth, there can be no authoritative determination that truth has been "found".

A more compelling justification for protecting speech is that free speech is essential to the functioning of the democratic process.[154] In any democratic system, the people are the source of political power, and they control the government and elected people through the ballot box. If the people are to cast informed votes, they must have the freedom to speak out on public issues, must be able to try to persuade each other and to sway the democratic process, and must have the right to hear the views of others. In other words, power should flow from the people to the government, rather than vice versa, and governments should not have the power to declare truth, or to repress speech that they regard as inconsistent with their declared truths. On the contrary, it is up to the people to declare their wishes through their votes. This is the reason that, although the US balances free-speech interests against other competing interests, it usually cuts that balance much differently than other countries do.[155]

The US did not come easily or lightly to these conclusions regarding the importance of the democratic process, or the importance of free expression in that process. Interestingly, while the US shares a common heritage with England, we reach somewhat different conclusions regarding the importance and impact of that heritage. Perhaps the differences are explained by the American Revolution, and the US Declaration of Independence, and its articulation of a vision regarding the rights of man.[156]

In the US, decisions like *New York Times* show concern regarding a history of speech repression. After Gutenberg invented the printing press in the fifteenth century, thereby enabling private individuals to more freely communicate with each other, governments went to great lengths to limit its use.[157] For example, the British government imposed licensing

150 250 US 616 (1919).

151 Ibid. at 630.

152 See C E Baker, "Scope of the First Amendment Freedom of Speech" (1978) 25 *UCLA Law Review* 964, p. 965.

153 Ibid.

154 Ibid.

155 See "Governmentally declared truth", see n. 146 above.

156 The US Declaration of Independence provides, in part, that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

157 See W T Mayton, "Seditious libel and the lost guarantee of a freedom of expression" (1984) 84 *Columbia Law Review* 91, 97–8.

restrictions which required a printer to obtain a licence to print, and (of course) allowed the government to withhold permits from those whose publications it found objectionable (often materials critical of the government).[158] In addition, in 1606, in its decision in *de Libellis Famosis*,[159] the Star Chamber created the crime of seditious libel[160] which made it a crime to criticise the government or governmental officials (and, at one point, the clergy as well), and enforced that crime through criminal and other sanctions.[161] The crime was justified by the notion that criticism of the government might cause "disrespect for public authority".[162] Moreover, since the goal was to maintain respect for public authority, and true criticism could undermine respect as easily as false criticism, truth was not a defence.[163] Indeed, since true criticisms might be more believable than lies, and therefore more harmful, they were punished more severely.[164] There were similar press restrictions in the American colonies.[165]

Fifteenth- and sixteenth-century press restrictions might have made sense in an era dominated by monarchies who claimed that they were placed on their thrones by God and who also claimed that their decrees were manifestations of God's will. But, as democracies began to take root, people began to reject the idea that the government is the repository of all wisdom, as well as the idea that governments should be insulated from criticism. In the Declaration of Independence, the American revolutionaries mapped out a new relationship between people and their governments. As democracy began to take root, we accepted the idea that a citizen's right to criticise goes hand-in-hand with the citizen's right to vote. As a result, in a stirring opinion in *West Virginia State Board of Education* v *Barnette*,[166] Justice Jackson forcefully stated that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[167]

Justice Jackson's sentiment has been reinforced in a number of subsequent United States Supreme Court decisions[168] and strongly reflects the bias against governmentally declared truth.[169]

The point is that the US attitude towards freedom of expression was not arrived at easily or lightly. As a result, when the *New York Times* decision expresses concern regarding the chilling effect of defamation litigation, and the need to protect the media against that

158 See *Lovell* v *City of Griffin*, 303 US 444. 451 (1938).

159 77 Eng Rep 250 (Star Chamber 1606).

160 For a thorough discussion of the history of seditious libel, see Law Commission Working Paper No 72, *Treason, Sedition and Allied Offences* (London: Law Commission 1977); J Schenck Koffler and B L Gershman, "The new seditious libel" (1984) 69 *Cornell Law Review* 816.

161 See Law Commission, *Treason*, n. 160 above; Koffler and Gershman, "The new seditious libel", n. 160 above.

162 *De Libellis Famosis*, see n. 159 above.

163 Ibid; see also W R Glendon, "The trial of John Peter Zenger" (1996) 68 *NY State Bar Journal* 48, p. 49.

164 See S D Krauss, "An inquiry into the right of criminal juries to determine the law in America" (1998) 89 *Journal of Criminal Law and Criminology* 111, p. 183, n. 290.

165 See *The Right to Speak Ill*, n. 14 above, pp. 6–7.

166 319 US 624 (1943).

167 Ibid. at 641.

168 See e.g. *Federal Election Commission* v *Wisconsin Right to Life Inc.*, 127 S. Ct. 2652, 2685 (2007); *Texas* v *Johnson*, 491 US 397, 415 (1989).

169 See *Texas* v *Johnson*, 491 US 397, 414 (1989): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

chilling effect, it is expressing deeply held constitutional convictions that go to the essence of the US democratic system. The US regards those convictions seriously enough that it applies independent appellate review in defamation cases, and those convictions are not to be brushed aside with a simple conclusionary statement to the effect that the US has an obligation to enforce foreign judgments. When foreign judgments conflict with fundamental constitutional principles, it is not clear that the constitutional principles should give way to the foreign judgment.

Given the significant differences between US defamation law and British defamation law (and, for that matter, Australian defamation law), a strong argument can be made for refusing to enforce English (and Australian) defamation judgments. If foreign defamation judgments, particularly English judgments, were enforceable in the United States, England would likely be a magnet for defamation litigation.[170] Because England's libel laws have historically been plaintiff-friendly, plaintiffs have had financial and litigational incentives to sue there even if they had little connection to the forum.[171] For example, Roman Polanski, an author and a fugitive from US justice who was living in France, sued in Britain even though he could not appear in person for fear of extradition.[172] Polanski received a £50,000 judgment.[173] There is also evidence that others have used English law when they have little connection to England.[174] The *Telnikoff* decision shows how an English decision might be applied to a US resident, and the *Bachchan* decision shows how English libel law can be applied to international news communications that may have only limited connections to England and English interests.

If England became the centre of defamation litigation and British defamation judgments were enforceable in the United States, the *New York Times* decision would be effectively undone. Extremely litigious individuals would likely resort to English courts to vindicate their rights. Not only are English standards of proof different, and less protective, but plaintiffs have the potential to recover costs. Moreover, since the costs of litigation can be quite high, the prospect of an English defamation judgment could be quite chilling for a US or international media organisation. As a result, it is likely that US news organisations would become much more risk adverse (in a similar way to that shown by the data on English and Australian media outlets).[175]

The problem is aggravated by the fact that jurisdictional rules have eased in recent years, thereby enhancing the possibility that far-flung jurisdictions (with more draconian defamation laws) can assert jurisdiction in libel cases.[176] Illustrative is the Australian holding in *Dow Jones* v *Gutnick*,[177] in which an Australian citizen sued in Australia over an article in *Barron's* magazine that alluded to his participation in illegal activities with an individual recently convicted of tax evasion, which was available online through the *Wall Street Journal* website.[178] Australia's High Court held that defamation occurs where the damage to

170 See H Maly, "Publish at your own risk or don't publish at all: forum shopping trends in libel litigation leave the First Amendment un-guaranteed" (2006)14 *Journal of Law and Policy* 883, p. 905.

171 Ibid. pp. 905–6; see also G Robertson QC and A Nicol, *Media Law* 3rd edn (London: Sweet & Maxwell 1992), p. 65.

172 Maly, "Publish", n. 170 above, pp. 905–6.

173 Ibid.

174 See R Donadio, "Libel without borders", *New York Times*, 7 October 2007.

175 See *The Right to Speak Ill*, n. 14 above, pp. 138–50.

176 See *Dow Jones* v *Gutnick* (2002) 210 CLR. 575, 606–7. (Austl); *King* v *Lewis* [2004] ILPr 31 (QBD) (UK).

177 (2002) 210 CLR 575, 606–7 (Austl).

178 Ibid. at 594.

reputation occurs, and that damage occurs at the point of download.[179] In other words, Gutnick could sue in Australia even though the article was published and placed online in the United States. The decision's impact was mitigated by the fact that Gutnick's Australian damages were limited to the harm caused in Australia (rather than worldwide).[180] Nevertheless, Britain takes a similar attitude towards jurisdiction, and its jurisprudence allows for the imposition of costs.[181]

If the US is going to maintain its constitutionally stated goal of providing breathing space for free expression, it is difficult to comprehend how it is possible for US courts to enforce foreign free-speech judgments. Are US courts really willing to accept the proposition that the US media should be subject to English defamation standards, and English cost recovery rules? The answer, as those cases that have examined the issue have decided, is an emphatic "no".

Conclusion

In the defamation area, the United States Supreme Court used the *New York Times* decision to map out a new constitutional approach that makes it difficult for public officials and public figures to recover for defamation. The *New York Times* decision produced a sea change in US defamation litigation. As a result, even though the United States is widely regarded as far more litigious than the rest of the world, especially in the torts arena, defamation litigation rates are much lower in the US than they are elsewhere.[182] In other words, the *New York Times* decision achieved its intended effect of producing breathing space for First Amendment rights.

It is difficult to argue that the US should be willing to forfeit that breathing space by enforcing free-speech judgments from other countries, particularly defamation judgments from the United Kingdom. If the US were to enforce foreign defamation judgments, libel plaintiffs would be likely to flock to the UK and other jurisdictions with lower liability standards to bring suit, and the end result would be a circumvention of the *New York Times* standards, and a chilling impact on free speech in the United States. This reluctance is reinforced by the fact that England and a number of other countries (e.g. Australia) permit the recovery of costs, including attorneys' fees, and the amount of these costs can sometimes dwarf the damages caused by reputational injury.

There is some mild hope of a convergence between US and British defamation law. It will be interesting to see how the British media has responded to the decision in *Jameel*. Of course, the question is whether *Jameel* has had only a very limited impact on media practices (as was true of *Lange* and *Reynolds*) or whether it has produced a revolution similar to that precipitated by the *New York Times* decision. If a revolution has occurred, it may make sense to consider whether British defamation judgments should be enforced in the United States. However, it will be necessary to assess carefully the impact of British cost rules even under *Jameel*. Based on the existing evidence, there is no basis for reconsideration.

It is possible to argue for enforcement of foreign defamation judgments that have little or no connection to the United States so that enforcement would not adversely affect US

179 *Dow Jones* v *Gutnick*, n. 177 above, at 607.

180 Ibid. at 604.

181 See *King* v *Lewis* [2004] ILPr 31 (QBD); see also Maly, "Publish", n. 170 above, p. 915.

182 See D A Logan, "Libel law in the trenches; reflections on current data on libel litigation" (2001) 87 *Virginia Law Review* 503, p. 519.

free-speech interests.[183] But it is far from clear that such a limitation would be feasible, or how it might be applied. In *Telnikoff*, a dissenting Judge Chasanow took issue with the court's refusal to enforce an English defamation judgment, noting that the case involved a libel judgment obtained by one British resident against another British resident, and that England should have discretion to allow recovery against its own citizens.[184] By contrast, the majority described the defendant as a resident of Maryland. Moreover, the broader issues (the composition of a reporting staff) directly related to the public interest and to broader social issues.

183 See C A Stern, "Foreign judgments and the freedom of speech: look who's talking" (1994) 60 *Brook Law Review* 999.

184 *Telnikoff* v *Matusevitch* 347 Md 561, 702 A 2d 230, 251-60 (Md 1997) (Chasanow J, dissenting).

NILQ 63(1): 119–36

Global speech and global terrorism: a tall tale of two cities

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Introduction

The propositions that "libel tourism" exists and that it constitutes a pernicious threat to free speech interests have gained wide currency. A somewhat partisan (American) definition of libel tourism is rendered as follows:[1]

> What is "libel tourism"? The phrase refers to international forum shopping. The libel tourist is a plaintiff who files a libel action in a forum with laws favorable to the libel plaintiff. The libel tourist's target is often an American author or publisher. Accordingly, the libel tourist is ordinarily attempting to circumvent the First Amendment by suing the American speaker in a foreign court.

Given this slant, the mischief is one for which the jurisdiction of England and Wales lies accused of contributing more prominently than any other, though there are certainly supplementary national offenders,[2] especially if "group libels" are considered.[3] Thus, London has been denigrated as the "libel capital" of the world, with laws which are "uniquely stacked in favour" of foreign libel plaintiffs.[4] Its stance is often contrasted sharply with the dismissive treatment of such plaints in New York and other US cities.

The point of this paper is to suggest that these first impressions may be misleading and that this "tale of two cities", London versus New York, does not exactly tessellate with the Manichean divide which is thereby mounted between speech repression and speech freedom. The contrast becomes especially dimmed when the focus is turned to speech about terrorism, which has frequently been a trigger for libel tourism. Accordingly, this "tale" will be told in three parts. Part 1 will consider why many of the key libel cases at the

* The author thanks the organisers and participants for comments, especially Dr David Capper, Professor David Partlett and Professor Russ Weaver.

1 R L McFarland, "Please do not publish this article in England: a jurisdictional response to libel tourism" (2010) 79 *Mississippi Law Journal* 617, p. 625.

2 Criticism has also been levelled against Australia (*Dow Jones* v Gutnick [2002] HCA 56; *Evony* v *Everiss*, www.guardian.co.uk/technology/2010/mar/31/evony-libel-case-bruce-everiss) and Canada (*Black* v *Breeden* 2010 ONCA 547 (Ont. C.A.)).

3 See *Yahoo! Inc.* v *La Ligue Contre Le Racisme et L'Antisemitisme* 169 FSupp2d 1181 (ND Cal 2001), reversed for lack of personal jurisdiction, 379 F3d 1126 (9th Cir 2004), reversed and remanded to district court to dismiss without prejudice, 433 F3d 1199 (9th Cir 2006 en banc).

4 "Be reasonable", *The Times*, 19 May 2005, p. 19. See also for the use of English libel law by US celebrities, R Verkaik, "Invasion of the libel tourists", *The Independent*, 21 August 2008, p. 8.

heart of libel tourism have arisen from terrorism-related speech. It will be necessary to reflect upon why late modernity engenders speech about terrorism across borders. Part 2 tackles the recent practice of libel tourism itself, as related to the paradigm case of allegations about involvement in terrorism. It explains the relevant English libel law litigation, based in London, and the US reactions to it, initially hatched in New York. Part 3 suggests why this apparently contrasting tale of two cities might be a "tall tale". The paper does not deny the different approaches and outcomes in libel laws in the respective jurisdictions. Rather, its point is to set those differences in the wider context of the legal treatment of speech about terrorism. If one considers public law rights to speech about the state as well as private law rights to speech about persons, a more balanced picture emerges. In that light, US reactions to speech about terrorism and the restrictions imposed are in some ways more threatening than those on the other side of the Atlantic.

Part 1: A sense of place

The first part of the tale of two cities requires a comprehension of the globalised nature of networked terrorism and the ways in which it engenders globalised speech. The purpose is to understand why so many of the libel tourism cases relate to terrorism.

The late modern "third millennium" variant of terrorism is characterised by heterarchical and sometimes self-generating networks whose objectives are focused on broader goals than the narrow nationalism or ethnicity pursued by most terrorist groups during the previous century. The qualitatively distinct features of contemporary terrorism include religious and cultural motivations and the cataclysmic use of suicide attacks associated with millenarian language, alongside predominantly late-modernist structures and communications.[5] The same features apply to participation in such terrorism – the participants may be not be so localised in ethnicity, residence, or political objectives as in previous terrorism campaigns, though this trend does not rule out an important role for locals who endorse the globalised cause and thereby inflict "neighbour terrorism".[6] These emergent features can be detected in the paradigm case of third millennium terrorism as represented by Al-Qaida. Its very title embodies the notion of the "base" of a network, but, increasingly, that base is more metaphysical than physical, functioning as a foundation for inspiring ideological jihad rather than offering the practicalities of training or shelter for *mujahideen*.[7] This trend is partly a result of external pressures, especially the military invasion of Afghanistan in 2001, which eliminated any sustained concentration of adherents. Predator missiles now ensure that physical gatherings almost anywhere entail high risks for Al-Qaida operatives, whether in Afghanistan, Pakistan, or countries even further afield such as in Yemen.[8]

This spread of third millennium terrorism and terrorism ideology through networks and across jurisdictions entails a number of important implications for communications systems and the laws which govern them, including libel laws. First, the maintenance of coherence

5 See R. Gunaratne, *Inside al Qaeda* (New York: Columbia UP 2002); J Gray, *Al Qaeda and What it Means to be Modern* (London: Faber and Faber 2003); M Sageman, *Understanding Terror Networks* (Pennsylvania: University of Pennsylvania Press 2004); B Lia, *Globalisation and the Future of Terrorism* (London: Routledge 2005); P Neumann, *Old and New Terrorism* (Cambridge: Polity 2009); E N Kurtulus, "The 'new terrorism' and its critics" (2011) 34 *Studies in Conflict & Terrorism* 476.

6 See C Walker, "'Know thine enemy as thyself': discerning friend from foe under anti-terrorism laws" (2008) 32 *Melbourne Law Review* 275.

7 D Rashwan, "After Mombassa", *Al-Ahram Weekly Online* (No 619), 2–8 January 2003, http://weekly.ahram.org.eg/2003/619/op13.htm.

8 See D Kretzmer, "Targeted killing of suspected terrorists" (2005) 16 *European Journal of International Law* 171; E Gross, *The Struggle of Democracy against Terrorism* (Charlottesville: University of Virginia Press 2006), ch. 8; J Murphy and A J Radsan, "Due process and the targeted killing of terrorists" (2009) 32 *Cardozo Law Review* 405.

of strategy by terrorist movements demands some unifying messages and headlines, lest the objectives of individual cells become so diffuse as to be unintelligible. Some of this media work is provided by the terrorism movement itself. In the case of Al-Qaida, a notable development has been the issuance of regular bulletins of the *Inspire* magazine.[9] This publication is an English language online-only magazine of "open source jihad" which is said to be produced by Al-Qaida in the Arabian Peninsula (AQAP). Yet, no matter how glossy the cover, such a magazine is not able to engage a wide audience, and so terrorism must force itself on the public as an issue which cannot be ignored in the mainstream media. This outcome, which forms the expressive aspect of many terrorist attacks,[10] was achieved par excellence by Al-Qaida on 9/11 with its strike against the "Far Enemy" and a prime symbol of Western globalisation.[11] Since then, the activities and threats of affiliates have been unfailingly able to occupy the headlines almost at will.

The resultant media coverage of Al-Qaida is neither evenly spread in geographical terms, nor is it bipolar between terrorists and the state. In terms of geographical spread, there are reasons for London and New York – the two cities at the heart of this tale – to be chief nodal points for speech about terrorism. In the case of New York, the two attacks on the World Trade Center (1993 and 2001) have inevitably heightened local media interest in terrorism. As for London, the experience of multiple IRA (Irish Republican Army) attacks through to the bombings on 7/7 also concentrates attention. There also comes into play the additional factor that many Arabic media organisations are represented in London, bolstered by large Middle Eastern émigré or visiting audiences. These Arab-centric media outlets are seemingly more welcome and tolerated in London than in New York, where the cable transmission of Al Manar has been deemed to amount to the offence of material support for terrorism.[12] Further evidence of the US administration's attitude to Arab media outlets include its alleged plans to bomb the offices of Al-Jazeera in Doha.[13]

In terms of bipolarity between terrorists and state, both the US and UK governments are keen to present to the public their own discourses about terrorism, whether in the form of counter-strategies[14] or counter-narratives.[15] Yet, communications about terrorism are not confined to a bipolar discourse between terrorists and the state. In reality, there is a profusion of independent expressions, as should always be the position in a healthy open society.

The late-modern features of terrorism, already described, here interplay with the importance and amount of media coverage of terrorism. A publication about late-modern terrorism is as likely to concern foreigners as citizens. It is as likely to emanate from a

9 A Fordham, "Terror magazine's tip: make a bomb in mom's kitchen", *The Times*, 2 July 2010, p. 45.

10 See B L Nacos, *Mass-Mediated Terrorism* (Lanham: Rowan & Littlefield 2002); P Norris, M Kern and M Just, *Framing Terrorism* (London: Routledge 2003); D L Altheide, *Terrorism and the Politics of Fear* (Lanham: AltaMira Press 2006).

11 F A Gerges, *The Far Enemy* (New York: Cambridge UP 2005).

12 *US* v *Iqbal* (USDC SDNY) reported in *New York Times*, 24 April 2009, p. A22.

13 "Bush plot to bomb his Arab ally", *Daily Mirror*, 22 November 2005, p. 1. David Keogh and Leo O'Connor were convicted of offences under the Official Secrets Act 1989 for the unauthorised disclosure of this information: *In re Times Newspapers Ltd* [2007] EWCA Crim 1925.

14 For the UK, see Home Office, *Countering International Terrorism* Cm 6888 (London: TSO 2006), as developed by Cm 7547 (London: TSO 2009), Cm 7833 (London: TSO 2010), and Cm 8123 (London: TSO 2011); Cabinet Office, *The National Security Strategy of the United Kingdom* Cm 7291 (London: TSO 2008). For the US, see US President, *National Strategy for Combating Terrorism* (Washington DC 2006 and 2011).

15 For the UK, see *Report of the Official Account of the Bombings in London on 7 July* 2005 HC 1087(2005–2006). For the US, see *National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report* (Washington DC: GPO 2004).

foreign-based publication, albeit that it commands the attention of just a minor and specialist readership in London or New York, as to be the handiwork of an indigenous media source aimed at the mass native population. Yet, it is at this point of publication about late-modern terrorism that a divergent tale of two cities arises. Though London and New York share many features in respect of their abiding interests in terrorism and also their heavy concentrations of media activity, there is apparent divergence over how the law of libel applies in each location to expressions about terrorism. That divergence will next be considered in Part 2.

Part 2: Libel laws unbounded and libel laws confounded

There are important differences in the ways in which libel laws apply to expression about terrorism in London and New York.

London libel actions

In London, there is encouragement towards "late-modern" applications of libel, in other words, a willingness to treat national jurisdictional boundaries as relatively fluid.[16] The impugning of foreign reputations and the invasion of foreign publications present no elemental obstacles to this highly networked legal node. Therefore, a combination of relatively lax rules about forum and damage[17] all favour the business of claimants with limited nexus to the jurisdiction. In addition, the rules as to onus[18] are also encouraging given that the subject matter of the expression, in this context regarding terrorism, engages national security interests which will normally hamper exacting evidence-gathering by a defendant. As a result, the impact of the *Reynolds* (or public interest) defence may be somewhat neutered.[19]

The outcome of these features is that there has been a constant stream of litigation assailing the London courts based on libels about connections to terrorism. The claimants are often (but not exclusively) wealthy Arabs. The defendants have been mainly mass media corporations, but individuals are also affected. In either case, they may be UK-based or foreign. The more significant disputes regarding third millennium terrorism include the following.[20]

The *cause célèbre* is Rachel Ehrenfeld, a US citizen based in New York and the author of *Funding Evil*.[21] In this book, she alleged that Khalid bin Mahfouz, a Saudi Arabian businessman and former head of a Saudi Arabian bank, had provided finance to Al-Qaida and other terror groups. The US publisher mainly marketed the book in the US, but at least 23 copies were dispatched to the UK via internet sales. In addition, one chapter was accessible from the ABCNews.com website, which was also viewable in the UK. A default judgment of libel was sustained in the English High Court, which awarded damages under the Defamation Act 1996 summary scheme (amounting to £10,000 each for

16 See M Castells, *The Information Age vol. I: The rise of network society* (Oxford: Blackwell 1996); *The Information Age vol. II: The power of identity* (Oxford: Blackwell 1997); *The Information Age vol. III: End of millennium* (Oxford: Blackwell 1998).

17 For details, see W V H Rogers and P Milmo, *Gatley on Libel and Slander* 11th edn (London: Sweet & Maxwell 2008), paras 26.20, 26.31, 34.50; T Hartley, "Libel tourism and conflict of law" (2010) 59 *ICLQ* 25.

18 See *Reynolds* v *Times Newspapers Ltd* [2001] 2 AC 127 at 203; Rogers and Milmo, *Gatley*, n. 17 above, paras. 11.3, 25.19.

19 [2001] 2 AC 127. See further *Jameel* v *Wall St Journal Europe SPRL* [2006] UKHL 44. For a full survey, see Rogers and Milmo, *Gatley*, n. 17 above, ch. 15.

20 See, generally, R Balin, L Handman and E Reid, "Libel tourism and the Duke's manservant – an American perspective" [2009] *European Human Rights Law Review* 303.

21 Chicago: Bonus Books 2003.

Mahfouz and his two sons),[22] enjoined her from further publication of the defamation in England and Wales, and ordered her to publish an apology under the Defamation Act 1996.[23] Mafouz took no steps to enforce the judgment either in London or in New York up to his death in 2009.[24]

A very similar action was lodged by Mahfouz in 2007 against the American academic authors, J Millard Burr and Robert O Collins, in respect of their book, *Alms For Jihad*,[25] which again linked Mahfouz to terrorism funding. Cambridge University Press decided to withdraw the book and not to defend the action. Allegedly contrary to the wishes of the authors, Cambridge University Press apologised, asked libraries to remove the book from public access, and paid undisclosed damages and costs.[26]

There next appeared some equally prominent claimants in *Jameel* v *Wall Street Journal*.[27] The action involved a claim by a billionaire Saudi car distributor, Mohammed Jameel, arising from a press report that bank accounts associated with several Saudi citizens, including Jameel's family and his businesses, had been monitored by Saudi authorities on the request of US investigators for alleged terrorist ties. The trial judge, Eady J, ruled that publication of the story was not in the public interest, inter alia, because it breached an agreement between the US and Saudi governments to keep the monitoring processes secret. Eady J also rejected the defendant's argument that the claimant should prove special damage. An award of £40,000 damages was made. The Court of Appeal rejected the *Reynolds* defence on grounds that the defendant had not undertaken responsible journalism because of inadequate verification efforts.[28] It also confirmed that there was no need for a claimant to prove special damage even in the case of a foreign corporation.[29] The House of Lords confirmed that a presumption of damage applied to a trading company. But the Court of Appeal award to the claimant was reversed by the House of Lords. The lead speech of Lord Hoffmann ruled that the media met the *Reynolds* tests:[30]

> It is for the judge to apply the test of public interest. But this publication can easily pass that test. The thrust of the article as a whole was to inform the public that the Saudis were co-operating with the US Treasury and monitoring accounts. It was a serious contribution in measured tone to a subject of very considerable importance.

In the further view of Lord Scott:

> It is no part of the duty of the press to co-operate with any government, let alone foreign governments, whether friendly or not, in order to keep from the public information of public interest the disclosure of which cannot be said to be damaging to national interests.[31]

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22 See Defamation Act 1996, s. 8(3).

23 *Mahfouz* v *Ehrenfeld* [2005] EWHC 1156 (QB). See also *Mahfouz* v *Brisard* [2006] EWHC 1191 (QB).

24 See "Writ large. Are English courts stifling free speech around the world?", *The Economist*, 8 January 2009, www.economist.com/world/international/displaystory.cfm?story_id=12903058.

25 Cambridge: CUP, 2006. See now http://defendingfreespeech.files.wordpress.com/2010/02/alms_for_jihad-final.pdf.

26 See T Tivnan, "CUP pays damages to Saudi sheikh", *The Bookseller*, 3 August 2007, www.thebookseller.com/news/cup-pays-damages-saudi-sheikh.html.

27 [2005] EWCA Civ 74; [2006] UKHL 44. See also *Jameel* v *Times Newspapers Ltd* [2004] EWCA Civ 983; *Jameel* v *Dow Jones* [2005] EWCA Civ 75. Compare *Al Rajhi Banking and Investment Corp.* v *Wall Street Journal Europe* SPRL [2003] EWHC 1358 QBD. See Rogers and Milmo, *Gatley*, n. 17 above, para. 15.5.

28 [2005] EWCA Civ 74 paras 88, 89.

29 [2005] EWCA Civ 74 para.113.

30 [2006] UKHL 44 para.49.

31 [2006] UKHL 44 para.142.

There were mixed messages for libel tourism over terrorism matters arising from this case. On the one hand, foreign corporate interests are as readily protected as individual reputations, perhaps an unsurprising result in a globalised trading post like London.[32] On the other hand, while the libel suit can be heard, its success is by no means assured and expressive rights are taken into account through the *Reynolds* defence so long as there is evidence of responsible journalism.

Next, in *Ghannouchi* v *Al Arabiya*,[33] a Dubai-based television broadcaster was sued by the claimant, a Tunisian political exile who had been granted asylum in 1993 and was the leader of the exiled An Nahda party, for a programme in which he was alleged to be an extremist with links to Al-Qaida. The defendant argued that the (Arab language) publication in England and Wales was minimal and did not defend the action. Eady J awarded £165,000.

The foregoing list, by no means exhaustive,[34] is weighty and contrasts with a more modest list which arose from decades of Irish Republican terrorism during which time libel tourism was not an issue.[35] One important and instructive case from that era might, however, be mentioned. In *Monteith* v *Clarke, Neill*,[36] Channel Four TV had broadcast in 1991 a programme, *The Committee*, made by the independent Box Productions Ltd in which it was claimed that there was a secret and unofficial Ulster Central Co-ordinating Committee. This committee involved collusion between Loyalist businessmen, politicians, police and paramilitaries and pursued a programme of assassinations of Republican targets. The Royal Ulster Constabulary investigated these allegations, and, though Box Productions refused to reveal all its sources,[37] the police issued a detailed press release that the allegations were an invention. Much reliance was placed on evidence obtained from an unnamed Loyalist who had made a statement to the police that the allegations had been fed to the reporters in Box Productions in order to discredit the police in the minds of the Nationalist community. The statement had been made in the presence of a solicitor, identified as the applicant, Richard Monteith. The chief executive of Box Productions, the fourth respondent, then sought to refute the doubts cast on the veracity of his programme. In statements published by the *Sunday Times* and the BBC, he downplayed the importance of the police's witness and claimed that the applicant was himself a member of the alleged committee. The applicant sought leave to bring a prosecution for criminal libel against the *Sunday Times* journalist who interviewed the chief executive of Box Productions, the editor of the *Sunday Times*, the proprietor of the *Sunday Times* and the chief executive of Box Productions for both the press and television interviews. Carswell J concluded that three of

32 In Australia, there are limits on corporate libel suits where the corporate objects do not include financial gain or where it employs fewer than 10 persons: Civil Law (Wrongs) Act 2002 (ACT) s. 121; Defamation Act 2005 (NSW, Qld, SA, Tas, Vic, WA) s. 9; Defamation Act 2006 (NT) s. 8. But corporate rights have been maintained in the Irish Defamation Act 2009, s. 12.

33 8 November 2007 (reported in Rogers and Milmo, *Gatley*, n. 17 above, A3.31). See also *Ghannouchi* v *Houni Ltd and Others* [2003] EWHC 552 (QB).

34 See also *Hewitt* v *Grunwald* [2004] EWHC 2959 (QB): the website of the Board of Deputies of British Jews published statements that the charity Interpal was involved in the support of terrorism through donations to Hamas; the case was settled with an apology: http://news.bbc.co.uk/1/hi/uk/4564784.stm); *Veliu* v *Mazrekaj* [2006] EWHC 1710 (QB): a claim by a journalist based in the UK in respect of an article in an Albanian language newspaper published in the jurisdiction that alleged that he had been implicated in the London terrorist bombings; an apology and substantial damages were the remedies; *Burstein* v *Associated Newspapers Ltd* (summary judgment to the defendant on the basis that the words in an opera review that the author admired terrorism were mere comment) [2007] EWCA Civ 600.

35 See e.g. *Doherty and Others* v *Telegraph Group Ltd* (Kerr J, 12 September 2000); *Madden* v *Sunday Newspapers* [2006] NIQB 1; *Curistan* v *Times Newspapers* [2007] EWHC 926, [2008] EWCA Civ 432.

36 (1993) QBD, LEXIS. The dispute concluded with a settlement in damages for the plaintiff.

37 The refusal resulted in a heavy fine for contempt: *DPP* v *Channel 4 & Box Productions*, *The Times*, 14 September 1992.

these applications were misconceived and had to be dismissed. Reviewing the legislative history, the judge held that:

> It seems to me clear that the words "person responsible for the publication of a newspaper" in s. 8 of the Law of Libel (Amendment) Act 1888 are to be construed *ejusdem generis* with the preceding words "any proprietor, publisher, editor". In my view they are intended to cover the persons who bring the newspaper out, not the contributors whose material is contained in the issues published.

It followed that leave for a criminal libel prosecution was required neither against the first respondent, the reporting journalist, nor against the fourth respondent, the source of the story. It was further concluded in respect of the latter that the statements made on television additionally fell outwith s. 8 since:

> [T]he word "newspaper" is by section 1 of the Law of Libel (Amendment) Act 1888 to have the same meaning as in the Newspaper Libel and Registration Act 1881. That definition, contained in section 1 of the 1881 Act, has never been amended to include television or radio broadcasts.

The remaining application for leave against the editor and the proprietors of the *Sunday Times* did properly fall within s. 8, but leave was refused on the facts. Whilst the criminal libel threat thus fell away, no attempt was made to publish in the UK the book on which the programme had been based, though it remains available in the US.[38] Criticisms of the author, Sean McPhilemy, were themselves the subject of a successful (for the claimant) libel action.[39]

New York counter-libel activities

In contrast to the London experience, New York libel actions in response to expressions about terrorism will often be confounded by the US Constitution's First Amendment, as applied by the judgment in *New York Times* v *Sullivan*.[40] A good example of the variant experience concerns *Hamas: Politics, charity, and terrorism in the service of jihad*, a book by Professor Matthew Levitt and published by Yale University Press, in which Hamas is presented as an organisation organically linked to terrorism.[41] A libel suit begun in California was dropped in 2007. The libel suit was filed on behalf of KinderUSA, a pro-Palestinian group, especially because of the statement that, "[t]he formation of KinderUSA highlights an increasingly common trend: banned charities continuing to operate by incorporating under new names in response to designation as terrorist entities or in an effort to evade attention. This trend is also seen with groups raising money for Al-Qaida." After indications of a vigorous defence by the publisher, the suit was withdrawn.

Furthermore, the prospect of silencing abroad through libel tourism US authors who mount allegations about the taint of terrorism has provoked an equally strongly hostile reaction. Perhaps because of the sensitivities of 9/11, this adverse reaction has been far stronger than on previous occasions when English courts have applied libel laws more

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38 S McPhilemy, *The Committee: Political assassination in Northern Ireland* (Lanham: Roberts Reinhart 1999).

39 *McPhilemy* v *Times Newspapers Ltd* [1999] EWCA Civ 1464, [2001] EWCA Civ 871, [2001] EWCA Civ 933.

40 376 US 254 (1964).

41 S Jaschik, "A university press stands up – and wins", 16 August 2007 www.insidehighered.com/news/2007/08/16/yaleup.

restrictively than the First Amendment would have allowed back home, notably in *Matusevitch* v *Telnikoff*[42] and *Bachran* v *India Abroad Publications Inc.*[43]

As a result, the catalogue of English libel tourism litigation is in no degree replicated on the other side of the Atlantic. Instead, a very different message is given, and it is a message which was in large part prompted by the history of Ehrenfeld in the English courts. In response to that experience, after an initial rejection by the US District Court for want of personal jurisdiction over Mahfouz,[44] Ehrenfeld pursued an action for a declaratory judgment in the New York state courts to the effect that under both New York and Federal law Mahfouz could not enforce his default judgment in the US.[45] The action was unsuccessful because the New York Court of Appeals decided that it could not exercise personal jurisdiction.[46] Mahfouz had not invoked the privileges or protections of New York law, and the court was also not convinced by Ehrenfeld's arguments based on potential enforcement of the judgment or potential chill on her First Amendment rights. The website maintained by Mahfouz, on which he posted details of the English litigation,[47] was also viewed as an insufficient jurisdictional basis for action.

This failure of Ehrenfeld in the US courts compounded the sense of disquiet on the part of First Amendment warriors whose hackles had already been raised by her defeat in the English courts. Ehrenfeld herself began instead campaigning for a legislative reaction, including later before the House of Representatives Judiciary Committee, where she did not mince her words:[48]

> Until the New York legislature passed the Libel Terrorism Protection Act last May, I spent many sleepless nights worried that Mahfouz will try to enforce the English judgment against me in New York. His deliberate non-enforcement left it hanging over my head like a sword of Damocles, which aggravated the chilling effects.

Her efforts led to an amendment to New York's Civil Practice Act in 2008, as s. 302(d):

> **Foreign defamation judgment.**
>
> The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided:

42 887 F Supp 1 (DDC 1995). See also *Telnikoff* v *Matusevitch* 702 A 2d 230, 251 (Md 1997): refusing to recognise the English libel judgment on public policy grounds; R B Korsower, "*Matusevitch* v *Telnikoff*: the First Amendment travels abroad preventing recognition and enforcement of a British libel judgment" (1995) 19 *Maryland Journal of International Law and Trade* 225.

43 585 NYS 2d 661 (Sup Ct 1992); C A Stern, "Foreign judgments and the freedom of speech: look who's talking" (1994) 60 *Brooklyn Law Review* 999. See also *Sarl Louis Feraud International* v *Viewfinder Inc.* 489 F3d 474, 478–80 (2d Cir 2007).

44 *Ehrenfeld* v *Mahfouz* 489 F 3d 542 (2d Cir 2007): certifying question to the New York Court of Appeals.

45 *Ehrenfeld* v *Mahfouz* 872 NE 2d 866 (NY Ct App 2007).

46 *Ehrenfeld* v *Mahfouz* 881 NE 2d 830 (NY Ct App 2007).

47 www.binmahfouz.info/en_index.html.

48 Hearing on Libel Tourism before the House Subcomm. on Comm. and Admin. on the Judiciary, 111th Congress, 12 February 2009, http://judiciary.house.gov/hearings/hear_090212.html, p. 12.

1 the publication at issue was published in New York, and
2 that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.

> The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

Next, s. 5304(b)(8) goes on to specify that:

> the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the US, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the US and New York constitutions.

Where New York led, other states have followed. Next in the field was a 2008 Illinois statute which ensures that:

> A foreign judgment is not conclusive if . . . the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.[49]

However, Illinois has not extended its long-arm jurisdiction so as to subject foreign plaintiffs to a declaratory judgment action over claimants who have never made any attempt to enforce their foreign judgments in Illinois. Five other states have now enacted responses to Ehrenfeld's plight: Florida,[50] California,[51] Tennessee,[52] Maryland[53] and Utah.[54] These have all replicated the emphasis on non-recognition and non-enforcement and have decided against providing more positive responses to libel tourism such as allowing a counter-suit going beyond declaratory relief even to the extent of awarding punitive damages.[55] Though the state laws may therefore merely reinforce the states' existing public policy exceptions which effectively bar libel tourism, US comparative lawyers still debate whether the New York initiative and its progeny represents a wise development or is destined to cause a reduction in international comity as well as undue limitation of legitimate foreign private rights.[56]

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49 735 Ill Comp Stat 5/12-621(7) (2008).

50 House Bill No 949 (2009), amending Florida Statutes ss 55.605(2)(h), 55.6055.

51 Senate Bill No 320 (2009), California Statutes Chapter 579, amending ss 1716 and 1717 of the Code of Civil Procedure (2008). See A Cate, "Civil Procedure: chapter 579: the California Anti-Libel Tourism Act" (2010) 41 *McGeorge Law Review* 533.

52 Public Chapter no 900, House Bill No 3300, adding s. 26-6-108 (2010).

53 House Bill 193 (2010), Laws of Maryland, 2010, Chapter 658, amending Laws 6-103.3, 10-704.

54 HB 96, amending Title 78B-5-320-322, Utah Code Annotated (2010).

55 Compare the Free Speech Protection Act of 2008 – see below.

56 See J S Hemlepp, "Recent development: 'Rachel's Law' wraps New York's long-arm around libel tourists; will Congress follow suit?" (2008) 17 *Journal of Transnational Law & Policy* 387; S Staveley-O'Carroll, "Libel tourism laws: spoiling the holiday and saving the First Amendment?" (2009) 4 *NYU Journal of Law & Liberty* 252; M Feldman, "Putting the brakes on libel tourism: examining the effects test as a basis for personal jurisdiction under New York's Libel Terrorism Protection Act" (2010) 31 *Cardozo Law Review* 2457; D Rendleman, "Collecting a libel tourist's defamation judgment?" (2010) 67 *Washington & Lee Law Review* 467; D C Taylor, "Libel tourism: protecting authors and preserving comity" (2010) 99 *Georgia Law Journal* 189.

Moving from state level to federal interventions, Congress has passed the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010 (the SPEECH Act).[57] The congressional findings bemoan the following catalogue of mischief:

(2) Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.

(3) These foreign defamation lawsuits not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit.

(4) The threat of the libel laws of some foreign countries is so dramatic that the United Nations Human Rights Committee examined the issue and indicated that in some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work. The advent of the internet and the international distribution of foreign media also create the danger that one country's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.

(5) Governments and courts of foreign countries scattered around the world have failed to curtail this practice of permitting libel lawsuits against United States persons within their courts, and foreign libel judgments inconsistent with United States first amendment protections are increasingly common.

The core of the new protections is set out in what is now codified as 28 USC s. 4102.[58]

Recognition of Foreign Defamation Judgments

(a) First Amendment Considerations.—

(1) In General.—Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that—

(A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or

(B) even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the

57 PL 111–223, codified at 28 USC §§ 4101–5. This Act followed in the wake of previous attempts such as the Free Speech Protection Act of 2008 (S.2977, 110th Congress). See on that Bill, T W Moore, "Untying our hands: the case for uniform personal jurisdiction over 'Libel Tourists'" (2009) 77 *Fordham Law Review* 3207; E Bernstein, "Libel tourism's final boarding call" (2010) 20 *Seton Hall Journal of Sports & Entertainment Law* 205; S Sturtevant, "Can the United States talk the talk and walk the walk when it comes to libel tourism: how the freedom to sue abroad can kill the freedom of speech at home" (2010) 22 *Pace Intertational Law Review* 269; T Zick, "Territoriality and the First Amendment: free speech at – and beyond – our borders" (2010) 85 *Notre Dame Law Review* 1543.

58 See E C Barbour, *The SPEECH Act: The Federal Response to "Libel Tourism"* R41417 (Washington DC: Congressional Research Service 2010).

party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.

(2) Burden of Establishing Application of Defamation Laws.—The party seeking recognition or enforcement of the foreign judgment shall bear the burden of making the showings required under subparagraph (A) or (B).

London libel fog lifting

This unequivocally hostile American attitude to English libel tourism litigation has been received back in England without undue rancour. Unlike some other recent legal disputes between the two jurisdictions,[59] there is no threat of reaction or retaliation. This British stiff upper lip is maintained despite the perception that American legal reactions stem in part from a degree of chauvinistic sense of the superiority of First Amendment jurisprudence over English law's treatment of free expression. However, many respectable liberal democracies do not endorse the view that the protection of false speech on a US scale represents desirable public policy.[60] There is also a readier perception in European jurisdictions that the mass media can be abusers of power as well as victims of power, as evidenced by ongoing and multiple scandals about phone hacking now being considered by the Leveson Inquiry into the culture, practices and ethics of the press. Nor are these more guarded opinions about rights to expression entertained only by countries with poor human rights records. They are, of course, enshrined in the balancing approach of Article 10 of the European Convention on Human Rights in which privacy interests are stronger than in US constitutional law.[61] However, the English forbearance is not total, and criticism has been made of "American imperialism at its best".[62] A more sustained disparagement was mounted by Lord Hoffmann in 2010:[63]

> It is only if you think, as many Americans do, that an American should only have to say *civis Americanus sum* to cloak himself in the immunity of the First Amendment against liability for injury which he has caused in a foreign country, or, as much of media in this country does, that we ought to become the second country in the world to adopt the *New York Times* v *Sullivan* rule, that there can be any basis for criticism.
>
> . . . I do not want to suggest that English libel law is perfect . . . But the complaints about libel tourism come entirely from the Americans and are based upon a belief that the whole world should share their view about how to strike the balance

59 Compare the reaction to what is viewed as an imbalance in extradition laws: Police and Justice Act 2006, Sch. 13, para. 4; Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf.

60 For a full consideration of the respective merits of Australia, England and Wales and the US, see R L Weaver, A T Kenyon, D E Partlett, C P Walker, *The Right to Speak Ill: Defamation, reputation and free speech* (Durham NC: Academic Press 2006). Compare F Schauer, "Free speech in an era of terrorism: is it better to be safe than sorry?: Free speech and the precautionary principle" (2009) 36 *Pepperdine Law Review* 301, pp. 314–15; T S Weber, "The Free Speech Protection Act of 2009: protection against suppression" (2009/2010) 22 *Regent University Law Review* 481.

61 See C Walker, "European Convention" in Rogers and Milmo, *Gatley*, n. 17 above,.

62 Hansard HC vol. 485, col. 82WH, 17 December 2008, Andrew Pelling. See also the criticisms in the Westminster Hall debate by Edward Garnier at col. 88WH and also P Tweed, "So much for the 'special relationship'" (2009) *Law Society Gazette*, 23 July 2010.

63 "The libel tourism myth", Dame Ann Ebsworth Memorial Lecture, delivered on 2 February 2010 at Inner Temple www.indexoncensorship.org/2010/02/the-libel-tourism-myth/.

> between freedom of expression and the defence of reputation. And naturally the American view is enthusiastically supported by the media in this country.

The transatlantic divergence over the suitable reactions to expressions about terrorism might further be said to be remarkable because this level of disagreement contrasts with the convergences between the jurisdiction over military interventions in "coalitions of the willing",[64] intelligence activities such as ECHELON,[65] and coordinated financial listings.[66]

For a variety of reasons, only some of which relate to pressures from New York, the tide is turning in English libel law towards greater hostility to libel tourism. The proposed changes are set out in the draft Defamation Bill of 2011.[67] The changes of most relevance[68] are set out cl. 7 – "Action against a person not domiciled in the UK or a Member State etc":

> (1) This section applies to an action for defamation against a person who is not domiciled:
>
> (a) in the United Kingdom;
>
> (b) in another Member State; or
>
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

Libel tourism is the subject of lengthy discussion in the accompanying consultation paper and is described as being of significant concern, though certainly not on quantitative grounds.[69] Clause 7 confers protection against libel tourism by ensuring that a court does not have jurisdiction to hear and determine a claim against a foreign defendant (with exceptions[70] for those domiciled in the European Union[71] or in a state which is a party to

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64 See R Watson, "US claims 'free hand' in its war against terror", *The Times*, 1 February 2002: "'America will claim a free hand in taking action against states linked to terrorism regardless of international opposition,' Donald Rumsfeld, the US Defence Secretary, said yesterday. He said that Washington would accept allies into 'coalitions of the willing' as it continued its war against terrorism, but future action would not be blunted by doubters or constrained by committee."

65 See British–US Communication Intelligence Agreement 1946 (National Archives HW/80/4); European Parliament resolutions on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI)), dated 5 September 2001, and 7 November, 2002 (B5-0528/2002); M Bedan, "Echelon's effect" (2007) 59 *Federal Criminal Law Journal* 425.

66 UNSCR 1267 and 1373, as amended by UNSCR 1988 (2011).

67 Ministry of Justice (MoJ), *Draft Defamation Bill: Consultation* CP3/11 (London: TSO 2011). For previous steps in this reform history, see House of Commons Select Committee on Culture Media and Sport, *Press Standards Privacy and Libel* HC 362 (London: TSO 2009–10); Ministry of Justice, *Report of the Libel Working Group* (London: TSO 2010); (Lord Lester's) Defamation Bill 2010–2011 HL No 3 and A Mullis and A Scott, "Lord Lester's Defamation Bill 2010: a distorted view of the public interest?" (2011) 16 *Communications Law* 6.

68 See also cls 1 ("Substantial harm") and 2 ("Responsible journalism on matters of public interest").

69 MoJ, *Draft Defamation Bill*, n. 67 above, paras.79, 80. Nevertheless, the Society of Authors has described "libel tourism" as "a huge problem." JUSTICE claims it represents a serious problem for NGOs and investigative journalists, and Liberty condemns it as a "national scandal": Joint Select Committee on the Draft Defamation Bill, Written Evidence (2010–12) pp. 101, 164, 295.

70 See MoJ, *Draft Defamation Bill*, n. 67 above, para. 81.

71 See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L229 16 November 2005, p. 62).

the Lugano Convention)[72] unless it is satisfied that, of all the potential places in which the impugned statement has been published, England and Wales is "clearly the most appropriate place in which to bring an action in respect of the statement". This holistic standard is not further explained, for example, by reference to quantity of publication, residence, or otherwise. Nor is the standard easily applied to the many global celebrities whose stardom and reputation evenly sparkle across multiple jurisdictions.[73]

This pending reform of the substantive law of libel is of uncertain impact because of the broad discretions embodied in these clauses. However, it seems certain that a combination of US declarations of non-enforcement (confirming the negative prognosis for recovery in any event) combined with a forthcoming legislative signal to the English judges to ask foreigners to find stronger grounds for establishing suit in London should reduce still further the rate of libel tourists wending their way to London. At the same time, given that libel tourism is factually not a common occurrence in the first place,[74] and given the continued globalised nature of the media industry based in London in the second place, the impact is likely to prove marginal. Therefore, one wonders whether other reforms, such as the removal of damages as a remedy and caps on costs,[75] would have made more difference to penurious authors and publishers (especially of the academic variety). Such radical changes may have to be postponed in the age of austerity when even libel courts must pursue export-driven sources of livelihood.

Part 3: Lies, damned lies and the lies of libel

First impressions from the foregoing tale of two cities – London versus New York – seem to confirm expectations. Freedom prevails in New York. It is protected by the US Constitution and jealously guarded by courts and legislatures, with recent added protection against incursions from abroad. By contrast, London welcomes the business of libel tourists to the doors of its courts, to an extent that even the government recognises to be excessive. These variant practices reflect significantly variant values as regards speech, reputation, privacy and even deference.[76] Thus, on the core treatment of libel tourism and indeed of libel in general, there is no doubt that US laws set standards more favourable to publishers than English law. However, this divergence should be sustained with three reservations, two of which have already been stated in passing. One reservation is that libel tourism is not very common or effective and is likely to become less common and effective in the light of pending reforms in England and Wales. The second reservation is that the "holier than thou" attitude, as evidenced in the recitals to the congressional Bill, is rather grating. The current English position on libel is actually some way more favourable to publishers than the stance in much of Western Europe, where criminal libel remains a common hazard and is much more frequently viewed by the European Court of Human Rights as a threat to

72 See Convention on Judgments and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Between the European Community and the Republic of Ireland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30 October 2007.

73 The Law Society has called for further clarification: Joint Select Committee, n. 69 above, p. 187.

74 In 2010, there were 3 cases out of 83 involving a foreign claimant and defendant: J Afia and P Hartley, "Tipping the balance" (2011) 161 *New Law Journal* 376 .

75 The financing of libel actions has been considered in: MoJ, *Controlling Costs in Defamation Proceedings* (London: TSO 2009); Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (London: MoJ 2009), p. 319; MoJ, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* (London: TSO 2010); R Shaw and P Chamberlain, "CFAs in defamation and related claims: is the gravy train coming to an end?" (2010) 15 *Communications Law* 51.

76 See R L Weaver et al., *The Right to Speak Ill*, n. 60 above, pp. 289ff.

freedom of expression than English libel law.[77] To be less indulgent towards publishers than the US does indeed represent different value systems but to say that the English position is unconscionable is itself an extreme opinion.

A third, and larger, reservation is that this tale of the land of free speech (represented by New York) in contrast to the land of the loose writ (represented by London) becomes an even taller tall tale when a wider perspective is taken. While the US law of libel is more hostile to claimants who wish to suppress civil speech about terrorism, the favouring of speech about terrorism is not the inevitable predilection of US law. The onlooker is being misled by an undue concentration on speech affected primarily by private law interests. A rather different picture emerges when account is taken of speech affected primarily by public law interests. In many respects, US and UK public law adopt similar responses. This parity even applies to much of criminal law. For instance, while an offence such as indirect encouragement of terrorism under ss 1 and 2 of the UK's Terrorism Act 2006 might not pass muster under US constitutional standards,[78] there exist several Federal offences, including "seditious conspiracy" in 18 USC s. 2384 and "material support" in 18 US Code ss 2339A and 2339B, which have been allowed to achieve similar impact. However, in three crucial respects at least, US public law development has been more restrictive of free expression than UK equivalents. These three examples can offer a fuller sense of reality than is evident from the discussion of libel tourism alone.

The first example concerns the operation of freedom of information legislation in relation to terrorism.[79] In the light of the 9/11 attacks, the Federal Attorney General, John Ashcroft, promulgated on 12 October 2001 the direction that "sensitive but not classified" information be removed from public scrutiny, resulting in the withdrawal of millions of unclassified documents (some previously released into the public domain) and the withholding of millions more documents which would have attained that status as a matter of course.[80] This initial step was followed by others relating to "critical infrastructure information"[81] and the National Security Agency.[82] The Ashcroft memorandum was withdrawn on 19 March 2009, to be replaced with a version which re-established a greater degree of discretion.[83]

Though hardly paragons of openness, UK governments have made no comparable post-9/11 adjustments. A recent robust assertion of freedom of information was made by the Upper Tribunal (Administrative Appeals Chamber) in the *All Party Parliamentary Group on Extraordinary Rendition* v *The Information Commissioner and the Ministry of Defence*.[84] The group's application for disclosure of any memoranda of understanding with the US regarding the potential transfer to US agencies of individuals detained by UK Forces in Iraq or Afghanistan was successful. In the view of the tribunal:[85]

77 See Rogers and Milmo, *Gatley*, n. 27 above, para. 25.13.

78 See C Walker, *Terrorism and the Law* (Oxford: OUP 2011), para. 8.101.

79 See 5 USC s. 552(a).

80 Memorandum from the Attorney General to the Heads of All Federal Departments and Agencies on the Subject of the Freedom of Information Act (Washington DC: 2001). See K Anderson, "Is there still a "sound legal basis?": the Freedom of Information Act in the post-9/ 11 world" (2003) 64 *Ohio State Law Journal* 1605; L Donohue, *The Cost of Counterterrorism* (Cambridge: CUP 2006) p. 342.

81 Homeland Security Act 2002 (PL no107-296) s. 211ff.

82 National Defense Authorization Act for Fiscal Year 2004 (PL no 108-136) s. 922.

83 www.justice.gov/ag/foia-memo-march2009.pdf. This followed the Presidential Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act, www.whitehouse.gov/the_press_office/FreedomofInformationAct/, 21 January 2009.

84 [2011] UKUT 153 (AAC).

85 Ibid. paras 59, 64.

> We very much doubt that the terms of a memorandum of understanding or similar agreement that is designed to ensure compliance with human rights and similar legal obligations in respect of people whose detention is transferred to another state could be perceived as confidential in nature or something the existence of which embarrasses foreign states . . .
>
> Since the maintenance of the rule of law and protection of fundamental rights is known to be a core value of the government of the United Kingdom, it is difficult to see how any responsible government with whom we have friendly relations could take offence at open disclosure of the terms of an agreement or similar practical arrangements to ensure that the law is upheld.

Furthermore, the British media has been subjected to fewer official threats and explicit restrictions than applied in the era of Irish Republican terrorism.[86]

A second instructive contrast relates to the impact of claims to state secrecy in litigation about terrorism. Here again, the English courts have often demanded greater disclosure from the state than has been the US practice. A relatively direct comparison may be garnered from the litigation of Binyam Mohamed. Binyam Mohamed is an Ethiopian national who had been resident in London from 1994 until 2001, when he travelled to Afghanistan. He was arrested at Karachi airport in April 2002 while attempting to return to the UK, following which he was allegedly imprisoned in Pakistan, Morocco (where he alleged that torture took place) and Afghanistan, the transportation being arranged under the US extraordinary rendition program. He was then taken from Bagram airbase to Guantánamo Bay on 19 September 2004 and was charged before the military tribunal with conspiracy offences in 2005 (which were replaced with new charges in 2008). However, the charges were dropped, and he was returned to the UK on 23 February 2009.

As far as his English litigation is concerned, Binyam Mohamed has sought discovery concerning his treatment in Pakistan and Morocco so as to defend military commission proceedings (which were in fact dropped in 2009 when he was released from Guantánamo but without prejudice to future charges).[87] Seven former detainees (including Binyam Mohamed) are also seeking civil damages for British complicity in their detention at Guantánamo.[88] Some of the documentation in the hands of the British government originated from US agencies who had transmitted on a strict policy of no further disclosure – the "control principle". The High Court adopted a balancing exercise between the public interests in disclosure versus national security and healthy international relations, as well as alternative means to disclosure (such as an inquiry by the Intelligence and Security Committee).[89] The High Court ordered disclosure, judging that the US threats to withhold security cooperation were empty. The Court of Appeal endorsed this assessment, relying on the further factor that a US Federal Court had already granted disclosure to the claimant, and it also rejected that the "control principle" was an immutable legal requirement.[90] The judgment was also notable for the comment by Lord Neuberger MR that "some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK's

86 See Walker, *Terrorism*, n. 78 above, para. 8.104.

87 *Mohamed* v *Secretary of State for the Foreign and Commonwealth Office* [2008] EWHC 2048, 2100, 2159 (Admin), [2009] EWHC 152, 2048, 2549, 2973 (Admin), [2010] EWCA Civ 65, 158. See also *R (Aamer)* v *Secretary of State for the Foreign and Commonwealth Office* [2009] EWHC 3316 (Admin).

88 See *Al-Rawi* v *Security Service* [2011] UKSC 34: the Supreme Court rejected the government's demand for a closed material procedure in a civil claim for damages.

89 See *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantánamo Bay and Iraq* Cm 6469 (London: 2005).

90 [2010] EWCA Civ 65.

involvement with the mistreatment of Mr Mohammed by US officials".[91] Police and judicial inquiries have flowed from this litigation, as well as a Green Paper,[92] plus potential governmental demands for special rules to nullify any "quixotic" judge who creates a "material risk" to security.[93]

These allegations, even though they are yet to be proven or resolved, have caused considerable official consternation. The assessment of the Intelligence and Security Committee is that the UK authorities were slow to appreciate the changed practices around extraordinary rendition beyond criminal justice of the US authorities and that guidelines as to involvement were not adequate.[94] The All Party Parliamentary Group on Extraordinary Rendition has called for criminal law prohibitions of facilitation or the use of facilities.[95] Though connivance in torture is denied,[96] the civil claims have been settled,[97] and a judicial inquiry (under Sir Peter Gibson) was announced in 2010.[98] The government has also published the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*. A system of reference up to a minister applies whenever risk of serious abuse is present.[99]

A less wholesome picture emerges in the counterpart US civil processes. State secrets privilege[100] has been increasingly invoked to exclude evidence based on an affidavit by the government and without any closed hearing or examination by the court. The US-based civil claims of Binyam Mohammed and others against Jeppesen Dataplan, an air carrier acting on behalf of the CIA, were halted because of state secrets privilege.[101] The doctrine was also invoked to prevent the civil action of Khalid el-Masri, a German citizen who was allegedly rendered from Macedonia to Afghanistan in 2003.[102] Likewise, the civil claims of Maher Arar, a Canadian citizen who was detained in New York and sent to Syria whilst en route to Canada,[103] were rejected in *Arar* v *Ashcroft*, though on other grounds.[104]

The third and final example of differential approaches to public law boundary-setting to discussion of terrorism concerns the disclosure of information by WikiLeaks. Official approaches have been markedly different to the publication in late 2010 and onwards via

91 [2010] EWCA Civ 158, para. 17.

92 See Ministry of Justice, *Security and Justice* Cm 8194 (London: 2011).

93 Privy Council Review of intercept as evidence, *Report to the Prime Minister and the Home Secretary* Cm 7324 (London: 2008), paras. 63, 90.

94 *Rendition* Cm 7171 (London 2007), para. 77. See also *The Handling of Detainees*, n. 89 above.

95 *Extraordinary Rendition: Closing the gap* (London: 2009). See also Joint Committee on Human Rights, *Allegations of UK Complicity in Torture* HL 152/HC 230 (2008–2009) and Government Reply Cm 7714 (London: 2009).

96 *The Times*, 29 October 2010, p.1 6 (Sir John Sawers).

97 Hansard HC vol. 518, col. 752, 16 November 2010, (Kenneth Clarke).

98 Hansard HC vol. 513, col. 175, 6 July 2010 (David Cameron).

99 *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees and Note of Additional Information* (London: Cabinet Office 2010).

100 *US* v *Reynolds* (1953) 345 US 1.

101 614 F 3d 1070 (2010).

102 *El-Masri* v *Tenet* (2006) 437 F Supp 2d 530, (2007) 479 F 3d 296 (cert den 169 L Ed 2d 258; 2007). See R M Chesney, "State secrets and the limits of national security litigation" (2007) 75 *George Washington Law Review* 1249; S Townley, "The use and misuse of secret evidence in immigration cases: a comparative study of the United States, Canada, and the United Kingdom" (2007) 32 *Yale Journal of International Law* 219; L Donohue, "The shadow of state secrets" (2010) 159 *University of Pennsylvania Law Review* 77.

103 See Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar (Ottawa: 2007).

104 (2008) 532 F 3d 157. See E Craddock, "Tortuous consequences and the case of Maher Arar" (2008) 93 *Cornell Law Review* 621.

WikiLeaks of over 250,000 US embassy diplomatic cables. Many of the most publicised have related to terrorism issues, such as the Lockerbie bombing[105] or Guantánamo detainees.[106] The head of WikiLeaks, Julian Assange, is subject in the UK to extradition procedures for sex offences in Sweden,[107] an application which is being resisted in part because of the fear of onward rendition to the US. However, as for the publications themselves, a rather phlegmatic attitude has mainly been maintained by members of the UK government without any attempt to stop the flow of information or to initiate rhetoric about any threat of prosecution for the expression, as illustrated by the following two sets of Parliamentary exchanges:[108]

> **Joseph Johnson:** Will the Minister give an assessment of the impact of the WikiLeaks affair on the conduct of diplomacy, and will he say what steps he plans to take, on the one hand, to tighten access to diplomatic cables that need protecting and, on the other hand, to free up access to the other information that can and should be in the public domain? The latter would also enhance the Government's transparency agenda.
>
> **The Minister of State, Foreign and Commonwealth Office (Mr Jeremy Browne):** We believe in freedom of information and open and transparent government, but there is a private realm and a legitimate area for confidentiality in diplomatic relations between nations. We need to get that balance right to ensure that we are secure when trying to safeguard confidential information. That is what we are working to do.
>
> **Simon Kirby:** To ask the Secretary of State for Foreign and Commonwealth Affairs what discussions he has had with the US administration on the disclosure of classified material by Wikileaks.
>
> **Alistair Burt:** My right hon. Friend the Foreign Secretary spoke to Secretary Clinton on 26 November 2010 about a range of issues including Wikileaks.

By contrast, the US Secretary of State, Hillary Clinton, has generated a livid reaction to WikiLeaks, describing the revelation of the diplomatic cables as tearing at "the fabric of the proper function of government."[109] Congressional speakers have even called for a prosecution for treason.[110] The Espionage Act 1917[111] appears to be a more workable option, though, to bolster its chances of success, an amendment has been proposed in Congress by way of the Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act.[112] The source of the leaks, Bradley Manning, a former US Army intelligence analyst, has not only been arrested but has been subjected to extraordinarily degrading conditions of confinement which have themselves become a subject of

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105 See 08LONDON2673, Pan Am 103 bomber has incurable cancer, http://wikileaks.dp.ru/cable/2008/10/08LONDON2673.html.

106 See http://wikileaks.ch/gitmo/.

107 *Assange* v *Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (appeal to the Supreme Court pending).

108 Hansard HL vol. 520, col. 795, 14 December 2010; Hansard HC vol. 520, col. 478W, 13 December 2010. David Cameron's spokesman said that "The leaks and their publication are damaging to national security in the United States and in Britain and elsewhere.", *The Times*, 30 November 2010, p. 2.

109 G Whittell, "Clinton condemns 'sabotage' amid frantic efforts to keep allies onside", *The Times*, 30 November 2010, pp. 4, 5. See further K Kovarovic, "When the nation springs a (wiki)leak" (2011) 14 *Tuoro International Law Review* 273.

110 Congressional Record: 30 November 2010, House of Representatives, p. H7744, Steve King (R–IA).

111 18 USC s. 792ff.

112 111th Congress 2d Sess HR 6506, S 4004. See G R Stone, "WikiLeaks, the proposed SHIELD Act and the First Amendment" (2011) 5 *Journal of National Security Law & Policy* 105.

controversy[113] and the application of which merely serves to underline the vehemence with which the US authorities are seeking to condemn publication. Defenders of these US reactions draw a comparison with the case of the Pentagon Papers – the secret report on *United State–Vietnam Relations, 1945–1967: A Study* which was prepared for the Department of Defense and leaked by the *New York Times*. The proponents of US law can rightly emphasise that, despite any political rhetoric, the First Amendment provides a strong bulwark against prior restraint, as availed the *New York Times* when faced with a government-requested injunction.[114] Yet, this fine affirmation of press freedom represented by the Pentagon Papers case, with the *New York Times* as the lead beneficiary, may not necessarily be replicated for a non-press source like WikiLeaks, though the fact that it is the publisher rather than the originator of the disclosure may assist in its protection.[115] The fate of the *New York Times* must in any event be set alongside the determination to prosecute subsequently the sources of the leak, Daniel Ellsberg and his colleague Anthony Russo. They were discharged in 1973 from charges under the Espionage Act 1917,[116] which carried a potential penalty of 115 years, but only through the chance revelation that the investigation had been tainted by unconstitutional "covert operations".[117]

In the light of these three contrasts, the initial tale of two cities – one which related the starkly contrasting fate of free speech – becomes a tall tale or at least a much murkier yarn. While English law is certainly more attuned to private interests via libel law, it is US public law which often seems readier to suppress public speech. Terrorism may again provide the recurrent linking and explanatory theme in this story. In other words, just as global terrorism has been the frequent subject of global civil "libel tourism", so the greater shock of terrorism to the US polity than to European states and populations inured to terrorism over three decades perhaps explains why US public laws have now turned very hostile to freedoms, including freedoms relating to speech, when security against terrorism seems to be at stake. As a result, the US is too readily depicted as a paragon of virtue because of its constitutional priority for expressive rights over private interests. The UK jurisdiction appears readier to admit inquiry and criticism in the public sphere, a stance which is ultimately far more important to the health of society than the US habit of overriding the sensitivities of a few wealthy litigants. Accordingly, the litigation by Binyam Mohamed has done far more to expose and shape public policy, say on torture, than have books by Ehrenfeld and others. Indeed, despite her published allegations, the US state remains markedly reticent about allowing further inquiry into the financing of terrorism by its allies and their citizens, especially in Saudi Arabia. In conclusion, it would be better for all governments to be more open and honest in their public speech than to peddle tall tales about the damage to private speech from shortcomings in the libel laws of their neighbours.

113 See R Cornwell, "A new jail for Bradley Manning – but the controversy rages on", *The Independent,* 21 April 2011, p. 25.

114 *New York Times Co.* v *US* 403 US 713 (USSC, 1971). For exceptions, see *US* v *Progressive Inc.* 467 F Supp 990 (WD Wis 1979); *US* v *Austin* (CR02-884SVW, CD Cal, 2004). The Pentagon Papers were published in full in June 2011: www.archives.gov/research/pentagon-papers.

115 See *Bartniki* v *Vopper* 532 US 514 (USSC, 2001).

116 18 USC ss. 793(e) and 641.

117 See *In re Ellsberg* 446 F2d 954 (1st Cir 1971); *Ellsberg* v *Mitchell* 353 F Supp 515 (DDC, 1973); *Ellsberg* v *Mitchell* 670 F Supp 1 (DDC, 1984); D Ellsberg, *Secrets: A memoir of Vietnam and the Pentagon Papers* (New York: Viking Press 2002).

NILQ 63(1): 137–44

"Everything should be as simple as possible but not simpler": practice and procedure in defamation proceedings

THE HONOURABLE MR JUSTICE GILLEN

High Court of Justice in Northern Ireland

Albert Einstein's pithy dictum that everything should be as simple as possible but not simpler in many ways encapsulates the attempts to modernise the approach to practice and procedure in defamation in the current era. It serves to add another perspective to the continuing public focus on the law of libel which has swept over us in recent months with a number of national newspapers pursuing campaigns seeking reform. Other integral parts of this wider context include non-governmental organisations like English PEN and Index on Censorship campaigning for greater freedom of speech, parliamentary debates, a Libel Reform Bill, a House of Commons Select Committee on Culture, Media and Sport report dealing with defamation, and a libel working group established by the Ministry of Justice which reported in March 2010.

The drive to create a simple but overriding objective in litigation, including defamation, found expression in Order 1 Rule 1A of the Rules of the Court of Judicature (NI) 1980. The declared overriding objective is to enable the court to deal with every action justly which includes so far as practicable, inter alia, saving expenses and dealing with each action in a manner proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party, ensuring that each action is dealt with expeditiously and fairly and allowing to every action an appropriate share of the court's resources by taking into account the need to allocate resources to other cases.

Solving the mischief

Delay in defamation litigation had been endemic across the system for some time with cases being ill-prepared and lacking in appropriate readiness for trial in a timely fashion. Until recent years the role of pre-trial case management was virtually unknown with an absence of recognition of the benefit of early identification of the real matters in dispute and, where appropriate, the removal of impediments to timely determination of some such issues long before trial.

The courts and those appearing before them, through the medium of case management in defamation litigation, have now been driven to accept a more businesslike approach. Whilst the overriding principle is that justice must be done, litigants are now entitled to have their case resolved with reasonable expedition in a manner that invests the process with appropriate sanctions, inducements and time constraints calculated to reduce cost, streamline procedures and encourage early discussion leading wherever possible to a just

resolution. Not the least rationale behind this philosophy is that in defamation a person whose reputation has been traduced should pursue legal address with vigour. "Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods."[1]

The pre-action protocol

The concept of pre-action protocols in Northern Ireland has crystallised from about 2008 when a pre-action protocol for the Queen's Bench Division was introduced. It was the first of a number of steps aimed at implementing the spirit of Order 1 Rule 1A. The purpose of a protocol is multifaceted. It is to govern the contents of a letter of claim and replies thereto, streamline the approach to documents and encourage settlement without frontloading the process with unnecessary cost. It raises the possibility of alternative dispute resolution (ADR) by way of recognition that litigation before the courts is not the only path to justice. The aim is to achieve more pre-action contact between the parties, better and earlier exchange of information, and better pre-action investigations by both sides, placing the parties in a position where they may be able to settle cases early without litigation in appropriate instances. It enables the litigation to proceed according to the court's timetable and promotes an overall "cards on the table" approach.

The defamation protocol that was introduced in April 2011 encourages both parties to disclose sufficient information to enable each to understand the other's case and to promote the prospect of early resolution, sets a timetable for the exchange of information relevant to the dispute, sets standards for the content of correspondence, identifies options which either party might adopt to encourage settlement of the claim and indicates that the extent to which the protocol has been followed both in practice and in spirit by the parties will assist the court in dealing with liability for costs and making other orders. It has a specific section indicating that the parties should consider whether some form of ADR would be more suitable than litigation and if so to endeavour to agree which form to adopt.

There are those who feel that there ought to be more beef in the sandwich and that letters of claim and defendants' responses should be even more detailed touching upon meanings/identification etc. in a fairly sophisticated and thoroughly comprehensive manner. The counter-concern is that such nuances might be better suited to the more specialist field of counsel rather than the solicitors dealing with a case in the initial stages. However, the protocol will be reviewed in a year's time and a further tightening up of the claim and response thereto can then be considered.

Offer of amends

The introduction of the offer of amends procedure is another simple but far-reaching procedure that has impacted greatly on the number of cases that come to trial in England and Wales. Prior to the coming into force of current defamation legislation, some 20 libel cases a year were heard in the London courts. Now only between three and five cases a year come to trial and most libel lawyers agree that the reduction is much to do with the offer of amends procedure.

Offers of amends are creatures of statute brought to life by ss 2–4 of the Defamation Act 1996 which has now come into effect in Northern Ireland. This procedure has its origins in the recommendations of Sir Brian Neill's Committee on Defamation, Practice and Procedure, July 1991. It caters for the situation where a complaint of defamation is made against someone who accepts that their allegations were false and wishes to make amends. An offer under the statutory provisions can be made at any stage up to and

1 *The Neill Report* (1991), PIRA, viii.2.

including the time, if it arises, when a defence becomes due. On the other hand, the procedure is also designed to enable an offer to be made and accepted without the need for proceedings even to be started. If such an offer, properly made, is rejected then a defendant (or potential defendant) will have a complete defence to any libel claim unless the complainant can take on and discharge the burden of proving, in effect, that the defamatory words were published in bad faith.[2]

If, however, the offer is accepted, it is then for the parties to attempt to reach agreement on the appropriate remedies including financial compensation, an apology, correction, the payment of costs and so on. If the parties are unable to do this, then an application can be made to a judge (sitting without a jury) to resolve any of the outstanding issues. The statute is drafted so as to permit such a hearing to take place without a need for an action to be commenced at all. Section 3(5) of the 1996 Act provides that:

> If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.
>
> The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

The reasons why the section speaks of "compensation" to be determined "on the same principles as damages" is precisely because it contemplates an award being made without the commencement of proceedings. Technically a judge who is asked in such circumstances to award compensation is not awarding damages in an action for libel. This means that it is appropriate to hear evidence and submissions in the same way as in the course of a "damages only" defamation trial. This procedure should not be confused with that of summary judgment. There is no cap on the level of compensation permitted, as there is in the context of the summary judgment regime introduced in ss 8-10 of the 1996 Act. The "offer of amends" procedure is by no means confined to the less serious cases. It can come into operation because the parties have chosen to take that route and can apply in relation to defamatory allegations at any level of gravity.

It may well thus be legitimate in some cases to raise issues relevant to mitigation, aggravation and causation of loss in exactly the same way as during a conventional trial. What is precluded is anything tantamount to introducing a defence such as justification or fair comment.[3]

This legislation is an example of policy-making brought into force to encourage simpler and swifter dispute resolution and reduce the number of costly libel trials being heard in court. The procedure aims to give the makers of defamatory statements a chance to wave an early white flag without being taken to task over what is more often than not, an unintentional and unwitting libel. It remains to be seen if the advent of the offer of amends procedure in Northern Ireland leads to earlier resolution of cases on the scale that seems to have occurred in England and Wales.

Mediation

Active case management is a means of furthering the overriding objective of Order 1 Rule 1A. This must include at appropriate times both encouraging the parties to use an

2 *Milne* v *Express Newspapers Ltd* [2002] EWHC 2564 (QB) and *Cleese* v *Peter Clarke, Associated Newspapers Ltd* (2003) EWHC 137 (QB).

3 *ABU* v *MGM Ltd* [2002] EWHC 2345 (QB).

ADR procedure if the court considers it appropriate and facilitating the use of that procedure. The English system under the Civil Procedure Rules 1998 (CPR) has embraced this for some time and parties are given the opportunity, when filling in an allocation questionnaire, to request a stay for one month while the parties try to settle the case by ADR or other means. Alternatively the court may order a one-month stay of its own initiative per CPR 26.4(2) and the court may extend the stay as appropriate under CPR 26.4(3).

Mediation has been a buzz word in legal circles for many years. It can take different forms. For those parties who cannot negotiate a way through the issues themselves, different mediation support is available from legal advisers with appropriate training to an independent third party, whether a judge or trained mediator, stepping in to assist, and from round-table discussion to more arms-length engagement. It is certainly not a one-size-fits-all discipline.

Mediation is said to shorten disputes and to allow parties to resolve differences without doing terminal damage to their continuing relationship. It empowers individuals by giving them a voice and enabling them to craft solutions which properly meet their needs. Importantly, in these difficult financial times, it is often said to be more cost-effective than litigation.

A major component of the drive towards mediation has been the European Union, which in Directive 2008/52/EC required states to put in place mechanisms to facilitate mediation in civil and commercial disputes with a cross-border dimension. Article 1 of the directive expresses the objectives as "encouraging the use of mediation and . . . ensuring a balanced relationship between mediation and judicial proceedings". The directive required member states to legislate by 21 May 2011 about certain fundamentals of mediation in order to facilitate the conduct of cross-border disputes of a civil or commercial nature through the mediation process. The main requirements of the directive may be summarised as follows in that member states:

- Shall encourage the development of and adherence to voluntary codes of conduct and other effective quality mechanisms and training of mediators to ensure they are competent.[4] Courts may invite parties to use mediation to settle disputes.[5]
- Shall ensure that written agreements arising from mediation shall be made enforceable.[6]
- Shall ensure that mediators and mediation provider organisations shall be prevented from being compelled to give evidence subject to specified exceptions.[7]
- Shall ensure that if a limitation or prescription period in domestic law expires while mediation is ongoing parties should not be subsequently prevented from seeking a remedy for that dispute through the courts or arbitration if the mediation fails.[8]
- Shall encourage the availability of information on how to contact mediators and organisations providing mediation services.[9]

In Northern Ireland recent steps have been taken by the judiciary and court staff working together with the legal profession and others in the field of mediation. Family

4 Article 4.
5 Article 5.
6 Article 6.
7 Article 7.
8 Article 8.
9 Article 9.

mediation schemes already run extremely successfully at several court venues and legal aid is available. The Legal Services Commission is considering ways to make legal aid for family mediation available before proceedings are issued. There is a judicial mediation committee looking at methods to assist the courts towards saving of time, expense and stress.

Importantly, the Cross Border Mediation Regulations (Northern Ireland) 2011 which came into operation on 18 April 2011 implement Directive 2008/52/EC. Regulation 3 sets out when mediators and those involved in the administration of mediation may be compelled to give evidence in civil and commercial judicial proceedings or arbitration and provides for the extension of limitation periods so that these do not expire during the mediation process. Where a period would otherwise have expired while mediation is ongoing or within eight weeks of its ending, the regulations extend the period so that it will expire eight weeks after the end of mediation. A mediator is not to be compelled in any civil proceedings to give evidence or produce anything regarding any information arising out of or in connection with that mediation.

The UK has decided to implement only the requirements of the directive and it will, therefore, apply to cross-border disputes only. In Northern Ireland we have adopted the somewhat more liberal approach followed in Ireland and have introduced the Rules of the Court of Judicature (Northern Ireland) (Amendment) Rules 2011 which empower the courts to adjourn any case – whether cross-border or internal – either on request of the parties or of its own volition for such time as the court thinks just and convenient and invite the parties to use an ADR process to settle or determine the case or, where the parties consent, refer the proceedings to such process. The court, as well as extending time for compliance with any other rule pending this occurrence, may give any other direction which will facilitate the effective use of that process. In order to encourage early use of this provision, the rule sets a time limit for its invocation, namely 56 days before the date on which the proceedings are first listed for hearing. Already an increase in the number of cases availing of this process may be noted.

A potent means of persuasion has always been a costs sanction. In England when the court comes to exercise its discretion on costs it must have regard to all the circumstances including the party's conduct and accordingly if a party turns down out of hand the chances of ADR when suggested by the court, it may face "uncomfortable costs consequences". [10] However, refusal to take part in ADR need not, if reasonable, be visited with cost sanctions.[11]

It is difficult to know how successful ADR/mediation will prove in defamation cases in Northern Ireland or how often it will be invoked. However, anecdotal evidence in England suggests that it has the capacity to achieve an harmonious outcome even in apparently uncompromising circumstances.[12] The legal department of at least one national newspaper publisher[13] offers claimants a form of ADR through "fast-track arbitration", a system of binding arbitration used in disputes over meaning and quantum, and as to whether the words complained of are fact or comment, which has undoubtedly succeeded in offering a cheap and speedy resolution of defamation disputes where there is no great issue of fact.[14]

10 *Dunnett* v *Railtrack plc* [2002] EWCA Civ 303; (2002) 2 All ER 850 per Brooke LJ, paras 14–15.

11 *Scoyett Internationale de Telecommunications Aeronautiquis SC* v *Wyatt* [2002] EWHC 2401 (Ch).

12 E.g. it provided an amicable resolution of the litigation in *Fayed* v *Telegraph Group Ltd* [2002] EWHC 1631 (QB).

13 Times Newspapers Ltd (Mr Alastair Brett).

14 W V H Rogers and P Milmo, *Gatley on Libel and Slander* 11th edn (London: Sweet & Maxwell 2008), p. 1066, note 171.

Case management

The furthering of the overriding objective of enabling the court to deal with cases justly has in recent years led to active case management dealing with as many aspects of cases as is practicable on the same occasion. Although in Northern Ireland we do not have the Civil Procedure Rules 1998 and in particular the provision in CPR 1.4(1)(i) or even a Practice Direction such as Practice Direction (Civil Litigation) Case Management (1995) 1 WLR 262 which govern proceedings in England and Wales, nonetheless the advent of Order 1 Rule 1A has given fresh momentum to the court's inherent jurisdiction to control its own process by active case management.[15] The significance of current case management procedures is that, whilst simple in conception, they mark a change from the traditional position under which the progress of cases was left largely in the hands of the parties.

Accordingly, during the pre-trial stages of a case, in defamation cases no less than others, the court stands ready to react to the needs of the parties by making necessary orders, decisions and directions either by its own initiative or on the request of the parties. Clearly, costs and delays would be increased and court resources wasted if, in dealing with a case for one purpose (whether by a hearing, directions or otherwise), the court did not deal with other matters which had arisen or were looming and which required or justified the court's attention. It is important, particularly in the field of defamation, that parties and judges should not be encouraged to deal with several aspects of a case on successive occasions when it would be practicable to deal with them on one occasion.

Equally so in the course of case management it is important not to attempt to oversimplify the approach and to recognise that the courts remain constrained by both statutory and regulatory rules. A distinction must be made between directions on the one hand and orders, decisions or judgments on the other. The role of directions is to oil the wheels of case management. As such they can be and are often varied or revoked where it is just and reasonable to do so. On appropriate occasions this can be done administratively by way of a letter of consent of the parties with the approval of the court or alternatively before the court without the necessity for pleadings. They do not bear the seal of court orders, decisions or judgments but are nonetheless an integral part of the case management system.

It is thus important to distinguish between directions calculated to cut through peripheral and time-wasting issues on the one hand and full hearings with necessary court orders on the other. The House of Lords[16] strongly protested against the practice of the court of first instance allowing preliminary points of law to be tried before and instead of first finding the facts since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. Preliminary questions of law should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue. Such applications need the careful scrutiny of the court even where the parties are consenting to such a course at direction hearings before any such order is made. Hence, case management hearings must not sacrifice appropriate full hearings on the altar of simplicity and expedience.

Nonetheless, case management has become a crucial tool in dealing with defamation cases in Northern Ireland. Rigorous and early scrutiny of defamation litigation at an early stage, and in any event never more than nine months after the writ has been issued in every such case, has enabled the courts to clear a heavy backlog of cases that have been waiting

15 *Caldwell* v *Morgan Walker Solicitors* (2010) NIQB 115.

16 *Tilling* v *Whiteman* (1980) AC 1.

in the aisles in some instances for years and streamline all other cases towards early resolution or hearing. The aim is to ensure that within nine months of the issue of proceedings every single defamation case in Northern Ireland has been given at least a target date for hearing even if the pleadings are at a comparatively early stage. The setting of realistic deadlines made after informed discussion with the parties at early case management proceedings and which can be extended only with the compliance and consent of the court, ensures that minds are concentrated in what is and should be seen to be a fairly specialised and difficult area of law in Northern Ireland.

Thus, a typical defamation review will deal with and confront the following issues, setting deadlines for the completion of same and pointing inexorably towards the target date for hearing:

- Deadlines are set for the completion of all pleadings where an extension of the time limits set out in the Rules of the Court of Judicature is sought. The presumption always is that the rules and the time limits therein prescribed are there to be met and are to be extended only for good reason.
- Deadlines are set for any outstanding interlocutory proceedings which are anticipated or are outstanding, including amendment of pleadings, hearing of preliminary issues, meanings applications, interlocutories, disclosure, strikeout applications, notices for particulars, and pleadings in general etc.
- These time limits are rigorously enforced and extended only upon application to the court.
- A deadline is set for exchange of discoverable documents. Disclosure in defamation cases is fertile ground where delay and spiralling costs breed. It has to be gripped at an early stage and carefully monitored by appropriate directions leading to early court determinations if logjams emerge.
- The parties are specifically asked whether mediation has been considered.
- The court insists that only the solicitor with carriage of the case or barrister retained will attend the hearing.
- The mode of eventual trial has to be addressed at an early stage, e.g. is a jury required or appropriate for all issues?
- Once a date is fixed for trial, specific directions are given as to the nature of the documents to be produced in orderly, paginated and collated form with an emphasis on the need to furnish only core and relevant papers; skeleton arguments must be furnished prior to trial on any legal issues; a date for negotiation is fixed in every case even if the defendant chooses, as is his or her right, to state that the case is to be contested at that meeting; and provision is made for the exchange of a timetable for witnesses; and, if necessary, evidence by way of live television link set up for witnesses outside the jurisdiction.
- The case must be set down by a specified date determined at the review.
- The review system is also used to encourage counsel to address the issue of damages so that the parties come to the trial well prepared. Hence every review in a defamation case includes a direction to consider a number of specified authorities touching on quantum so that the matter is addressed by every single practitioner prior to the hearing.

Pre-trial attendance

Particular attention is drawn to the need to clarify outstanding preliminary issues prior to the day when the jury will attend to determine the case. Thus, meanings applications, preliminary issues to strike out etc., all must be addressed at a hearing before the trial date. A genuine attempt is made by the court to anticipate legal issues that require determination prior to the hearing. Thus attendance of counsel is required at a final pre-trial review listed seven days prior to the hearing geared to the following matters:

- Impediments to jurors serving, e.g. connections with the case.
- Confirmation that all other preliminary issues have been determined, e.g. meanings/pleading points etc.
- The order of play. Where justification/qualified privilege have been pleaded, have the parties agreed which party shall give evidence first?
- Where for example a *Reynolds*[17] defence arises, what questions need to be determined by the jury as opposed to the judge?[18]
- Have the parties agreed a timetable for the witnesses? Courts must become user-friendly so that witnesses no longer attend needlessly for days on end.
- Have the parties considered written directions to the jury? Whilst ultimately a trial judge must decide whether to reduce his directions of law, or some of them, into writing or whether written steps to verdict may be particularly useful if there are several possible avenues for an award, it is important that counsel have a considered view rather than produce a spontaneous unprepared reaction. In all instances counsel must be prepared to engage in the process with written submissions if necessary. All such written documents will need to be discussed with counsel before they are finalised but counsel need to be appraised of this possibility before the trial commences.

Conclusion

Defamation is a specialist and difficult area where only experienced and proficient lawyers should dare to tread. For far too long delay – often as a tactic by one party or another – and spiralling costs in the process have been the enemy of justice and the rule of law in this field. Costs have often been used as a weapon to deter claimants from the seat of justice and equally claimants have often used defamation as a means of silencing those who ought not to be silenced. Simple, efficient and expeditious justice is the key to proper resolution of these cases executed by professionals who know what they are doing and are procedurally well informed. Einstein was right to emphasise the need to keep things simple so that obfuscation and cost do not become impediments to justice. Equally so, it cannot be made so simple that the complexities of one of the most fascinating areas of law become ignored. Simple but not too simple must be the clarion call for the future.

17 *Reynolds* v *Times Newspapers* [2001] AC 127.

18 *Jameel (Mohammed)* v *Wall Street Journal Europe* [2005] QB 904 where Lord Phillips of Worth Matravers MR said: "The division between the role of the judge and that of the jury when Reynolds privileges and issues arise is not an easy one; indeed it is open to question whether a jury trial is desirable at all in such a case." For an example where this was canvassed see *O'Rawe* v *William Trimble Ltd* [2010] NIQB 135.

NILQ 63(1): 145–8

Funding defamation litigation

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Current position in Northern Ireland

Unlike in England, in this jurisdiction a plaintiff in a defamation action cannot avail of a conditional fee arrangement (CFA)[1] nor can he or she recover any after the event (ATE) insurance premium. While the position is likely to change in England in the near future (see below), nonetheless, with no entitlement to legal aid, libel litigants in Northern Ireland face significantly greater financial hurdles than their fellow UK citizens taking legal proceedings in London.

The Access to Justice (NI) Order 2003 Part III[2] does make provision for the introduction of CFAs and other litigation funding agreements in Northern Ireland. However, this part of the 2003 Order has not yet been brought into force. As a consequence, a plaintiff litigating in Northern Ireland is deprived of those options available to claimants in England and Wales.

Unfortunately, notwithstanding various representations I have made to the Legal Services Commission (LSC) and the judiciary, this unsatisfactory situation is unlikely to change in the foreseeable future without specific statutory intervention.

Fee structure in England/Wales

At the present time, a solicitor is entitled to offer a client the benefit of a CFA, with a potential mark up of up to 100 per cent, which is ultimately recoverable from an unsuccessful defendant. Furthermore, a plaintiff can recover, in addition to any damages awarded, the ATE premium, subject to compliance with certain notice requirements. While the availability of this type of CFA is very much dependent on a firm of media lawyers being prepared to take on a particular case, nonetheless the attraction of a success fee has tended to make any reciprocal financial risk worthwhile.

The recovery of success fees has also facilitated claimant solicitors in pursuing a broader range of potential claims, including those with more questionable merit and this has been the subject of recent debate. It has been suggested that this has led to a chill factor for defendants in contesting claims, as cases become frontloaded with significant costs from the outset. However, successful defendants are still entitled to recover party costs from

1 Access to Justice Act 1999, s. 27.

2 2003 No 435 (NI 10).

plaintiffs, which may be covered by ATE insurers. Plaintiffs are not liable to their own solicitors under CFAs for cases that are unsuccessful and it has been suggested that this has fuelled a claims culture. On the other hand, these measures have made the availability of legal remedies more accessible for claimants with more limited financial means, particularly when considering pursuit of defendants with substantial financial resources, such as a well-established nationwide publisher with both in-house and external legal representation.

The campaign for reform of CFAs has received momentum from the decision of the European Court of Human Rights (ECtHR) in *Mirror Group Newspapers Ltd* v *UK*.[3] Mirror Group Newspapers (MGN) sought to challenge the House of Lords' decision in *Campbell* v *MGN Ltd*[4] on the basis that the award of costs to the claimant, including success fees, constituted a disproportionate interference with MGN's Article 10 rights.[5]

The ECtHR agreed with the applicant's submission that the requirement to pay success fees constituted an interference with its right to freedom of expression. The ECtHR held that widening public access to justice in civil litigation was a legitimate aim, but that the costs obligations imposed on defendants under the CFA regime were disproportionate. The media viewed this judgment as a victory for the reform movement. However, it should be noted that the court appeared to base its decision on the ground that the claimant was a person of considerable wealth and therefore was not at risk of being denied access to justice.[6]

Proposed changes to funding arrangements in the UK (excluding Northern Ireland)

On 29 March 2011 the government announced that the reforms proposed by Lord Justice Jackson following his comprehensive review[7] of costs in civil litigation would be implemented in full. Key reforms include lawyers being no longer able to recover success fees and ATE insurance premiums from losing defendants. Any success fees will therefore have to be paid by claimants to their lawyers, although these are capped at 25 per cent of the amount recovered for damages in personal injury cases. A 10 per cent increase in the level of general damages is to be awarded in all civil litigation claims to compensate for the necessity of claimants discharging success fees from damages. CFAs are permitted. For personal injury claims, a "qualified one-way costs shifting" scheme will be implemented. Accordingly, subject to certain exceptions, defendants will not be able to recover costs against an unsuccessful claimant, so as to protect claimants from having to pay excessive costs in the event of an unsuccessful claim. Conversely, defendants will still have to discharge a successful claimant's costs. This reform is based on the premise that in personal injury cases usually the defendant is the party with superior resources. This will not, however, extend to other types of litigation, including defamation.

While Lord Justice Jackson in his original proposal spent some time considering the possibility of reform of the area of costs in defamation claims specifically, ultimately there were no major proposals specifically relating to libel included in the government's proposals for reform by way of implementation of the review recommendations that differed significantly from proposals applicable to civil litigation generally.

Counsel for the Media Lawyers' Association had submitted that the recovery of substantial success fees against unsuccessful defendants in libel cases produced a "gross and

3 Case No 39401/04.

4 [2004] UKHL 22.

5 Article 10 ECHR, concerning the right to freedom of expression.

6 See n. 3 above, para. 167.

7 *Review of Civil Litigation Costs: Final report* (London: TSO, December 2009).

serious interference with freedom of expression".[8] This was countered by claimant groups who argued that any interference was offset by the usual lack of equality of arms in libel cases and the importance of claimants' Article 8 rights (right to respect for private and family life).[9]

The Law Society had submitted for the purpose of the Jackson Review that it did not consider that costs in libel cases should be treated differently to costs in other civil litigation and also opposed costs capping in terms of success fees.[10] Over the course of the review a working group conducted an assessment of the prospect of introducing a specialised Contingency Legal Aid Fund, although ultimately it concluded that this was not viable. The working group also concluded that the recovery of success fees pursuant to CFA agreements against unsuccessful defendants was unfair, although it was accepted that CFAs and ATE were the only measures that allowed the hypothetical middle-class claimant to feel comfortable in embarking on litigation.

Lord Justice Jackson in his final proposals specific to defamation claims recommended that the level of damages also be increased by 10 per cent. This followed in line with the abolition of recoverability of success fees and ATE premiums, and is intended to enable claimants to pay over a proportion of their damages to their lawyers on successful outcome to their claim. Lord Justice Jackson extended the same proposal for qualified one-way costs shifting as he had made in relation to personal injury and other civil litigation to claims in defamation.

As an additional recommendation for the defamation pre-action protocol in England and Wales, Lord Justice Jackson also recommended that a claimant be required to identify the meaning they attribute to the words complained of in their letter of claim. He also recommended that the question as to whether to retain trial by juries in defamation cases be further considered at some point in the future (given the increased costs of a jury trial as compared to a trial by judge alone).

However, the above reforms will only be applicable to the jurisdiction of England and Wales.

The future

As previously stated, the fundamental disparity in the position between claimants in Northern Ireland and in the rest of the UK continues, with no indication of any political impetus to implement the funding provisions contained within the Access to Justice (NI) Order 2003.[11] Indeed, the impending reform in the UK means the order is unlikely to see the light of day any time soon. As a result we are likely to see an ever-decreasing number of libel suits being brought in this jurisdiction, at least by the "man on the street" who is the main victim of this inconsistent approach.

As noted above, the relative advantages currently available to a claimant issuing proceedings in England and Wales are also under threat. The current government reforms to fee arrangements are being pushed through with some considerable determination following what is a relatively limited consultation period.

If these proposals are ultimately implemented they will erode the fundamental right of the ordinary private citizen to access justice (enshrined in Article 6 of the European Convention on Human Rights)[12] and inhibit their ability to seek vindication of their reputation.

8 Jackson, *Review*, n. 7 above, para. 2.2.

9 Article 8 ECHR, concerning the right to respect for private and family life, home and correspondence.

10 *Review of Civil Litigation Costs: Final report – Response by the Law Society of England and Wales* (October 2010).

11 See n. 3 above.

12 Article 6 ECHR, concerning the right to a fair and public hearing.

These reforms are highly disproportionate and go far beyond what is needed to protect freedom of speech, and have had a "chilling effect" on claimants, resulting in a perverse situation where the costs burden is effectively shifted from the wrongdoer to the innocent party. There can be little deterrent for the offending publisher if a successful claimant is required to pay costs out of the damages received for the wrong inflicted upon them.

In both jurisdictions, the complexity of the work and the risks involved mean that lawyers will be increasingly reluctant to take on cases where there is such a financial risk to all concerned.

It appears that in future no matter how damaging the defamatory allegation, or how flagrant the breach of privacy, access to justice will be restricted to the wealthy elite or the extremely courageous.

NILQ 63(1): 149–86

The "global pariah", the Defamation Bill and the Human Rights Act

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1 Introduction

The campaign for reform of the law of defamation in England and Wales[1] is reaching its climax. Following the report of the Ministry of Justice's Working Group[2] and Lord Lester's 2010 Bill, the government last year produced its own Draft Defamation Bill, based largely on Lord Lester's, together with a Consultation Paper that canvassed possible options for further or alternative reforms.[3] The Bill, in accordance with best parliamentary practice, was submitted in draft for scrutiny by a Joint Committee of both Houses, which heard extensive oral and written evidence and reported in October 2011.[4] The Joint Committee broadly endorsed the government's approach but in certain respects urged it to go further, producing a number of detailed recommendations. As this article went to press, the government produced its formal Response[4B] to the Report, accepting many, though not all, of its recommendations; it is expected that a revised Bill will be introduced into Parliament later this year. Meanwhile campaigners for more radical reform have vowed to keep up the fight and it is certain that attempts will be made in Parliament to amend in a pro-defendant direction whatever Bill the government finally produces.

This article will argue in favour of reform of the law of defamation, in particular to clarify the threshold of seriousness for a claim to be brought, extend qualified privilege, change to a single publication rule and restrict the rights of corporate claimants to sue. However, while supporting reform, it will also make four key arguments intended to balance some of the more exaggerated claims made by campaigners for reform. First, it will

* I would like to thank David Capper for organising the seminar at Queen's University Belfast in April 2011, from which this article grew, and all the participants there, including in particular Eric Barendt, Andrew Scott and Alastair Mullis for numerous helpful discussions. Particular thanks are due to Alastair Mullis for reading a draft of this paper at short notice and providing very helpful comments and Gordon Anthony for his thorough editing. All remaining errors are entirely my own responsibility.

1 See, generally, http://libelreform.org/

2 Ministry of Justice, 23 March 2010, www.justice.gov.uk/publications/libel-working-group-report.htm; the author acted as the academic member of that group.

3 Ministry of Justice, *Draft Defamation Bill: Consultation paper* CP3/11 Cm 8020 (Norwich: TSO 2011).

4 Joint Committee on the Draft Defamation Bill, *First Report: Draft Defamation Bill* HL 203, HC 930-I (2011–2012), hereafter JC Report.

4B Government's Response to the Report of the Joint Committee on the Draft Defamation Bill' (February 2012) Cm 8295; hereafter "Response".

highlight how much of the "chilling" effect of libel law is unrelated to the substance of the law, but flows instead from fear of high legal costs. Second it will challenge the notion that the *values* underpinning speech and reputation are inevitably in conflict with each other. Third, by means of a brief comparative analysis, it will question whether English libel law really deserves its labelling by the reform campaign as a "global pariah" or "disgrace" – labels that have helped drive the perception that a *radical* rebalancing of substantive law in favour of free speech is required. Fourth, it will advance a number of arguments questioning the extent to which parliamentary reform of defamation law can achieve exactly what campaigners want: these will consider the important role in this area of both Articles 8[5] and 10[6] of the European Convention on Human Rights (ECHR), as interpreted by the Strasbourg Court, and will highlight the important obligation of courts under s. 3 of the Human Rights Act 1998 (HRA) to interpret and apply legislation compatibly with those rights "so far as is possible to do so".[7] It will contend that the constraint on one-sided reform flowing from this interpretive obligation, coupled with serious ambiguities about the role of the existing common law after reform, together mean that the relationship between the production of new statutory language and actual legal change is more complex and nuanced in this area than many reformers have appreciated.

2 The role of procedure and costs

Everyone agrees that the recent impact libel law has had on serious journalism and scientific inquiry has been problematic; the stories of Peter Wilmshurst, Simon Singh and others are too well known now to require retelling here.[8] The question is: why has this problem come about in recent years, and what should be done about it? A key aspect of the debate has concerned questions about whether it is substantive law that is mainly or partly to blame, or whether the problems flow from excessive costs and complex procedures, or both. So we must first question the extent to which reform of the substantive law of defamation can prevent harm done by threatened *misuse* of that law. Nick Clegg, when introducing the draft Bill, said: "It is simply not right when academics and journalists are effectively bullied into silence by the prospect of costly legal battles with wealthy individuals and big businesses."[9] No one surely could disagree; but it is important to be clear about the limits of what can be done to prevent such *abuses* of the law by reforming the *content* of the law. That such objectionable things can happen flows above all from two simple facts: first, that there is no legal aid for libel;[10] second, that, in private law disputes, as opposed to judicial review of a public authority, claimants can issue proceedings without the permission of a court. And issuing proceedings – or simply threatening to do so – is often enough to scare some critical voices into silence, given the huge cost of such proceedings and the absence of legal aid. Much of the evidence put forward by the Libel Reform Campaign against the current state

5 Article 8 provides: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6 Article 10 provides in para. 1 that "Everyone has the right to freedom of expression"; the second paragraph provides a similar set of exceptions to para. 2 of Article 8.

7 HRA, s. 3. UK courts also appeared to have accepted that they are obliged to act compatibly with the Convention rights as public authorities under HRA, s. 6, in deciding domestic defamation cases: see e.g. *Re Guardian News and Media Ltd* [2010] UKSC 1.

8 See e.g. their evidence, and those of other scientists and writers to the Joint Committee, JC Report, Evidence, n. 4 above, vol. II, HL 203 & HC 930-II.

9 "Nick Clegg: 'Chilling' libel laws will be overhauled", *The Telegraph*, 7 January 2011.

10 Save in the exceptional circumstances set out in the Access to Justice Act 1999.

of the law does not concern actual court decisions; rather it tells stories of scientists and journalists being intimidated, silenced, by letters from expensive lawyers carrying frightening threats of legal action.[11] From this there is often a jump to the notion that law reform is the answer. But in many of the admittedly heinous examples used to fuel the campaign, the changes made to substantive law by the draft Bill would make no difference at all, since it is the simple *threat* of proceedings, however unlikely they are to be successful, that has caused the damage. As the Joint Committee put it: "The threat of court action, however empty, is enough for many to give way.".[12] Many others may be "chilled" by the fear of libel laws into not speaking out at all, however groundless their fears. The Publishers Association, in a survey of its members, found that "almost half of the publishers who took part" had "withdrawn publications as a result of threatened libel actions; a third have refused work from authors for fear of libel suits, a third have avoided publication on particular subjects" and "60% have avoided producing books about specific people or companies who have previously sued for libel".[13] Peter Wilmhurst, a victim of corporate libel proceedings, has related his experience of doctors being deterred by the fear of being sued for libel from giving evidence to the General Medical Council in relation to serious misconduct allegations against other doctors – this despite the fact that such statements would clearly be privileged and thus immune from liability.[14] Wealthy individuals or large corporations may issue proceedings even if their lawyer advises them that they would be highly likely to succumb to a strikeout application. Such claimants may simply calculate that the case is unlikely to get that far – that the recipient of the threatening letter will publish the desired retraction or simply desist from further criticisms, fearing that once proceedings are issued, even to have the case struck out may cost tens of thousands of pounds. Should the critic instead take a stand, refuse to withdraw their statements and defend the subsequent proceedings, they may be forced to give up in the end, or risk bankruptcy. Even if they win, they will probably not be able to recover all of their costs and thus risk being left very substantially out of pocket – over a hundred thousand pounds in Dr Singh's case.[15] As Dr Wilmhurst told the Joint Committee:

> Even though a defendant's statements are provably true . . . a wealthy claimant can use the cost of a case and amount of time wasted to drag out a case in order to force a less wealthy defendant to give up defending a good case.[16]

Equally, from a claimant perspective, the huge cost of defamation proceedings can deter or prevent many of those seriously libelled by the media from obtaining the rapid, prominent correction and withdrawal that they seek. While conditional fee arrangements (CFAs) have allowed for greater access to justice – and been used by deserving defendants as well as claimants – the current proposals radically to restrict such success fees, although aiming to bring down costs, risk rendering CFAs less available as they become less attractive to lawyers.[17]

Regrettably, however, there is very little in the Bill itself that recognises these basic points, the sole exception being the provision in cl. 8 to remove the right to trial by jury.

11 See e.g. Evan Harris's evidence in the JC Report, n. 8 above, EV 05, p. 73.

12 JC Report, n. 4 above, para. 81.

13 See n. 8 above, EV 38 at p. 300–1. It should be stressed that these figures only cover those *who responded to the survey*, around 65% of its membership; thus the figures in the text must not be read as if they were percentages of all publishers who are members of the association.

14 Ibid. Appendix 2.

15 See n. 8 above, EV 24.

16 See JC Report, n. 4 above, Written Evidence, HL 203 & HC 930-III, Dr Wilmhurst, EV 7, at [8].

17 On costs, see e.g. R Shaw and P Chamberlain, "CFAs in defamation and related claims: is the gravy train coming to an end?" (2010) 15(2) *Communications Law* 51 and Paul Tweed's paper in this volume (2012) 63(1) *NILQ* 141.

There is broad support for this move, with a strong consensus by practitioners that, when judges are freed from the worry of pre-empting matters that they must currently leave to the jury, they may become much more proactive in terms of case management, striking out bullying or trivial claims at an early stage.[18] The consultation paper includes some outline proposals for procedural reform, none of which, however, are in the Bill itself.[19] Here, the Joint Committee report has provided a much-needed corrective, arguing that:

> New mechanisms and streamlined procedures are required to enable parties to settle disputes more quickly and therefore cheaply. *Without procedural reforms, any changes made by the Bill will have little impact on the problems that have been identified with defamation law.* There was widespread agreement too that a rapid public correction, explanation or apology is often the remedy most valued by the claimant, and generally preferable to a lengthy legal case and consequent financial compensation, which too frequently would not meet the total costs of legal action.[20]

It is to be hoped that the latter point – making judge-ordered corrections or retractions much more quickly and cheaply available – will be picked up by the government, which, disappointingly, included no reforms to remedies in the Bill itself.[21] While the Committee's greater focus on this point is to be welcomed, it is notable that, save for a concrete proposal to require the permission of a court for a corporate claimant to issue proceedings,[22] most of its suggestions are in outline only and would require further detailed work by both the Ministry of Justice and the judiciary before they could be brought forward as concrete reforms. Moreover, neither the government, nor the Joint Committee has engaged in really radical thinking about defamation law, of a kind that might result in ground-breaking procedural and remedial reform.[23] At the outset therefore, it must be recognised that the draft Bill misses some of the most important targets for libel reform. Thus, for change that will make a real difference on the ground, we must hope that the Joint Committee's proposals in this area are picked up by the government when it brings forward a revised Bill, or during the Bill's passage through Parliament.

3 Libel reform: background and context

Speech and reputation: an incommensurable clash of values?

Many advancing the "free speech" side of the argument in this area would appear to agree with Iago that "Reputation is an idle and most false imposition; oft got without merit and lost without deserving."[24] Many commentators have noted how little attention has been paid in the libel reform debate to the importance of reputation and both Mullis and Scott in this volume[25] and David Howarth elsewhere[26] have recently sought to correct this tendency. It

18 See e.g. the comments of Adrienne Page QC, Paul Tweed, Hugh Tomlinson and Desmond Browne QC, n. 8 above (22 June 2011) especially Q566 and 567.

19 Ministry of Justice, n. 2 above, Annex D, and see the government Response, at paras 65–76.

20 JC Report, n. 4 above, para. 10 (emphasis added).

21 Another significant omission is any reform to the current "single meaning" rule (the legal fiction whereby a defamatory article is taken for legal purposes to have only one meaning: see e.g. *Slim* v *Daily Telegraph Ltd* [1968] 2 QB 157, especially at 171 and *Charleston* v *News Group Newspapers* [1995] 2 AC 65. It is condemned by many as both artificial and responsible for lengthy and complex procedural wrangling.

22 See p. 185–6 below.

23 See A Mullis and A Scott, "Reframing libel: taking (all) rights seriously and where it leads" (2012) 63(1) *NILQ* 3.

24 *Othello*, Act II, Scene 3, 259–64.

25 See A Mullis and A Scott, "Swing of the pendulum: reputation, expression and the re-centring of English libel law" (2012) 63(1) *NILQ* 25.

26 D Howarth, "Libel: its purpose and reform" (2011) 74 *MLR* 845–77.

is also frequently asserted that freedom of expression is the primary right in a democracy and that the crucial values underlying it do not also underpin the right to reputation. Hence the submission of the Libel Reform Campaign to the Joint Committee argued:

> Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: "I may not agree with [your reputation], but I will defend to the death your right to [protect] it." It seems unlikely . . . Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression.[27]

In order to contest the notion that reputation and speech are simply opposing principles, with free speech having inevitable categorical priority, a very brief survey of the key free speech rationales[28] will be undertaken, with the aim of showing that there is in fact a strong congruence between the values underpinning both rights.

The argument from truth, one of the classical free speech justifications,[29] has evident affinity with the basic existence of defamation law and the public interest it serves in providing a public remedy in respect of false and damaging accusations that may distort public discourse, as well as defaming the individual concerned. Of course, libel law can be misused to silence truthful criticism, but the point is that the basic principle underlying the law is one that, like free speech, aims to *promote* truth. Similarly, the self-development rationale for free speech evidently does *not* support a right to publish stories that wrongly damage or destroy another's reputation: both the "looking glass"[30] rationale for defamation law and that deriving from the vital human interest in forming social bonds and relationships[31] explain how gravely harmed an individual's ability to flourish may be when either they are shunned by society or their own self-esteem is badly damaged by seeing the poor image reflected back at them by the world.[32] Thus, while free speech *in general* is undoubtedly a vital condition for human development, its use to damage or destroy reputations may severely injure the development of those defamed; hence providing remedies for such misuse is in harmony with this rationale for free speech itself. The argument from moral autonomy[33] is also engaged by both free speech *and* reputation. While the moral autonomy of citizens is a powerful argument in favour of free speech in general, it is hard to see how such arguments, which are essentially dignitarian, can justify the kind of utilitarian calculus by which it is considered that allowing for the damaging of the dignity of certain individuals will be likely to produce better public discourse overall.[34] To treat the

27 See JC Report, n.4 above, Supplementary Written Evidence, Libel Reform Campaign (EV 13).

28 For an excellent discussion, see E Barendt, *Freedom of Speech* 2nd edn (Oxford: OUP 2005), ch. 1; for detailed analysis in the context of defamation law, see D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008).

29 Set out originally by J S Mill, "On liberty", in M Cowling (ed.), *Selected Writings of John Stuart Mill* (London: Everyman 1972).

30 That is, the social-psychology argument that how others see us has a critical impact on our self-image and thus self-esteem. See Mullis and Scott, "Swing of the pendulum", n. 25 above.

31 Advanced by Howarth, "Libel", n. 26 above.

32 As Howarth notes, ibid. p. 854, Rawls considered self-esteem so important that he afforded it the status of a primary good in his hugely influential account of justice: J Rawls, *A Theory of Justice* (Cambridge MA: Belknap Press 2005), especially at 440.

33 See e.g. R Dworkin, "Rights as trumps" in J Waldron (ed.), *Theories of Rights* (Oxford: OUP 1984); "Do we have a right to pornography?" in *A Matter of Principle* (Cambridge MA: Harvard UP 1985). For another defence of free speech based on autonomy see T M Scanlon, "A theory of freedom of expression" (1972) 1 *Philosophy and Public Affairs* 204.

34 I have made a similar argument elsewhere about the free speech rationales and privacy-invading speech: see G Phillipson and H Fenwick, *Media Freedom under the UK Human Rights Act* (Oxford: OUP 2006), pp. 683-90.

individual's reputation as "regrettable but unavoidable road kill on the highway of public controversy"[35] is plainly to use that person as a means to an end, failing thereby to recognise their inherent worth and dignity as an individual, which gives rise to the autonomy argument in the first place.

By far the most important contemporary free speech justification is the argument from democracy, in which freedom of speech is viewed as a primarily *instrumental* good in enabling and sustaining democratic self-government.[36] Barendt has rightly termed the democracy rationale, "much the most influential theory in the development of 20th century free speech law",[37] something that is clearly true in terms of both UK and Strasbourg jurisprudence.[38] While the importance of free speech to a democracy is self-evident, it should also be noted that a convincing argument can be made that the legal freedom carelessly to damage the reputation of others with false accusations does *not* well serve either public debate or the democratic process. As Barendt has put it:

> The public has a free speech interest in the publication of fair, well-researched stories, not in those which are poorly put together and which gratuitously destroy the standing of people in public life. The House of Lords was, therefore, surely right to insist [in *Reynolds*] that the press and other media should be required to observe the standards of responsible journalism . . .[39]

As Lord Nicholls put it in *Reynolds*, when reputations are wrongly damaged by the media:

> society as well as the individual is the loser . . . 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.[40]

Barendt's paper in this volume illustrates this point tellingly by reference to a case in the US in which a newspaper "made a shocking mistake" in reporting that a candidate for a local office had been charged with perjury, when in fact the accused was his brother.[41] Thus "its coverage may have ruined the life of the claimant",[42] while the democratic process would clearly have been distorted had the plaintiff lost the election on the basis of a straight falsehood. The *Reynolds* approach of course also recognises that it may be in the public interest to publish stories the truth of which cannot in the end be proven in court, provided that reasonable attempts were made to verify the facts. Hence, the media should be free from the chilling effect of libel damages in relation to such stories, although, as many have pointed out, the value in truth *and* in informed public discourse surely require that, where it becomes clear in court that a given accusation was *not* true, the court should have power to order the newspaper to publish a correction, even though it is protected from liability in *damages* by the *Reynolds* defence.[43]

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35 *WIC Radio Ltd* v *Simpson* [2008] 2 SCR 420, at para. 2, per Binnie J.

36 Advanced originally by A Meiklejohn, e.g. "The First Amendment is an absolute" (1961) *Supreme Court Review* 245.

37 Barendt, *Freedom of Speech*, n. 28 above, pp. 18 and 20 respectively.

38 See e.g. Phillipson and Fenwick, *Media Freedom*, n. 34 above, pp. 16–18, 37–79, 689–90.

39 See Barendt, *Freedom of Speech*, n. 28 above, p. 222.

40 *Reynolds* v *Times Newspapers* [2001] 2AC127, 201 (hereafter, *Reynolds*).

41 See *Ocala Star Banner Co.* v *Damron* 401 US 295 (1971).

42 See E Barendt, 'Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and reportage' (2011) 63(1) *NILQ* 59, p. 66.

43 See further below, p. 172.

In short then, even a brief consideration of the key rationale for free speech shows considerable congruence with the values underpinning the right to reputation. This should encourage us to search for principled resolution of more practical and limited legal points of conflict between the two, rather than making the crude assumption of an inherent normative conflict with free speech figuring as the invariably superior value. It also helps to explain why both Strasbourg and a number of Commonwealth jurisdictions have concluded that a proper accommodation between defamation law and free speech is fully consonant with human rights values. It is to the comparative issue that we now turn.

COMPARATIVE PERSPECTIVES: MYTH AND REALITY

If the inevitability of a clash of values between reputation and speech at the theoretical level has been too readily assumed, the use of comparative analysis in the reform campaign has been obviously flawed and misleading. This issue is important, because it is only when we have a realistic view of the alleged problems of English libel law in comparative perspective that we will be in a position properly to evaluate the case for reform. Conversely, it has been a grossly *distorted* comparative perspective that has been used as one of the major arguments for radical reform: the perception has been put about that English law is some kind of "global pariah" as John Kampfner of Index on Censorship has repeatedly put it.[44] Far from being able to show anything close to a global consensus against English law, however, the usual comparison cites only the opposition of a single country, the United States.[45] The US example has been convenient for reformers because the USA recently passed an Act to protect US citizens from the enforcement of foreign libel judgments not compatible with the US First Amendment protection for free speech.[46] This has had a profound effect upon perceptions in this country. The Commons Select Committee on Media, Culture and Sport concluded that it was "a humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts",[47] while the Deputy Prime Minister has claimed that reforms are necessary to stop English libel law being an international "laughing stock" and make it instead a "model" for the world to follow.[48] It may be noted in passing that, if the premise of this argument were correct, it would leave the government with some difficulty. Since (as discussed below) the Bill makes only very modest changes to substantive defamation law, if English law really were a laughing stock before the Bill, it would certainly still be so after it. Fortunately, however, the premise of the argument is plainly false: English law has if anything already been something of a model to Commonwealth countries, which have adopted variants of its nuanced *Reynolds* approach – that broadly protects *responsible* journalism on public interest topics even where defamatory allegations turn out to be false – and clearly *rejected* the blanket US *Sullivan* doctrine, which effectively denies the protection of defamation law to all "public figures".[49] As a leading comparative scholar of defamation law points out:

> Changes have been seen in countries including Australia, Canada, Hong Kong, India, Malaysia, New Zealand, South Africa, and the UK itself. Generally *the developments outside the US* mean that, where material is published to a wide

44 See e.g. "Libel reform: a final push", *The Guardian*, 18 October 2011.

45 Reliance has also been placed on criticisms made by the UN Human Rights Committee – see below p. 157.

46 The so-called SPEECH Act (Seeking the Protection of our Enduring and Established Constitutional Heritage) 2010.

47 *Press Standards, Privacy and Libel*, House of Commons Culture, Media and Sport Committee, 9 February 2010, HC 362-I, 6.

48 "'Laughing stock' libel laws to be reformed, says Nick Clegg", *The Guardian*, 6 January 2011.

49 Subject to them proving malice – generally an impossible burden: see *Sullivan* v *New York Times* (1964) 376 US 254. For a comprehensive comparative study, see D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008).

> audience, defamation defendants can establish a form of qualified privilege if they show that the publication concerned a matter of public or political interest and *was made responsibly or reasonably*.[50]

As Mullender puts it:[51]

> In . . . Commonwealth jurisdictions . . .. judges have pursued a common theme. Where journalists go about their business responsibly and in ways that serve the public interest,[52] they should not run afoul of defamation law – even if they are unable to prove the truth of the statements they make.

He notes that, while there are differences of "nomenclature and points of doctrinal detail", judges in Canada,[53] Australia,[54] New Zealand,[55] South Africa[56] and the United Kingdom have all agreed on this basic approach.

To this may be added the fact that English libel law is also broadly consonant with the approach of the European Court of Human Rights to freedom of expression.[57] The Court draws on the common traditions of the European democracies and is in turn responsible for setting standards across the whole of the Council of Europe. In comparative terms, the European Court has clearly pursued the Commonwealth rather than the US approach, holding that even major public figures are entitled to reasonable protection for their reputations.[58] Hence, in Strasbourg's view, the mere fact that the subject matter of a publication relates to a politician, or other topic of legitimate public interest, can never per se justifiably afford it blanket protection from defamation law if it makes false and damaging allegations. Instead, the European Court has repeatedly held that journalists benefit from protection under Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability.[59] In *Bladet Tromsó*, for example, the court, in an oft-repeated phrase, said that the press should be protected, providing "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".[60] Part of this ethic means that the "ordinary obligation" on the media is "to verify factual statements that [are] defamatory".[61] Moreover, it is now clear that, where a state fails to provide a remedy when serious defamatory allegations are published without due care, Article 8 may be breached, due to the adverse impact on personal integrity that seriously defamatory allegations may have.[62] Moreover, this applies even where the allegations relate to "public

50 A Kenyon, "What conversation? Free speech and defamation law" (2010) 73 *MLR* 697, p. 711 (emphasis added).

51 R Mullender, "Defamation and responsible communication" (2012) 126 (July) *LQR* 368, pp. 370–1.

52 Strictly speaking, under *Reynolds*, it is only required that the subject matter of the publication be on a matter of public interest.

53 *Grant* v *Torstar* (2009) 2009 SCC 61.

54 *Lange* v *Australian Broadcasting Corp*. (1997) 189 CLR 520 HC (Aus).

55 *Lange* v *Atkinson* [2003] 3 NZLR 385 CA (NZ).

56 *National Media Ltd* v *Bogoshi* 1998 (4) SA 1196 SCA.

57 See e.g. Milo, *Defamation*, n. 49 above; G Phillipson (with C O'Brien), "Defamation and political speech" (ch. 21), Fenwick and Phillipson, *Media Freedom*, n. 34 above.

58 See e.g. *Lingens* v *Austria* (1986) 8 EHRR 407, at [42].

59 See, amongst numerous authorities, *Pedersen & Baadsgaard* v *Denmark*, Application No 49017/99 (17 December 2004); *Radio France* v *France*, Application No 53984/00 (30 March 2004).

60 (1999) 29 EHRR 125, at [65]

61 Ibid. at [66].

62 See e.g. *Pfeifer* v *Austria* (2009) 48 EHRR 8; *Chauvy* v *France* (2005) 40 EHRR 706, at [31]; *Lindon, Otchakovsky-Laurens and July* v *France* (2008) 46 EHRR 35; *Petrenco* v *Moldova* [2011] EMLR 5; *Petrina* v *Romania* 78060/01 [2009] ECHR 2252. See, generally, below, pp. 159–60.

figures", including politicians,[63] an approach that implicitly but necessarily rejects the US *Sullivan* approach as incompatible with the ECHR.

It is in light of the above that we must consider the now notorious criticisms of English libel law made in the 2008 report of the UN Human Rights Committee,[64] also much cited by campaigners for reform as evidence of pariah status. First of all, it should be noted that it was primarily "the practical application" of the law of libel that was criticised; its adverse international impact was said to flow from the "advent of the internet and the international distribution of foreign media", while one of the Committee's main recommendations concerned curbing excessive costs.[65] It is true that the Committee also referred to the law itself as being "unduly restrictive" and suggested that the UK should consider introducing a US-style *Sullivan* "public interest" defence – but this was a baffling suggestion, since not only would this imply a need to change the law in all the Commonwealth countries noted above, but it would also almost certainly place the UK in breach of its international obligations under Article 8 of the ECHR – presumably not a desirable outcome in human rights terms. The conclusion must be, therefore, that, despite this apparent singling out of the UK by the UN Committee, English libel law is very much not out of step with most other Western countries. It is important to emphasise this because the libel campaign has said so many times that English libel law is the most draconian or claimant-friendly in the Western world that it seems to have become a kind of accepted truth just through repetition. But, as the evidence above confirms, the English *Reynolds* approach is, if anything, something close to an international standard-setter – already in this respect the model that Nick Clegg imagines only reform can make it. Moreover, in the light of the recent revelations of gross press misconduct by the Leveson Inquiry and the phone-hacking scandal, it would seem a bad time to argue that the current standards of responsible journalism that the law imposes on the media should be relaxed. The idea of removing from British newspapers a requirement that, before defaming public figures, they should check their facts, would strike many as a decidedly unappealing prospect.

Why then the violent criticism from US commentators? The simple answer is that US free speech doctrine under the First Amendment is very much an example of what human rights lawyers know as "American exceptionalism". It undoubtedly forms a strong contrast to English law in this area – but in most other areas of free speech law is out on a limb compared to the Strasbourg–Commonwealth consensus. The most dramatic example is probably in the area of hate speech, in which the US stands alone in holding that intentional incitement to racial hatred is constitutionally protected speech.[66] But other examples of US free speech exceptionalism are easy to find and include its stance on whether the state may punish, prevent or remedy by individual suit prejudicial media reportage of criminal trials

63 See e.g. *Lindon* v *France* (2008) 46 EHRR 35 concerning the notorious political figure Le Pen; *Europapress Holding DOO* v *Croatia*, Application No 25333/06 (2009) concerning a government minister. In that case, the court remarked that "the more serious the allegation is, the more solid the factual basis should be".

64 30 July 2008, CCPR/C/GBR/CO/6 at [25].

65 The Joint Committee recommended that the UK consider "limiting the requirement that defendants reimburse a plaintiff's lawyers fees and costs regardless of scale, including Conditional Fee Agreements and so-called 'success fees', especially insofar as these may have forced defendant publications to settle without airing valid defences." It also said tentatively that the UK "might consider" requiring claimants to show some "preliminary evidence" of falsity and absence of ordinary journalist standards. However, these aspects of English law are again commonly found in other countries and are also in accordance with the Strasbourg jurisprudence: see e.g. text to n. 183 below.

66 *RAV* v *St Paul*, 505 US 377 (1992); *Virginia* v *Black*, 538 US 343 (2003). This stance is also probably contrary to Article 19 of the International Covenant on Civil and Political Rights.

in the interests of fair trial rights and the presumption of innocence;[67] how far the state may regulate campaign financing;[68] and the extent to which there should be a remedy for the publication of private facts by the media.[69] The often unique stance of the US in these areas is well known to comparative free speech lawyers, and it is no surprise, therefore, to find US law in an oppositional stance to English law in relation to defamation also. What *is* startling is the frequency with which media and libel campaigners routinely hold up US libel law as somehow being "the standard" by which English law should be judged, without any acknowledgment that the US approach to the defamation of public figures has been rejected by virtually every major Western democracy. Our consideration of libel reform must then start with the clear acknowledgment that English law in this area is firmly in the moderate mainstream of comparative free speech law. That does not mean that it could not benefit from reform: but it does mean that such reforms must be assessed on their merits, not be propelled by the Libel Reform Campaign's baseless assertion that "English libel law is becoming a global disgrace."[70]

Since it is *not* then the case that English law falls outside some international consensus, what else may have fuelled the recent campaign for reform? Has English law perhaps been moving in a more claimant-friendly direction in recent times? Once again, unequivocally not. As Mullis and Scott point out in their paper in this volume, all the major changes in recent years have been in favour of the media: these include the development of *Reynolds* privilege from 1999 and its strengthening recently in *Jameel*;[71] the introduction of the offer of amends procedure in the 1996 Defamation Act; the ability of the Court of Appeal to control the award of damages by juries;[72] the introduction of a *reportage* defence for the media;[73] and the significant widening in recent years of the defence of "fair comment".[74] So it seems plausible to assert that what led to the recent campaign were developments elsewhere: the introduction of CFAs, which allowed more people to sue but, when coupled with the recent use of 100 per cent success fees, can hugely increase the costs that the losing side must pay; the massive rise in internet usage, which has vastly increased the scope for defamatory allegations to be read across the world, thus increasing the choice of possible fora for legal action; and the practice of newspapers and non-governmental organisations (NGOs) of maintaining vast online archives, which, combined with the effect of English law's admittedly archaic multiple publication rule, has meant that such bodies faced liability

67 US Supreme Court: *Nebraska Press Association* v *Stuart* 427 US 539, 549 (1976); cf. the Strasbourg decision in *Worm* v *Austria* (1997) 25 EHRR 557 and the laws governing contempt of court in most Commonwealth countries, on which see: I Cram (ed.), *Borrie and Lowe on the Law of Contempt* 4th edn (London: LexisNexis 2010). On the US stance, see G Phillipson, "Trial by media: the betrayal of the First Amendment's purpose" (2008) 71 *Law and Contemporary Problems* (Duke Law School, USA) 15–30 and other papers in that volume.

68 Modern doctrine stems from the Supreme Court decision in *Buckley* v *Valeo*, 424 US 1 (1976), which ruled that spending money to influence elections is a form of constitutionally protected free speech. For the most recent Supreme Court decision, see *Citizens United* v *Federal Election Commission*, 558US 08-205 (2010).

69 For a particularly striking example of US law's weak protection for privacy in the face of press freedom claims, see *Florida Star* v *BJF* 491 US524 (1989), in which the US Supreme Court held that the revelation in newspaper's report of a rape victim's name and address, resulting in her further terrorisation by her assailant, was protected against a civil action by the First Amendment. See, generally, D Anderson, "The failure of American privacy law" in B Markesenis (ed.), *Protecting Privacy* (Oxford: Clarendon 1999).

70 See http://libelreform.org/

71 *Jameel* v *Wall Street Journal* [2006] UKHL 44.

72 By virtue of s. 8(2) of the Courts and Legal Services Act 1990.

73 *Al-Fagih* [2001] All ER (D) 48. This allows the media to report the facts of an ongoing dispute involving defamatory allegations without incurring liability.

74 Said to have "widened enormously" in recent years by Lord Walker in *Spiller* v *Joseph* [2010] UKSC 53 at [131].

for defamation that was essentially indefinite in time.[75] English law has not recently become more claimant-friendly, rather the reverse; but the rise of the internet and the globalisation of legal services has recently extended the *practical effect* of English libel law as a potential restriction on free speech.

Article 8 ECHR: gone missing from the debate?

Having disposed now of two myths – relating to value-incommensurability and comparative law – we may move to consider briefly a third and more specific contextual factor, namely the growing importance of Article 8 in this area. This complex issue is comprehensively considered by Mullis and Scott in this volume,[76] so it is necessary to make only a simple point here. It is notable, reading the Joint Committee report and some of the evidence submitted to it, that there is a strong general tendency to ignore Article 8, minimise its importance, or imagine, wrongly, that it can somehow be shunted out of the way into privacy law, where it belongs. Thus the report discusses Article 8 in relation to defamation just once – and then briefly,[77] otherwise mentioning it only in relation to the right to privacy and then to support a pro-defendant reform to the fair comment defence that is in fact dubious from an Article 8 perspective.[78] Similarly, JUSTICE's determinedly one-sided submission all but ignores Article 8 (save for one dismissive point)[79] and appears to be either unaware of, or unconcerned about the possibility that some of the changes it advocates could place the UK in breach of its obligations under Article 8.

A look at the legal realties, in contrast, makes clear that the wistful hope of reformers that Article 8's role in defamation law can be minimised is misplaced. Whatever the rights and wrongs of the relevance of Article 8 to defamation law,[80] it now seems firmly established that it is here to stay, particularly in domestic law. The European Court does not at present *consistently* consider Article 8 in defamation cases: in fact, a 2010 study of 90 decisions since *Chauvy* v *France* in 2004[81] found that Article 8 figured in only 24 of them.[82] Rather, it seems to be in the process of deciding *when* Article 8 should apply.[83] In contrast, the decision of the Supreme Court in *Re Guardian News and Media Ltd*[84] on its face accepted that Article 8 is *always* engaged in defamation cases, thus seemingly going further than Strasbourg itself requires. Similarly, Lord Neuberger MR recently found in *Times* v *Flood*[85] that "Articles 8 and 10 of the Convention . . . are, of course, of critical importance in this area."[86] It is to be hoped that Strasbourg and the domestic courts together can clear up the

75 This is because English law treats each time an article is downloaded and read as a fresh publication, giving rise to fresh liability, meaning that in effect, there is no limitation period for libel.

76 Mullis and Scott, "Swing of the pendulum", n. 25 above.

77 JC Report, para. 18.

78 Ibid. para. 69(a); see discussion below at 176–7.

79 Considered below at ibid.

80 Some opposition to this development, including the author's, has proceeded from the lack of a properly reasoned account by the Strasbourg court of its relatively abrupt introduction into defamation cases; the "Swing of the pendulum" piece by Mullis and Scott in this volume is the best defence to date of the engagement of Article 8 in defamation, see n. 25 above; see also Howarth, "Libel", n. 26 above.

81 (2005) 40 EHRR 706.

82 S Smet, "'Freedom of expression and the right to reputation': human rights in conflict" (2010) 26(1) *American University International Law Review* 184, p. 195.

83 See *Karako* v *Hungary* (2011) 52 EHRR 36, discussed in detail by Mullis and Scott, "Swing of the pendulum", n. 25 above.

84 [2010] UKSC 1, at [37]–[42].

85 [2010] EWCA Civ 804, [2011] 1 WLR 153, para. 20.

86 Citing *Cumpana* v *Romania* (2005) 41 EHRR 14 (GC), para. 91, and *Pfeifer* v *Austria* (2009) EHRR 8, paras 33 and 35 as "authoritative" findings that "reputation [is] within the ambit of article 8" (ibid.).

confusion created by the former's somewhat enigmatic *Karako* judgment and its apparent misinterpretation in *Guardian News*. Courts need a clear and principled basis for deciding when Article 8 is applicable in defamation cases.[87]

But even assuming that this results in the finding that Article 8 does *not* always apply to defamation, in cases that, for example, concern corporate claimants[88] or strictly financial loss caused by "business libels",[89] its applicability even in some cases is of potentially great significance. Hugh Tomlinson QC has recently highlighted up to four ways in which English defamation law, under the influence of Article 8, may be driven in a more "*pro-claimant*" direction:[90] these include questions over the continued viability of the complete defence of truth, the rule against injunctions,[91] the existing categories of qualified privilege and the notion of resolving doubt in favour of Article 10 in *Reynolds* cases: the latter has already gone, deemed incompatible with Article 8.[92] Similarly, Mullis and Scott suggest that the Article 8-driven denial of qualified privilege to a local authority in *Clift* v *Slough*[93] might be taken further in cases where private bodies are concerned, with courts having to reassess established heads of privilege by asking whether they properly balance the competing Article 8 and 10 rights.[94] Howarth has also recently suggested that the defence of truth should arguably not apply where the harm caused is disproportionate to the benefit of revealing the truth in all the circumstances[95] – an issue also raised recently by Eady J.[96] In short, then, this might have been a good time for some serious reflection on when Article 8 should apply in defamation cases and what reforms it may require of the law. Instead, the approach of many reformers seems to amount to little more than the vain hope that it will somehow just go away.

Having disposed of these preliminary points, we may now turn to consideration of some general issues raised by legislative intervention into the common law, and the constraints on that intervention represented by the courts' obligations under the HRA.

4 Codifying and reforming the common law under the HRA: general considerations

Codification and reform: advantages and disadvantages

Given that in many areas the Bill makes only modest changes to the law and in some none at all, one of its chief benefits has been argued to be that it codifies an often very complex caselaw in relatively simple language. This may have two possible benefits. First, it may produce a more *accessible* version of the law, by placing in statute simpler and clearer

87 For full analysis, see Mullis and Scott, "Swing of the pendulum", n. 25 above.

88 On which, see *Hays* v *Hartley* [2010] EWHC 1068.

89 See Tugenhadt J in *Thornton* v *Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), at [39]: "What is at stake in a defamation reflecting on a person's character is now likely to be recognised as engaging that person's rights under article 8. On the other hand, if an alleged defamation engages only a person's *professional* attributes, then what is at stake is less likely to engage their rights under article 8, but may engage only their commercial or property rights (which are Convention rights, if at all, under article 1 of the First Protocol" (emphasis added).

90 "Strasbourg on privacy and reputation Pt 3: 'A balance between reputation and expression?'", *Inforrm*, 23 June 2010, available at http://inforrm.wordpress.com/2010/06/23/revisited-and-updated-strasbourg-on-privacy-and-reputation-part-3-%E2%80%9Ca-balance-between-reputation-and-expression%E2%80%9D/.

91 Affirmed recently in *Greene* v *Associated Newspapers* [2005] QB 972.

92 *Times* v *Flood* [2010] EWCA Civ 804, [2011] 1 WLR 153, at [21].

93 [2010] EWCA Civ 1484.

94 Mullis and Scott, "Swing of the pendulum", n. 25 above.

95 Howarth, "Libel", n. 26 above, pp. 867–8.

96 Speaking extra-judicially in a speech delivered at City University, London, 11 March 2010, available at www.judiciary.gov.uk.

formulations of the fair comment, "truth" and *Reynolds* defences that will be much more readily available and comprehensible to the layperson than the current, highly complex caselaw. This may particularly benefit two groups, who generally cannot afford routine – or indeed any – access to libel lawyers: "citizen journalist" bloggers and small NGOs, both of whom have increasingly important roles to play in public discourse. From a rule of law perspective, therefore, in which the clarity and accessibility of legal rules are cardinal virtues, the Bill can be argued to have significant merit. Second, if it can set out the best understanding of the common law in clear and emphatic terms, the Bill *may* ensure that more judges actually apply the law, rather than the more speech-restrictive version of it that many of them have evidently historically preferred.[97]

On the other hand, a number of commentators have pointed out the danger that the Bill's new provisions will simply lead to more uncertainty and hence more (expensive) litigation, defeating the clarificatory purposes of the Bill and adding to legal costs. Mullis and Scott have previously argued that, particularly where legislation mainly codifies the law with only minor changes, the reforms may simply not be worth the trouble. They place the "new" public interest and truth defences in this category, together with the "substantial harm to reputation" requirement in cl. 2, arguing:

> It is inconceivable that there will not be litigation while the precise ambit of the new law is explored. Given that the gains will be negligible, it must be doubtful whether statutory restatement in [these] . . . [areas] would be worth the candle . . .[98]

Similar arguments – that the new cl. 2 test is unnecessary and will merely increase costs – have been made by leading practitioners.[99]

It is tempting to respond by arguing that such additional litigation may simply be the short-term price to be paid for the longer-term goal of better and clearer libel law. However, this is subject to three major provisos. First, the legislation must clearly distinguish between pure codification on the one hand and reform on the other; in places the two appear to be mixed up together, as in relation to cl. 4 on "honest comment", where elements of codification and minor reform appear together in an uneasy jumble.[100] Second, in relation to *both* codifying *and* reforming provisions, the statute must make clear what role the existing common law will play. The rule of law benefits of clarity and accessibility posited above will not accrue – indeed the position could become worse than the present – if judges in practice simply keep applying the common law (on the basis that the statute is merely declaratory of it). Nor will the law become any more clear or accessible if judges purportedly apply the new statutory provisions, but so heavily glossed by the common law that, to discover the "real" meaning of the new provisions, one must, after all, read the previous caselaw.

There are in fact a number of possible approaches that courts may take to the interrelationship between the new statute and the existing caselaw; moreover, given the

97 It is generally acknowledged, for example, that High Court judges applied the new *Reynolds* defence somewhat restrictively, resulting in the eventual rebuke and clarification of *Jameel*. *Jameel* v *Wall Street Journal* [2006] UKHL 44, especially paras [33] (Lord Bingham), [56] (Lord Hoffmann). As Boland puts it, "the lower courts . . . initially thwarted the intention behind '*Reynolds* privilege' by applying it restrictively, with the consequence that it succeeded in very few cases": J Boland, "Republication of defamation under the doctrine of reportage – the evolution of common law qualified privilege in England and Wales" (2011) *OJLS* 89, p. 90.

98 A Mullis and A Scott, "Worth the candle? The government's Draft Defamation Bill" (2011) 3(1) *JML* 1, pp. 2–3 (hereafter *JML*).

99 See e.g. the comments of Adrienne Page QC, Paul Tweed, Hugh Tomlinson and Desmond Browne QC in evidence to the Joint Committee, JC Report, n. 19 above, Q564.

100 See further below, pp. 173–80. The JC Report, n. 4 above, notes this problem, at para. 21.

mixture of codification and reform in the Bill, it seems likely that different approaches will have to be taken, depending upon which part of it is being applied. Possible approaches include the following.

(a) First, judges could treat certain provisions as setting out a new and separate defence from those established under common law. This is a possible reading of cl. 2, which does not abolish the common law *Reynolds* defence. Under this approach, the common law would remain, running alongside the new law, so that defendants could argue *either Reynolds* privilege *or* cl. 2 "responsible publication". Quite plainly this would achieve nothing other than more litigation. Recognising this, the government has now indicated that it will amend the Bill to explicitly abolish *Reynolds* (Response at para. 13).

(b) A second possibility would be for courts to treat the new law purely as declaratory of the old; in such a case, judges would presumably recite the statutory formulation, but use established caselaw to determine all the detailed meanings of the law. This would be another possible approach to cl. 2, and a likely approach to cl. 1 (substantial harm) and cl. 3 (truth). As discussed above, this would provide little, if any, additional clarity, but it would improve accessibility, provided that the wording of the statute at least broadly captured the law actually applied by the courts.

(c) A third possibility would be for judges to treat at least some of the new provisions as representing a modest change in the law, but then to use established caselaw and principles as the key to *interpreting* the new provisions. Parts of cl. 4 on honest opinion seem ripe for this kind of treatment.

(d) Fourth, judges might apply the new law as it stands, using the caselaw only to help resolve ambiguities. This could apply to any provisions in the Bill that codify or change the law.

(e) Fifth, and finally, judges could take the new law as an entirely fresh start, rendering the old law wholly inapplicable. This seems likely at least in relation to cl. 6 (single publication) but could be applied elsewhere.

In practice, different judges will probably employ different combinations of the above approaches, disagreeing amongst themselves at to which approach should apply to which provisions. Under the worst case scenario, a great deal of litigation, possibly involving numerous appellate decisions, would be required to lay down an authoritative approach. The government seems to envisage approach (d) in relation to both the new truth and fair comment defences. In each case, the Explanatory Notes state that, where a defendant wishes to rely on the new statutory defence, the court would be required to apply the words used in the statute and not the current caselaw. However, the notes go on to say that: "in cases where uncertainty arises the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied". [101] Mullis has aptly described this as "an invitation to litigation",[102] while Mark Warby, in his evidence to the Joint Committee, similarly commented in relation to the new defence of truth:

> If the intention is that the courts would take account of the common law case law (as stated in para 24 of the Consultation Paper) then why abolish it? The justification offered in the Consultation Paper is that otherwise the common law

101 See n. 3 above, Explanatory Notes, para. 19 (Truth) and para. 30 (Honest Comment).

102 "The government's Defamation Bill – insufficiently radical?" Pt 2; *Inforrm*, 19 March 2011, available at http://inforrm.wordpress.com/2011/03/19/opinion-the-government%E2%80%99s-defamation-bill-%E2%80%93-insufficiently-radical-part-1-alastair-mullis-2/.

> defence would continue to exist alongside the statutory one, leading to confusion. But . . . I find it hard to think of anything more likely to confuse a client or non-specialist lawyer than advice to the effect that "Yes, I know that section 3(4) says the common law of justification is abolished, but that was not really the intention; the government expects Judges to refer to the common law nonetheless . . ."[103]

An additional problem here is that the same language is used in the Explanatory Notes about both the truth and honest comment defences. However, in the former case, it appears that the Act *only* codifies the existing law; in the latter, as currently drafted, it appears to both codify *and* modify it.[104] Further uncertainty could arise over how far courts will use references to the consultation paper or Explanatory Notes as evidence of the intention of *Parliament*. Although *Pepper* v *Hart* allows for reference to Ministerial Statements in order to resolve legislative ambiguities,[105] there are constitutional difficulties inherent in allowing government statements, whether forming part of Hansard or not, to determine the intention of the legislature.[106]

These problems, many of which are inherent in any statutory reform of rules of common law, will be aggravated in this particular instance by the fact that, assuming the Bill is enacted in some form, there will in future be not two but *four* sources of law for the courts to integrate, viz:

1. the new Defamation Act;
2. the existing caselaw, which will have some role – presumably a varying one depending upon the wording of particular provisions – in determining the meaning of the new provisions;
3. Articles and 10 and 8 as interpreted and applied by the Strasbourg court in its very extensive jurisprudence in this area;
4. The HRA, which tells the courts (in provisions themselves open to interpretation)[107] how to apply the Convention and its caselaw in domestic law.

While domestic courts have made a start in reshaping libel law to take account of factor 3, this will be an ongoing task, as the Strasbourg court's jurisprudence continues to develop and refine. Moreover, as noted above, the UK Supreme Court has recently held that Article 8 is *always* engaged in defamation cases.[108] If, at some future point, the Strasbourg court clarifies unequivocally its apparent stance in *Karako* v *Hungary*[109] that this is sometimes, but not always the case,[110] then domestic courts will have to reconsider this point, at the same time as seeking to apply the new legislation. Either way, assuming that the HRA remains on the statute book, courts will remain bound to ensure under s. 3 that any new Defamation Act is interpreted and applied compatibly with the Convention rights

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103 See JC Report, n. 16 above, EV 55, at para. 20.

104 By removing the common law's current insistence that, to benefit from the defence, the publication must explicitly or implicitly refer to the facts that justify the opinion offered: see below, pp. 174–5.

105 *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593 (HL).

106 See A Kavanagh, "*Pepper* v *Hart* and matters of constitutional principle" (2005) 121 *LQR* 98, 100.

107 For example, there is a lively debate around how far s. 3 legitimately allows courts to go (discussed in Kavanagh, *Constitutional Review*, n. 125 below), while the interpretation of the HRA's provisions in relation to "horizontal effect" continues to be of notorious difficulty. See, most recently, G Phillipson and A Williams, "Horizontal effect and 'the Constitutional Constraint'" (2011) 74 *MLR* 878–910.

108 *Guardian News*, n. 84 above.

109 See n. 83 above.

110 As Mullis and Scott argue is the best interpretation of its *Karako* decision ("Swing of the pendulum", n. 25 above).

under the HRA and, in doing so, take account of the Strasbourg jurisprudence on those rights (under s. 2). As is well known, under the so-called "mirror principle", domestic courts have interpreted the HRA as meaning that they should generally follow the clear requirements of the Strasbourg caselaw.[111] It is to the HRA's importance to the interpretation of any new statute that we now turn.

The HRA constraint on reform

One matter that seems to have been notably neglected in the libel reform debate to date is the constraints represented by the courts' above-noted duties under the HRA. Indeed the HRA has generally been given pretty scant consideration: the Joint Committee report, for example, mentions it just once, and then only (with unconscious irony) to cite s. 12(4) – the provision requiring courts to "have particular regard to the importance of the Convention right to freedom of expression" – which has certainly *not* had the effect of causing domestic courts to favour that right over competing ones such as Article 8.[112] This example notwithstanding, the common assumption by reformers seems to have been that, if only just the right statutory language can be found, it will be like pulling a legal lever: the new formulation will be automatically implemented, just as intended, by the courts. The naivety of this stance will be immediately apparent to human rights lawyers familiar with some of the HRA caselaw on s. 3. The Defamation Bill will doubtless be accompanied by a statement of compatibility with the Convention rights when presented to Parliament.[113] Hence the courts will be likely to assume Parliament's intention to have been that any apparent incompatibilities should be dealt with using s. 3. Indeed, the Explanatory Notes, when dealing with the issue of compatibility with the Convention rights, state:

> It is considered that this Bill allows due flexibility for courts, when considering cases, to ensure that Convention rights are respected according to the extent to which the relevant rights are in play.[114]

The caselaw on s. 3 demonstrates that, whatever language Parliament uses, judges are capable of subjecting it to some pretty drastic re-interpretation in order to bring it into line with the Convention rights. As Lord Nicholls put it in the leading case: "Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear."[115] It is worth rehearsing briefly a few of the leading cases on s. 3, in order to correct the tendency, evident in so much of the discussion of this subject, to ignore its potential to change the meaning and effect of whatever provisions end up in the new Defamation Act.

The leading case, *Ghaidan* v *Godin-Mendoza*,[116] concerned a provision in a statute giving the right to inherit tenancies to married couples and couples "living together as husband and wife". In order to "read out" the sexual orientation discrimination entailed by this provision,[117] the House of Lord reinterpreted it so as to cover two gay men who had lived

111 See *R (on the application of Ullah)* v *Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323, at [20] (Lord Bingham); J Lewis, "The European ceiling on rights" (2007) *Public Law* 720. See also R Masterman, "Aspiration or foundation? The status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law" in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP 2007).

112 As affirmed, e.g. in *Guardian News*, n. 84 above. Similarly, the JUSTICE submission mentions the HRA only once, in its final paragraph, and only then in relation to an ancillary point on the ability of "public authorities" to bring defamation actions: JC Report, n. 16 above, EV 20, para. 59.

113 Such a statement accompanies the draft Bill, n. 3 above.

114 See n. 3 above, Explanatory Notes, para. 66.

115 *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, 571.

116 Ibid.

117 Which violated Article 8 read with Article 14 – the non-discrimination provision.

together in a stable relationship. Lord Millet’s dissent complained that the terms “husband” and “wife” were surely gender-specific terms, intended to limit the benefit of the legislation to opposite-sex couples.[118] In an earlier decision, a provision in the recently passed Youth Justice and Criminal Evidence Act 1999, providing that evidence of the victim’s sexual history with the defendant in rape trials could only be admitted in very narrowly defined circumstances,[119] was interpreted by the House of Lords to mean that it could be admitted whenever the interests of a fair trial under Article 6 required it.[120] No real attempt was made to explain how the actual words of the statute could bear the new meaning imposed upon it (as Lord Hope in dissent complained); rather, an effective amendment to the statute was inserted in the form of a proviso that evidence must be admitted where Article 6 ECHR so required. A similarly dramatic re-reading of legislation occurred when their Lordships found in *Lambert*[121] that a provision in the Misuse of Drugs Act that plainly placed an adverse *legal* burden on the accused[122] could be read down using s. 3 into merely an *evidential* burden. Their Lordships thus read the words, “proves that he neither believed or suspected that the substance in question was a controlled drug” as meaning, “*leads evidence such as to raise an issue as to whether* he neither believed or suspected . . .”. The most recent example concerned provisions in the Prevention of Terrorism Act 2005 dealing with control orders: the provisions stated that evidence *must not* be disclosed to a suspect where it was contrary to the public interest; they were reinterpreted by the House of Lords to mean that the gist of such evidence must be disclosed even if that was contrary to the public interest,[123] again by the insertion of an Article 6-protecting proviso. As a result of these and other decisions,[124] the leading commentator in this area, Aileen Kavanagh, is very clear that courts have reached outcomes plainly contrary to Parliament’s intention as expressed in the relevant legislation,[125] occasional pious denials by Law Lords notwithstanding.

Of course, there are some quite well-established limits to interpretation under s. 3 deriving from the caselaw. Most importantly – if rather vaguely – acts of interpretation must be recognisable as such and not cross into the “forbidden” area of “legislation”.[126] However – and this is a key point – *reinterpretation of statutory provisions is easy to achieve when those provisions use broad and general terms, which are inherently open and flexible in meaning*. Applying this point to the Defamation Bill, it is immediately evident that it is heavily reliant on such terms – and thus inherently flexible in its meaning and effect. Consider for example the repeated use of the term “substantial” in the Bill’s clauses: only statements causing or likely to cause “substantial harm” to reputation are defamatory (cl. 2); “substantially true” allegations are protected by the defence of truth (cl. 3(1));[127] the new single publication rule

118 *Ghaidan* v *Godin-Mendoza*, n. 115 above, at 582ff; his Lordship complained by way of analogy that the word “black” cannot be interpreted to mean “white” (at [70]).

119 S. 41.

120 *R* v *A (Complainant’s Sexual History)* [2002] 1 AC 45 (HL).

121 *R* v *Lambert* [2001] 3 All ER 577.

122 If he could not prove that he was ignorant of the fact that the substance he had in his possession was a controlled drug, he would be convicted.

123 *Secretary of State for the Home Department* v *AF (No 3)* [2009] 3 WLR 74.

124 See also *R* v *Offen* [2001] 1 WLR 253.

125 A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP 2009), pp. 80–1 and see, generally, chs 2–4 on the s. 3 caselaw.

126 See e.g. Lord Millett in *Mendoza*, n. 115 above, at 584: “the exercise which the court is called on to perform is still one of interpretation, not legislation”.

127 And see also re multiple imputations in cl. 3(3), the repeated use of “substantially true” and a similarly open-textured term, “materially injure”.

uses the test of whether a later publication was "substantially the same" (cl. 6(1(b)) as an earlier one, while denying it protection under the rule if the manner of its publication was "materially different"(cl. 6(4)). Another example is the notoriously vague term, "the public interest", used both in relation to the codification of *Reynolds* in cl. 2[128] and as part of the definition of honest comment in cl. 4(3). The comment defence also hangs upon the key distinction between statements of fact and expressions of "opinion" – a famously slippery distinction that sharply divided the High Court from the Court of Appeal on the facts of the notorious *Simon Singh* case.[129] Similarly general terms include the test of whether "an honest person could have held the opinion" in relation to the honest comment defence in cl. 4(4), "responsible"[130] in relation to cl. 2, "impartial" in relation to "reportage",[131] and so on. Moreover, even when introducing a seemingly hard and fast change like the single publication rule in cl. 6, an escape route is left via the very general proviso in the Limitation Act 1980, allowing an action to be brought out of time where "it appears to the court that it would be equitable" to allow it.[132] Clearly then, the Defamation Act will be *linguistically* wide open to interpretation and reinterpretation.

There are other limits to the use of s. 3 HRA deriving from the caselaw; however, none would appear to apply to the Bill. The first of these, deriving from *Anderson*,[133] is that a proposed re-interpretation must not go against the basic thrust or "grain" of the legislative scheme. Thus, in *Anderson*, the incompatibility with the Convention lay in the involvement of the Secretary of State in sentencing adult life prisoners (which violated Article 6(1)). Whilst it might conceivably have been *linguistically* possible to have read the Secretary of State's role out of the legislation, his role was a feature that was pervasive: unlike in cases in which the compatibility problem lay only in a particular sub-section of the statute, his role was embedded in the statute as a whole. In contrast, the Defamation Bill sets out a series of piecemeal, distinct reforms; presumably therefore, if one is found, on its ordinary construction, to violate Article 8 (or 10), courts will view it as easily remedied by interpretation without this gainsaying a "fundamental feature" of the legislation.

Another limitation derives from *Bellinger*,[134] and may be termed the implied "constitutional constraint" on the use of the court's s. 3 powers, deriving from the separation of powers. It applies when courts, although *able* to achieve re-interpretation as a matter of linguistic possibility, consider that the proposed change would have widespread implications in a complex area of social policy[135] that are "felt to be beyond the constitutional competence of the court".[136] The result is that a Declaration of Incompatibility (under s. 4 HRA), allowing *Parliament* to devise a comprehensive legislative solution, is seen as the more appropriate remedy. Again, however, this constraint would not appear applicable to the Defamation Bill: since the law of libel was originally judge-made, courts will doubtless feel themselves to be constitutionally competent to deal with legislation in the area as necessary; moreover, it is hard to see how judicial reinterpretation of the Defamation Act could have major knock-on effects in other areas of law, save

128 Cl. 2(1), 2(2).

129 *British Chiropractic Association* v *Singh* [2010] EWCA Civ 350, CA.

130 In relation to cl. 2 (responsible publication on matter of public interest).

131 Used in cl. 2(3) "an accurate and impartial account of a dispute" attracts cl. 2 protection.

132 S. 32(A). And see below, at pp. 171–2.

133 *R (on the application of Anderson)* v *Secretary of State for the Home Department* [2003] 1 AC 837. The House of Lords instead issued a declaration of incompatibility.

134 *Bellinger* v *Bellinger* [2003] 2 AC 467. See A Kavanagh, "The elusive divide between interpretation and legislation under the Human Rights Act 1998" (2004) *OJLS* 259, p. 272.

135 In *Bellinger* itself, how to recognise new gender status in the law.

136 R Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: CUP 2011), p. 165.

possibly the new privacy "tort"[137] – which is also judge-made and therefore may be appropriately adjusted by judges, as necessary. The final key constraint arises in instances where the compatibility problem follows from the *absence* of provisions in a statute, so that "re-interpretation" would in reality mean the *implication* by a court of wholly new, detailed provisions into the statute (the issue in *Re S and Re W*).[138] Once again, this seems unlikely to apply in relation to the Defamation Bill, in which any compatibility problems will presumably arise from specific provisions, not their absence. In short, therefore, none of the major constraints on the use of s. 3 identified in the caselaw appear likely to apply to the new defamation legislation, while its repeated use of open-textured language leaves it extremely susceptible to (re)interpretation by courts armed with s. 3.

Thus the fact that, under the HRA, the courts will be not only free, but *required* to ensure that English defamation law remains compliant with Strasbourg principles, greatly limits the practical capacity of legislation to make radical changes to the law, even if its sponsors had wanted it to. An exception, ironically, is one change that the Bill does *not* make: were corporate claimants to be simply disabled from suing in defamation in clear language, this could presumably not be re-interpreted under s. 3. Given the modesty of the current Bill's proposed reforms, it is in fact hard to see major Article 8 or 10 issues arising from it, unless the courts were to take the view that some of the extensions to privilege (discussed below) under-protect Article 8. However, three other possibilities remain. First, were the Bill to be amended in Parliament so as to introduce more radical pro-defendant reforms, clear areas of incompatibility could well arise, requiring interpretive action to remedy them. Second, new Strasbourg developments, or domestic reassessment of the existing European caselaw, could require interpretation of the Act to change over time. This leads onto the third point, which is that the availability of s. 3 provides an answer to concern expressed by some practitioners that the codification undertaken in the Bill will "ossify" the law, preventing future dynamic developments.[139] In the light of the discussion above, this concern appears overstated:[140] the key provisions in the Bill may be interpreted and re-interpreted by courts using s. 3, allowing for a broad range of future developments related to Articles 8 and 10 to be accommodated within the existing wording. As seen above, such re-interpretations may even depart from the clear meaning of statutory words: the new Act should not in practice therefore prove to be a legal straightjacket.

5 The specific provisions and proposals to go further

Having now made the four key points highlighted in the introduction, we may turn to consider the particular proposals for reform contained in the draft Bill, taking them in order. In places, proposals to go further, from the Joint Committee and others, are also considered.

Requirement of substantial/serious harm: clause 1

Clause 1 of the draft Bill provides that: "A statement is not defamatory unless its publication has caused, or is likely to cause, substantial harm to the reputation of the claimant." A number of points may be made about this simple provision. First of all, as a

137 Otherwise known as the extended action in confidence: see, generally, *Campbell* v *MGN Ltd* [2004] 2 AC 157 (HL), especially at [11]–[22] (Lord Nicholls).

138 [2002] 2 AC 291.

139 See in particular Hugh Tomlinson's oral evidence to the Joint Committee, JC Report, n. 19 above, Q569.

140 This seems particularly so in relation the "new" public interest defence, in which the factors to which the court is instructed to have regard are neither weighted in any way nor stated to be exhaustive: plainly this clause therefore allows for developments in future.

number of commentators have pointed out, such a notion, rather than "raising the bar" for libel claimants, may go no further than the existing law, given the recent finding by Tugendadt J in *Thornton* v *Telegraph Group* that libel law "must include a qualification or threshold of seriousness, so as to exclude trivial claims".[141] Despite some confusion,[142] it now appears that the government's intention is that, while the new test was intended only to "reflect" not change the common law, putting it in the statute will give it "new prominence".[143]

Opposition to this provision, and suggestions for it to go further, have therefore both focused on the question of whether it will serve any real purpose as it stands. Two key points may be made here. First, in asserting that the common law already sets this threshold, most reliance has been placed on the *Thornton* decision, which after all, is only one, very recent decision, and not by an appellate court.[144] Second, there are undoubtedly older cases in which courts have set the bar too low for defamation: the best recent example is probably *Berkoff* v *Burchill*:[145] the Court of Appeal held that statements in film reviews by Julie Burchill that the claimant, like most film directors, was "hideously ugly" and – in a review of *Frankenstein* – that "the Creature" looked "a lot like Steven Berkoff, only marginally better-looking", were *capable* of being defamatory, in the sense of being likely to bring Berkoff into ridicule.[146] While the bar may well have been raised anyway since that decision,[147] the provision is a potentially useful reminder to the courts that, in order to restrict free speech, there should be some likely *serious* harm to reputation. This requirement is fully congruent with the view of the Strasbourg court that:

> In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life.[148]

This is not to imply that only those defamation actions that engage Article 8[149] should be permitted to proceed, but rather simply that some reasonable threshold of seriousness is fully consonant with Convention principles.

Two further points may briefly be made. First, this is an excellent example of a provision that, due to its general wording, will be read by the courts under the HRA – and by reference to the common law – to mean whatever they think the Convention and common law principle requires. Media lawyers will recall that the word "substantial" in the Contempt of Court Act 1981 was read down by the courts, so as to mean, in effect, "non-

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141 [2011] 1 WLR 1985 at [100]. *Ecclestone* v *Telegraph Media Group Ltd* [2009] EWHC 2779 (QB) has been cited as an example of the law already disallowing trivial claims.

142 When the Lord Chancellor and the minister responsible for the Bill, Lord McNally, gave oral evidence to the Joint Committee, they gave the impression that the provision was intended to "raise the bar" from that set by the existing law: JC Report, n. 18 above, Q574.

143 See JC Report, n. 11 above: Kenneth Clarke MP, Lord McNally and Jeremy Hunt MP, Written Evidence, Lord McNally (EV 47).

144 *Sim* v *Stretch* [1936] 2 All ER 1237 may also be interpreted as requiring the same threshold.

145 [1996] 4 All ER 1008.

146 Another probably borderline case was *Dee* v *Telegraph Media Group* [2010] EWHC 924 (QB) (accusation that the claimant was the world's worst professional tennis player – summary judgment for defendant on justification and fair comment).

147 See e.g. *John* v *Guardian Newspapers* [2008] EWHC 3066, in which a satirical article about Elton John was found not to bear the seriously pejorative meaning contended for by the claimant; I am indebted to Alastair Mullis for this point.

148 *A* v *Norway*, Judgment of 9 April 2009, at [64].

149 See discussion above, pp. 159–60.

negligible".[150] Thus arguments about the precise wording to be used may in practice be of little consequence. The Joint Committee, echoing the view of the Libel Reform Campaign in this respect, suggested that the test be modified to "substantial and serious", and the government now proposes to use "serious harm" as the test.[151] While the current author would support this, as giving the judges a nudge in the right direction, it must be doubted whether it will make any real difference in practice.

The second point, put forward by a number of media practitioners, and by Mullis and Scott, is that the provision may be an excellent example of the kind of clause that will add nothing to the law but more litigation. Mullis and Scott contend that it is likely that "in practice, defendants will seek to challenge every libel claim on a 'clause 1 basis' with mini-trials taking place on the issue of 'substantial harm' at the outset of every action", something that would "increase the complexity and cost of litigation, not reduce it".[152] However, this objection appears overstated. While there may be a risk of this occurring in some early cases, or later marginal ones, there will still surely be a large number of cases in which the allegation is plainly serious enough to cross the threshold. Moreover, its chief value may lie in helping to deter frivolous claims.

Responsible publication on a matter of public interest: clause 2

Here again, the approach of the Bill is basically to capture the existing common law but in simpler, more straightforward language. Clause 2 provides as follows (note that changes the government has agreed to make in its recent Response are indicated by square brackets showing words to be deleted):

2 Responsible publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that:

(a) the statement complained of is, or forms part of, a statement on a matter of public interest; and

(b) the defendant acted responsibly in publishing the statement complained of.

(2) In determining whether a defendant acted responsibly in publishing a statement, the matters to which the court may have regard include (amongst other matters):

(a) the nature of the publication and its context;

(b) the seriousness of any imputation about the claimant that is conveyed by the statement;

(c) the extent to which the subject matter of the statement is of public interest;

(d) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;

(e) whether the defendant sought the claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;

(f) whether the defendant took any other steps to verify the accuracy of the statement;

150 See the interpretation given to s. 2(4) of the Contempt of Court Act 1981 in *AG* v *English* [1982] 75 Cr App R 302.

151 JC Report, n. 4 above, para. 28. Response, at paras 9 and 10.

152 *JML*, n. 98 above, p. 4.

(g) the timing of the publication [and whether there was reason to think it was in the public interest for the statement to be published urgently];

(h) the tone of the statement [including whether it draws appropriate distinctions between suspicions, opinions, allegations and proven facts].

(3) A defendant is to be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person.

These provisions are similar to those in the Lester Bill and, as it did, treat reportage as an instance of responsible journalism (cl. 2(3).[153] They have the virtue of making clear that the protection affords to everyone, not just professional journalists.[154] As noted above, there is some modest merit in seeking to put *Reynolds* in simpler and more accessible language,[155] and particularly to emphasise the lesson of *Jameel* that lower courts had been applying the criteria too strictly and thus robbing journalists of much of the protection the House of Lords had intended to give them by that decision.[156] Thus, the clause may help make clear to judges that the required standard of responsible journalism is to be applied in a "practical and flexible manner"[157] and that the factors in cl. 2(2), taken from *Reynolds*, are not 10 hurdles every defendant must cross. It is notable that the factors to which the court is to have regard are deliberately presented as non-exhaustive and non-mandatory: thus, the court "may" have regard to the listed matters but only "amongst other [non-specified] matters". This is doubtless intended to stress that all the factors will not always be relevant, thus discouraging a rigid check-box tendency in applying them. However, there is the danger that this very flexibility may encourage courts simply to do whatever they were doing before, with the unfortunate result, discussed above, that the Bill's attempted clarification could be rendered nugatory. In relation to the reportage defence in particular, the consultation states openly that the Bill's provisions attempt only to capture the core of the emerging principles[158] and to leave the door open for further development. As discussed above, the Bill should formally abolish the common law here; moreover, as elsewhere, a coherent and consistent formula is needed by the draftsmen as to the role of existing authorities in interpreting the new law.

The consensus in terms of substance is that cl. 2 does not add anything new. Mullis and Scott see it as having rowed back from the more defendant-friendly Lester version, such that it essentially restates *Reynolds*,[159] while two leading practitioners agree.[160] Recognising this, the Joint Committee made a number of proposals to beef up the defence.[161] The most contentious of these is perhaps their suggestion that: "A new factor should be added that refers to the 'resources of the publisher'". The justification for this is that:

> it is not appropriate to expect the same level of pre-publication investigation from a local newspaper, non-governmental organisation or ordinary person as

153 Boland, "Republication", n. 97 above.

154 As already provided for by *Seaga* v *Harper* [2009] AC 1, see, especially, para. 11.

155 pp. 160–1.

156 Boland, "Republication", n. 97 above, p. 90.

157 *Jameel*, n. 71 above, at [56]

158 Based primarily on *Al-Fagih* [2001] All ER (D) 48 and *Roberts* v *Gable* [2008] QB 502, CA.

159 *JML*, n. 98 above, p. 6.

160 E Craven and A White, "Draft Defamation Bill – proposals, problems and practicalities: Pt 1", *Inforrm*, 3 April 2011, http://inforrm.wordpress.com/2011/04/03/opinion-draft-defamation-bill-proposals-problems-and-practicalities-part-1-anthony-white-qc-and-eddie-craven/.

161 JC Report, n. 4 above, para. 65.

> we should expect from a major national newspaper. [Instead] "responsibility" [should be treated as] a flexible standard that considers resources alongside other important issues such as the seriousness, nature and timing of the publication.[162]

JUSTICE similarly makes the argument that an unpaid blogger should not be expected to make the same checks before publishing a story as a professional journalist.[163] While it is of the essence of the *Reynolds* test that it should be applied with due flexibility, a note of caution should be added here. It could well be argued that if a blogger is considering publishing a seriously defamatory allegation, but knows that he or she does not have the resources to check its truth properly, the responsible course of action may not be to go ahead and publish anyway, knowing that the facts are largely unchecked, but rather to make further enquiries, or alert a professional journalist, with the resources of a newspaper behind them, to the possibility of the story's truth. Taken too far, the argument as JUSTICE puts it is a charter for irresponsible blogging, and it is welcome therefore, that the Government has rejected the proposal to add "resources" as a specific factor.[164]

As noted above, sub-cl. 3 attempts to reproduce the current defence of "reportage". It is important to recognise that such a defence has solid foundations in the Strasbourg caselaw in this area. The reportage defence recognises that, in Strasbourg terms, it is a key part of the media's "watchdog" role for it to report upon the *fact* that allegations have been made where that legitimately concerns the public. Thus, liability in defamation for such reportage will tend to violate Article 10. In particular, Strasbourg has found that journalists are entitled to repeat allegations made in official reports without attempts to verify them.[165]

However, in one respect subs. (3) may go too far. As the Joint Committee put it:

> the Reportage defence at clause 2(3) of the draft Bill . . . would appear to allow publishers to repeat almost any defamatory remark made by a third party in a context of a current controversy that relates to a matter of public interest . . . A limit is required. Our preferred option is to permit publication only when the reporting of the dispute is in the public interest (and not merely when the dispute concerns a matter of public interest). We also believe that the neutral reporting of a dispute should form one of the factors for determining responsibility, rather than automatically being viewed as responsible. Therefore, we recommend that the "reportage" defence at clause 2(3) is reformulated as a new matter to which the court may have regard under clause 2(2) namely "whether it was *in the public interest* to publish the statement as part of an accurate and impartial account of a dispute between the claimant and another person".[166]

This would appear to be in line with the most recent authority on this issue: the Court of Appeal's decision in *Times* v *Flood* makes clear that, to benefit from *Reynolds* privilege, not only must the general subject matter be one of legitimate public concern, but the particular

162 JC Report, n. 4 above, para. 65(a).

163 JC Report, n. 16 above, Ev 20, p. 8.

164 Response, at para. 15. The Joint Committee goes on to make a number of suggestions for minor drafting changes relating to timing, "Draft Defamation Bill", n. 160 above, (65(c)) taking the statement in context (65(b)), tone (65(d)) and editorial discretion (65(e)).

165 *Bladet Tromsó and Stensaas* v *Norway* 29 EHRR 125 at [68]: "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public watchdog role of the press may be undermined."

166 JC Report, n. 4 above, para. 66.

publication must be "in the public interest".[167] The government did not accept the JC's suggestion here, saying only that it would seek to find a provision that best reflected the caselaw (Response at paras 21–3).

One problem with the current law in this area is not addressed by the legislation: that by focusing on whether the conduct of the journalist was *responsible*, it neglects the value to the public in knowing (if possible) whether the original allegations made were true or false. If the publication in question is found to pass the test of responsible journalism, the defendant will win, if not the claimant. However, in neither case will the public be any the wiser as to whether the accusation was true or not. This seems out of line with the underlying rationales for free speech, amongst them particularly, the argument from truth.[168] One way round this, as a number of commentators have suggested, would be for a newspaper that wins a case on *Reynolds* only to be required to publish a retraction or correction, at least where it has become obvious that the original allegation was false. The Libel Reform Campaign indeed has suggested that "claimants should be able to obtain a declaration of falsity from the court in *all* cases where they can prove a defamatory allegation of fact to be false".[169] However, on this matter – as on the subject of discursive remedies generally – the Bill is disappointingly silent.[170] Further, the Joint Committee comes out against any such proposal,[171] on the curious basis that: "It is not the function of the courts to determine categorically that something is false." The public might be surprised to hear this, given that criminal and civil trials are often welcomed by those accused as a chance precisely to establish the truth and thus clear their names. The Joint Committee added that "such a remedy could lead to a declaration of falsity being made in relation to a statement which is later proved to be true". One might point out that – certainly in terms of public perception – courts routinely find allegations to be false in libel trials[172] – and award large damages – so this "problem" would scarcely be a new one. The Joint Committee also does not advert to the fact that court findings of guilt of criminal trials have been known to be overturned on the basis of fresh evidence, and yet no one suggests that it is inappropriate for authoritative findings of guilt or innocence to be made by criminal courts. The committee adds, with rather more plausibility:

> There may also be legitimate reasons for a publisher being unable to prove the truth of an allegation. For instance, the publication may be based on information provided by a confidential source who cannot openly verify its truth.[173]

The *Jameel* case was precisely such an instance,[174] and such cases provide vivid demonstrations of why *Reynolds* privilege is needed. But the answer, surely, is that in such cases, the courts could do what the Joint Committee recommends and simply make a finding that the accusation was "not proven". But such instances provide no argument against the availability of declarations of falsity where it is clearly established in court that

167 [2010] EWCA Civ 804, [2011] 1 WLR 153, at [63]. See the incisive commentary by P Mitchell: "The nature of responsible journalism" (2011) 3(1) *JML* 19–28. As this paper went to press, the Supreme Court gave its judgment in the *Flood* case, in which it allowed *The Times*' appeal from the Court of Appeal judgment, but did not appear to change the law: [2012] UKSC 11.

168 See Barendt, "Balancing freedom of expression", n. 42 above.

169 JC Report, n. 11 above, pp. 64–5.

170 For more on this matter, see Mullis and Scott, "Reframing libel", n. 23 above.

171 JC Report, n. 4 above, para. 36.

172 Strictly speaking, the courts merely find the defamatory allegation not proven true; but this is not the general perception, which is surely what counts here.

173 JC Report, n. 4 above, para. 36.

174 The crucial information in that case having been provided by intelligence sources, who were, for obvious reasons, unwilling to give evidence in open court.

the accusations were indeed untrue, although responsibly made at the time. It is to be hoped that this issue will be reconsidered when the Bill is before Parliament.

DEFENCE OF TRUTH: CLAUSE 3

Clause 3 provides as follows:

3 Truth

1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation in relation to a statement which conveys two or more distinct imputations

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not materially injure the claimant’s reputation.

Here, the Bill appears to represent a straightforward codification of existing law,[175] and it here formally abolishes the common law defence of justification.[176] However, as noted above, the government has acknowledged that the existing common law may still be referred to by judges to resolve uncertainty. The advantages and difficulties that this kind of “codification” may give rise to have already been considered.[177] In view of the discussion above on discursive remedies, it is to be welcomed that the government agrees with the Joint Committee that courts should have a wider power than at present to order a summary of their judgment to be printed by defendants (Response, para. 27). This should in some cases assist the pubic in learning the falsity of the original allegations.

FAIR COMMENT/HONEST OPINION: CLAUSE 4

Clause 4 provides as follows (note that changes the government has agreed to make in its recent Response are indicated by square brackets showing words to be deleted):

4 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that Conditions 1, [2] and 3 are met.

(2) Condition 1 is that the statement complained of is a statement of opinion.

[(3) Condition 2 is that the opinion is on a matter of public interest.]

(4) Condition 3 is that an honest person could have held the opinion on the basis of

(a) a fact which existed at the time the statement complained of was published;

(b) a privileged statement which was published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

175 It appears to reflect the law as stated in *Chase* v *News Group Newspapers Ltd* [2002] EWCA Civ 1772.

176 Cl. 3(4).

177 See above, pp. 160–4.

(7) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

Renaming the previous fair comment defence in a way that so much better reflects its essence is clearly sensible and follows the recent suggestion to this effect by the Supreme Court in *Spiller* v *Joseph*.[178] Again, this clause more or less replicates the Lester Bill but the formulation here is simpler and clearer and has the potential to enhance considerably the accessibility of the law. It is in fact slightly more restrictive as far as defendants are concerned than the Lester formulation; under the latter, the comment could be based on allegations that can themselves be shown to have been responsibly published.[179] This does not appear to be the intention with the current Bill, although the reference to a "privileged statement" in cl. 4(4)(b) should be amended to make clear that it does *not* apply to a statement found to be protected under cl. 2, nor indeed one privileged under traditional common law "duty-interest" privilege,[180] but *only* one protected by *statutory* qualified or absolute privilege.[181]

The notion that comment on matters of public interest is free, but must be based on at least some factual matrix, is fully consonant with the Strasbourg caselaw. As Strasbourg has recently put it: "Under the Court's case law a value judgment must be based on sufficient facts in order to constitute a fair comment under art. 10."[182] Provided that this condition is satisfied, Article 10 *requires* that such comments should not attract liability: the Court has consistently held that a requirement in national law to prove the truth of value judgments will breach Article 10. The following recent exposition by Strasbourg captures its stance well:

> In assessing the proportionality of interference [with free speech], a distinction would have to be made between statements of fact and value judgments. While the existence of facts could be demonstrated, the truth of value judgments was not susceptible of proof even though there would have to be a sufficient factual basis to support it, failing which it might be excessive.[183]

Importantly, the above makes clear that upholding freedom to make so-called "bare comments" – in which the defendant has put forward a disparaging opinion without any supporting facts at all – is not required by the Convention. Indeed, in cases in which the comments were so damaging as to risk violating personal integrity, affording them protection in domestic law might well breach Article 8.

Three main issues have arisen in relation to cl. 4. The first is whether it is right to drop the common law's current insistence that the defendant must normally indicate in the defamatory publication the facts on which the opinion is based in order to benefit from the defence. The second is whether the Bill as drafted retains – or should retain – the requirement that the defendant must be *aware* of the facts on which his or her comment is based. Condition 3 merely requires that a fact or facts existed at the time of the statement that could have led the opinion to be held. The third is whether condition 2 – that the comment be on a matter of "public interest" – should be dropped.

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178 [2010] UKSC 53.

179 The consultation paper says that this is because this would introduce further complexity – and that this link is not firmly established in the caselaw: see n. 3 above, para. 47.

180 See e.g. *Adam* v *Ward* [1917] AC 309 at 334, per Lord Atkinson: "a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it". A typical example is where an employer provides a defamatory reference to a potential new employer.

181 As the Joint Committee recommends, JC Report, n. 4 above, para. 69(f). The government has accepted this recommendation: Response at paras 39 and 40.

182 *Dyuldin* v *Russia* (2009) 48 EHRR 6 at [48].

183 *Europapress Holding DOO* v *Croatia* (2009) Application No 25333/06.

In relation to the first issue, the Supreme Court in *Spiller* v *Joseph* recently confirmed that:

> The comment must . . . identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did.[184]

In re-affirming this requirement, Lord Walker justified it explicitly by reference to the Convention, noting that:

> the Grand Chamber at Strasbourg has recently approved the general proposition that even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it. The defence of honest comment requires the commentator to identify, at least in general terms, the nature of that factual basis.[185]

The rationale for this requirement is that, whilst it is in the public interest for topics of general public concern to be robustly debated, it is very doubtful that the public interest is served by allowing people to voice opinions that are seriously defamatory without providing any of the facts that are relied on as grounding the opinion. Consider, of a senior academic: "she is the most incompetent member of her department", of a barrister, "the most dishonest member of his chambers". Allowing fact-free comment simply encourages the denigration of persons in the public eye and a poor standard of public debate. As Mullis and Scott put it:

> By requiring that the basis for the comment be made explicit, the Supreme Court imposed and encouraged a minimum standard of reasoned debate. Reasoning and analysis (albeit not of a very high standard) are required before the defence can apply. In contrast, the Government's draft Bill seems, in effect, to provide a defence for a naked opinion. This goes too far in favour of freedom of expression. Passed into legislation, it would positively invite irresponsible journalism and would permit authors to publish in the expectation that often some fact might subsequently be found upon which to hang any challenged statement.[186]

The Law Society expressed a similar concern about newspapers sued for defamatory opinions running "fact-gathering exercises all the way up to trial"[187] in order to try to find some evidence to justify the original derogatory comment.

This leads onto the second point: whether the defendant must be *aware* of the facts on which the comment is based. The draft Bill simply says that the fact must have "existed at the time the statement . . . was published". The requirement of knowledge is a common law rule and it is plausible to believe that judges would read it into the statute anyway on the basis that an "honest" person could not have held the opinion without knowing of any facts that might justify it. However, this is precisely the kind of point that would require litigation, possibly going all the way up to the Supreme Court again, to establish. Therefore, if it is intended that this rule should still apply, it should *not* be left to be implied by inference. Instead, cl. 4(a) should be amended to say that there must be "a fact or facts *of which the defendant was aware when making the comment*". On this point, the Joint Committee's reasoning is, at first sight, somewhat contradictory. On the one hand, it remarked approvingly that:

184 *Spiller*, n. 74 above, at [104].

185 Ibid, at [132]. The reference is to the decision in *Lindon* v *France* (2007) 46 EHRR 761, para. 55.

186 *JML*, n. 98 above, p. 11

187 JC Report, n. 16 above, Law Society, EV 21, p. 91.

> Neither the Government's draft Bill nor Lord Lester's Bill imposes any requirement that the commentator need know the facts relied on to support the opinion. In line with our concern to improve clarity, we welcome this change, which removes an undesirable layer of complexity.[188]

In arguing that the person making the comment need have no knowledge of any facts to support it, the Joint Committee at this point appears to be arguing for the right to wholly unsupported defamatory opinions. This appears to be implied by its comment that:

> often [the supporting] facts *will not have been evident* at the same time as the comment . . . There are also difficulties with the common situation where the media are reporting comments by others, whose knowledge of the background facts may be unknown, and where only the media are sued and the original commentator may not be prepared to assist.[189]

However, these remarks are hard to square with the Joint Committee's immediately preceding recommendation (accepted by the government) that:

> The Bill should not protect "bare opinions". It should be amended to require the subject area of the facts on which the opinion is based to be sufficiently indicated either in the statement or by context.[190]

At first sight these two statements seem contradictory: the Joint Committee seems to be demanding both that defendants should be able to publish opinions that are not based on any facts known to them, but that they must nevertheless reference those facts when writing the opinion. How, it might be asked, can a defendant refer to facts of which he or she is not aware? Presumably, however, what the Joint Committee means is that *if* a requirement is imposed that facts must be referenced in the publication in question, this will render a *separate* requirement that the defendant be aware of such facts otiose, since the reference requirement will cater for this already. However, it might equally be said that a court – or blogger – could be confused by the apparent contradiction highlighted above. Requiring the defendant to know of the facts *and* to refer to them when expressing the opinion instead puts forward a clearly consistent message; moreover the requirement of knowledge of the facts should generally be able to be satisfied by pointing to compliance with the requirement of referencing them.

The third and most difficult point is the suggestion by the Joint Committee that condition 2 – requiring the comment to be on a matter of public interest – be "dropped" as "an unnecessary complication",[191] a change strongly supported by the Libel Reform Campaign, and now accepted by the government.[192] JUSTICE also supported this proposal:

> We can see no good reason why the freedom to express one's opinions, honestly held, should be constrained by a requirement to demonstrate that the opinion relates to a matter of public interest. We note that Lord Phillips in *Spiller* v *Joseph* also doubted the need for this requirement . . . Any article 8 concerns are properly the subject of the law governing privacy, not defamation.

Similarly, the Media Law Resource Center urged the dropping of the public interest requirement, noting in relation to the Government's Article 8 concerns:

> We strongly urge that concerns for respect for private life not be imported into defamation law. Defamation law is designed to protect reputation in the

188 JC Report, n. 4 above, para. 69(c).

189 Ibid.

190 Ibid. para. 69(b). Response, at para. 32.

191 Ibid. para. 69(a).

192 See n. 27 above. Response at para 31.

> community and should not be blended haphazardly with concern for privacy rights which are subject to different legal theories and defences.

Such comments evince the desire, noted above, to keep Article 8 out of libel law. Now JUSTICE may simply have meant that if an objected-to comment on private life is made, then the remedy should appropriately be sought under the law of misuse of private information[193] not under libel law. This is what the Joint Committee seems to have had in mind in stating that: "The law's protection of the right to personal privacy and confidentiality . . . can be used to prevent people from expressing opinions on matters that ought not to enter the public domain."[194] Similarly, the Libel Reform Campaign argued on this point that "privacy law covers publication on matters of a private nature (medical records etc)". However, such comments fail to appreciate the complexity of this area. A number of different scenarios concerning comment on private matters logically arise and must be taken in turn.

The first is the scenario in which private facts about an individual have *previously* been published and given rise to liability under the new extended action in confidence/tort of misuse of private information;[195] is adverse *comment* on those facts permissible under defamation law? The Media Law Resource Center addressed this scenario, saying:

> In the Max Mosley privacy case the High Court held that reports about Mr. Mosley's German-themed S&M sessions did not involve a matter of public interest. It would be ludicrous to carry this forward and hold that opinions about his conduct are defamatory and not to be uttered because the conduct involved a private matter.[196]

However, it is not at all clear that such a finding would be "ludicrous". As noted above, the Bill will rightly not protect bare opinions, regardless of whether there is a public interest requirement or not: there must be at least some factual basis for defamatory comment. In the scenario above, newspapers commenting adversely on Mosley's private life would be relying on the facts being generally known to the public (no injunction was granted in Mosley's case). However, where the facts should never have been revealed to the public, because doing so involved a breach of Article 8, it would appear to be arguable that the same or another media body should not be able to rely on the legal wrong of another in publishing those facts, in order to be able to use them to render their defamatory comments immune from liability. The counter-argument would be that, once the facts *are* generally known, it would be futile to try to prevent others commenting on them: the analogy would be the view the courts take that, once confidential *information* has been widely published – even if wrongly – it would be pointless and therefore disproportionate to seek to enjoin further publication of those facts since the "ice-cube" of confidentiality has now melted and the damage to privacy has been done.[197] If this argument were accepted, the result would be that defamatory comment on private matters *would* be permitted in such circumstances *except* where publication of the relevant facts had been enjoined. (Where

193 See n. 137 above.

194 See n. 137 above. The JC was probably here drawing on the view of Lord Lester to the Committee: "Given that these interests are protected by privacy and data protection law, it is no longer necessary to retain this element of the defence." The JC also expresses the non-sequitur view that "it may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not." This, however, is a separate point and there is no question of English law requiring "proof" of the truth of value judgments.

195 See, generally, *Campbell* v *MGN Ltd* [2004] 2 AC 157 (HL), especially at [11]–[22] (Lord Nicholls).

196 See n. 16 above, EV 14. The reference is to *Mosley* [2008] EWHC 1777 (QB) [2008] EMLR 20.

197 See e.g. *Douglas* v *Hello! Ltd (No 3)* [2006] QB 125, at [105] – suggesting that the same principle might not apply to republication of widely seen intrusive photographs.

there *was* an injunction, the commentator would breach it if they published the relevant facts[198] or at least risk incurring liability in damages). However, if the public interest requirement of the honest comment defence were removed, then the message sent to courts would be that comment, *including on private matters*, was always permitted, provided that some facts existed that could lead an honest person to hold the relevant opinion. Thus, the removal of this requirement would put defamation law in tension with privacy law: disparaging *opinions* on private life lacking a public interest would be lawful when the disclosure of the related private *facts* would not.

Second there is the scenario in which a newspaper expresses a defamatory opinion about a person's private life *without* relying on previously stated facts; consider, for example, of a prominent, married QC: "she may be a good advocate but her private life is totally immoral". It is too hasty to say, as the Joint Committee and others do above, that such statements could be dealt with by privacy law. The above is a defamatory *opinion*, not the disclosure of private *information*. The tort of misuse of private information is concerned with the latter,[199] and so seemingly could not capture publication of such an opinion.[200] So in this scenario the privacy tort could *not* in fact help. The issue in defamation law would then turn on whether any facts could be adduced in support of the action. If no facts existed then the opinion would be a bare one and there would be liability in defamation, regardless of whether there was a public interest requirement or not.

However, if the commenter *were* able to produce facts that could give rise to the opinion then we would be in a third scenario. It will be recalled that, under the Bill, the facts do not need to be *referred to* in the article. In this case, suppose the facts relied on were the commenter's knowledge that the QC had an "open relationship" with her husband, whereby both parties occasionally had sex with other people with their spouse's full knowledge and consent. One course here would be for a judge to hold that, where the facts relied on to support the opinion could not be stated without violating Article 8 and incurring liability under the privacy tort, then they should be held to be legally "inadmissible" for the purposes of supporting the honest comment defence in defamation. The argument would be that the defendant could not rely on their own legal wrong of publishing private facts in order to render protected their otherwise defamatory opinion. It would follow that, since the supporting facts could not be adduced in court, the comment would be treated as a bare one and thus not protected by the honest comment defence; liability under defamation would therefore arise. But such a line of reasoning depends on the current requirement that the opinion must be on a matter of public interest. If this requirement were removed, a court would presumably have to take the view that there was simply no question of any opinion supported by some facts incurring liability on the grounds that it concerned private life. The result of this would be to allow a form of circumventing of the private facts tort through the publication of disparaging and damaging opinions on private life: these cannot incur liability under the private facts tort (since that requires publication of private *information*); but nor (on this reading) would they incur liability in defamation, because opinions – even on private matters – would be protected, provided they were honestly held and had some factual support.

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198 Depending upon which media bodies the injunction applied to. But see *Attorney General* v *Punch* [2003] 1 AC 1046 in relation to contempt liability for frustrating the purpose of an injunction against one media body by publishing the confidential information covered by that injunction.

199 See e.g. n. 197 above, at [83].

200 Although there could be a remedy under the Data Protection Act 1998; under the Act "personal data" "includes any expression of opinion about the individual" (s. 1(1)).

It is for this reason, then, that the requirement of public interest should *not* be dropped from the public interest test. This also provides a further argument against the Bill dropping the common law's current requirement that the defendant must refer to the relevant facts in the defamatory publication (the first point on comment, considered above). If the defendant were required to state the relevant private facts when advancing their disparaging opinion then the publication (assuming it lacked a public interest) would necessarily disclose private information; in such a case, it *could* be remedied under the private facts tort and the possible loophole in common law protection would be closed.

Finally, it is contended that to provide for liability in relation to disparaging comment about a person's private life would better reflect the Strasbourg approach. Strasbourg has held that states may justifiably punish such comment in order to uphold the Article 8 rights of those disparaged: *Tammer* v *Estonia*.[201] Moreover, the requirement that, to benefit from Article 10 protection, speech should concern a matter of *public* interest, is very firmly established in the Strasbourg caselaw. As the court said in its seminal *Von Hannover* judgment:

> the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the [publication] makes to a debate of general interest.[202]

Thus, where speech is primarily concerned with a critique of someone's private life, it will be seen as of decisively lower value, easily outweighed by reputational or privacy interests. Defamation law should recognise this by requiring that defamatory comments should be on a matter of public interest in order to attract protection under the honest comment defence. This would ensure that both defamation and privacy law continue to develop in a harmonious way that answer to the relevant Article 8 and 10 values. Otherwise the result will merely be complex litigation in which newspapers seek to use "comment" as a way of dragging peoples' personal lives into disrepute in circumstances where to make the *factual* allegations that could justify the opinion would clearly incur liability under the tort of misuse of private information. Encouraging the publication of derogatory opinions about people's private lives, where the relevant facts cannot be published without liability, is scarcely an aim that is in harmony with Article 8 – or indeed Article 10. It should finally be noted on this point that, if Parliament does not include the public interest requirement in the honest comment defence, the courts might read it back in, using s. 3 of the HRA, in reliance on the Article 8 arguments canvassed above. But this would (a) require litigation and (b) result in the statute's prima facie meaning diverging from its judicially interpreted meaning. Such outcomes would detract from the Bill's key aim of enhancing defamation law's clarity and accessibility.

The above leads onto a final issue mentioned briefly above: whether, as Tugendadt J put it in the *Terry* case, it should remain the case that, in defamation law, "the defendant is free to [disclose any facts that are] true, however harmful or distressing, even if there is no public interest or public benefit".[203] The opposite of course is the case in privacy law. This raises the question whether, rather than *removing* the public interest requirement from the

201 (2003) 37 EHRR 43.

202 [2004] EMLR 21 at [76]. In a recent libel case concerning disparaging comments made by Katie Price about whether her ex-husband, Peter Andre, really loved one of his children, H, unconditionally, Tugenhadt J expressly considered whether the requirement that comment must be on a matter of public interest was compatible with Articles 8 and 10 (*Andre* v *Price* [2010] EWHC 2572 (QB)). Although he flagged a cautionary note on this point (at para. 82), his conclusion was strongly that it was compatible: noting the *Von Hannover* case, Tugendadt J concluded that a celebrity's Article 8 rights included the right not to be subject to "comment . . . about their private life" and that in this case the Article 10 rights of Price did not outweigh the Article 8 rights of Andre and the child (at para 92).

203 *John Terry* v *Persons Unknown* [2010] EWHC 119 (QB), at [80].

honest comment defence, it should be *added* as a requirement of the truth defence to the publication of defamatory factual allegations. There is a view, discussed briefly above,[204] that the absolute nature of the truth defence may not be compatible with Article 8. The relevant issue is *not* where the facts disclosed relate to private life: even though true, such disclosures could be remedied under the privacy tort. Rather it concerns disclosures of fact that, although *not* concerning a person's private life, are so damaging that they affect the claimant's personal integrity, thus engaging Article 8. An example might be the public exposure of dishonesty or gross incompetence in a hitherto non-public figure in circumstances where the publicity had a devastating effect upon them. Is the mere truth of such allegations, with no broader public interest in them, sufficient to justify the damage to their Article 8 rights? No opinion is offered on that issue here, but it illustrates the point that the removal of the public interest requirement from the honest comment defence could take the law in the wrong direction – away, rather than towards the values underpinning Article 8.

EXTENSION OF ABSOLUTE AND QUALIFIED PRIVILEGE: CLAUSE 5

Some of the Bill's most important proposals are the broad extensions to absolute and qualified privilege that it sets out. Clause 5 significantly modifies the categories set out in the Defamation Act 1996 and expands the circumstances in which the defences can be used. Clause 5(1) extends the existing absolute privilege that applies to fair and accurate court reports published contemporaneously with the proceedings from UK, European courts and UN-established tribunals[205] to courts of other jurisdictions and a broader range of international courts and tribunals. This amounts to a modest and uncontroversial step. The proposed changes to qualified privilege go further.[206] Thus, reports from legislative, governmental and NGO/public interest associations, emanating from *all*, rather than just European states, will be covered by the Bill.[207] Similarly, the privilege at present provided to reports of proceedings at various "public meetings" is extended from European to include all states,[208] while the privilege covering reports of general meetings of UK companies is extended to reports of meetings of *all* quoted companies.[209] Moreover, where the 1996 Act covers "fair and accurate copies or extracts from" the protected categories of documents, cl. 5 additionally protects "fair and accurate summaries".[210] Significantly, in light of the well-founded concerns recently experienced about attacks on scientists, cl. 5(7) adds a wholly new category of privilege: "fair and accurate reports of a scientific or academic conference" and a "fair and accurate copy of, extract from, or summary of matter published by such a conference". Mullis and Scott contend that such protection may already be afforded under common law[211] but agree that it is plainly valuable to have such protection expressly afforded. In this area, the Joint Committee sensibly proposes going further and granting qualified privilege to "peer reviewed articles" in scientific and academic

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204 See pp. 160.

205 Defamation Act 1995, s. 14(3).

206 S. 5(2)–(8) amends Pt II of Sch. 1 to the Defamation Act 1996. Those in Pt I of Sch. 1 to the Defamation Act are given privilege; those in Sch. 2 are only afforded privilege if, upon challenge by the claimant, the publisher produces "a reasonable letter or statement by way of explanation or contradiction" (s. 15(1)).

207 Cl. 5(3).

208 Cl. 5(4).

209 Cl. 5(5)

210 In s. 5(3),(5), (7), (8).

211 *JML*, n. 98 above, pp. 8–9, citing *Vassiliev* v *Frank Cass & Co.* [2003] EWHC 1428. They note also that some conferences are also afforded statutory qualified privilege under paras 4, 8 and 14a of Pt I of Sch. 1 to the 1996 Act.

journals, a change the government has now agreed to in principle.[212] At a stroke, these changes would greatly enhance the protection of scientists against attempts to silence their critical scrutiny of issues of the highest public importance, and as such are to warmly commended. Moreover, these changes are of particular significance for two further reasons. First, they amount to plain and unequivocal changes to the existing law – there is no ambiguity as to whether they are intended merely to codify existing law or use the common law as a guide to interpretation of modified provisions of the type explored above. Second, because privilege categories have relatively hard edges, they are not as susceptible to being read down by unsympathetic judges as are some of the more generally worded changes considered above.

Single publication rule: clause 6

Reform in this area has been long-mooted. In essence the problem arises because, while there is a one-year limitation period for defamation actions,[213] each time a publication is viewed, sold or otherwise republished, English law treats it as a fresh publication, giving rise to fresh liability. Thus, each republication of the material restarts the limitation period. This is the "multiple publication" rule, sometimes known as "the rule in the *Duke of Brunswick's* case".[214] It means that, in effect, there is no limitation period for libel, something that creates particular problems for newspapers, which now maintain enormous online archives, and are thus faced by indefinite liability in time. The Bill proposes to replace this position with a single publication rule, under which the limitation period would run from the date of first publication. But this change, which clearly favours defendants, is subject to significant provisos in the Bill. Clause 6 provides:

> **6 Single publication rule**
>
> (1) This section applies if a person:
>
> (a) publishes a statement to the public ("the first publication"), and
>
> (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.
>
> . . .
>
> (3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.
>
> (4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.
>
> (5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters):
>
> (a) the level of prominence that a statement is given;
>
> (b) the extent of the subsequent publication.
>
> (6) Where this section applies:
>
> (a) it does not affect the courts' discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc) . . .

212 Report at paras 47–8. Response at para. 43.

213 Limitation Act 1980, s. 4A.

214 *Duke of Brunswick* v *Harmer* [1849] 14 QB 185.

Notably, therefore, this provision only applies to republication by the *same person*, thus answering the concern that a single publication rule would preclude redress for a serious libel by a mass-circulation newspaper on the basis that the substantially same statement had been published two years previously in an obscure pamphlet. Moreover, even republication by the *same* person is not automatically free from liability: it may still arise if the new publication is "materially different" from the old. This would clearly include cases in which, for example, a defamatory allegation was initially published in an obscure corner of a newspaper, but over a year later – after the person in question had acquired much greater prominence – was republished as a prominent headline in the same paper. This restriction ensures that a libellous publication that is significantly more likely to have been widely read than a previous such publication will not be protected by the new provisions. It will thus ensure that claimants who simply do not learn that a libellous statement has been made about them until it is later given greater prominence by the media will not be barred from redress.

A particular question has arisen as to whether it is necessary for the new single publication rule only to apply to the same publisher. James Price QC has argued that there is:

> some difficulty with the notion that, when a person has once published a defamatory statement, he should be free indefinitely, after a year, to publish it again (in a manner not materially different) as much as he likes, however irresponsibly or maliciously, without redress to the subject, *but no-one else is free to publish it*.[215]

Perhaps attracted by this argument,[216] the Joint Committee has suggested going further, so that the new single publication rule would "protect *anyone* who republishes the same material in a similar manner after it has been in the public domain for more than one year"; this is not a change the government has agreed to.[217] The argument in favour of the Joint Committee's proposal is that the Bill arguably offers unnecessary double protection by applying the single publication rule only to the original publisher *and* where republication is not materially different from the original publication. Both conditions appear to cater for the same mischief: that those defamed should not be disabled from suing by a further publication occurring more than a year later that has the effect of publicising the libel much more widely or accessibly, thus causing much greater harm to reputation. But, surely, the not materially different condition could cater for both: where a different publisher had far greater prominence or credibility (e.g. a national newspaper republishing a libel originally published on an obscure blog), then plainly the new publication would be in materially different circumstances and so not covered by the new rule anyway.

The Joint Committee – echoing here the views of JUSTICE – suggested going much further in a pro-defendant direction, by including a specific provision to the effect that merely transferring a paper-based publication onto the internet, or vice versa, does not in itself amount to republishing in a materially different manner. This is somewhat mystifying and this recommendation was fortunately *not* accepted by the government (Response at para. 52). The whole point about placing defamatory material on the internet is that *the very act of doing so* renders it potentially vastly more damaging. As the Joint Committee itself acknowledges in another part of its report:

> whereas newspapers are quickly thrown away, online archives will ensure that defamatory material will instantly be flagged up on an internet search. Not only does this last until taken down, it can be easily and instantly spread around the

215 See n. 16 above, EV 26, para. 13.

216 Although not necessarily in accordance with Price's intention!

217 JC Report, n. 4 above, para. 59. Response at paras 50–1.

> world. One well-publicised accusation, even if subsequently found to be untrue, can destroy a reputation . . .[218]

Precisely so, and this is why transfer of paper-based material to the internet will inevitably amount to republication in a materially different manner. JUSTICE recognised this and hence called for the removal of the materially different proviso precisely because otherwise such transfers of material to online archives would probably fall into this exception.[219] This, of course, would rob claimants of protection even in the extreme case where an obscure leaflet was transferred into a prominently displayed online article by a newspaper after a year, and simply reflects the one-sided nature of JUSTICE's approach to the whole area of libel reform. The point is, however, that the Joint Committee's compromise proposal here is simply unworkable.

In contrast Mullis and Scott argue that the proposed change goes too far:

> At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed. Indeed, secondary publication after the elapse of time may arguably, perhaps counter-intuitively, be more damaging than much initial publication. Often, only those with a particular interest in a subject or individual will be motivated to access the material at the later point in time, so that any impact on reputation may be especially poignant . . .
>
> On occasion, the proposed new rule will frustrate justice. It does not allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing Article 8 rights to reputation. Such occasions may be infrequent and they may be covered by the discretion of the court to set aside the limitation period for action under s 32A of the Limitation Act 1980. At present, however, this is done only in exceptional circumstances, and it may not be reasonable to expect that judges will use this power to address the potential problems.[220]

There may of course be other reasons why the victim of a libel could be out of time, including a long period of travel abroad, or prolonged illness. However, it is arguable that the concern Mullis and Scott point up can be catered for under the proposed change.[221] This is because s. 32A of the Limitation Act 1980 – allowing a claim to be brought out of time when it would be "equitable" to do so[222] – may offer much greater scope for protection than is currently perceived. In determining such an application under the Limitation Act 1980, a court will be required, under s. 3 of the HRA, to interpret and apply the provisions of the Act in a way that upholds the parties' Convention rights. Thus although it is apparently rare at present for limitation periods to be set aside, if a judge were to be convinced in a particular case that Article 8 *required* the case to be heard, then they would be bound to set aside the limitation period – something that the broad terms of s. 32A easily allow for. In this sense, therefore the limitation period will become a much "softer" limit than at present, subject, in effect, to an Article 8 exception.

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218 JC Report, n. 4 above, para. 15.

219 See n. 16 above, pp 18–19.

220 *JML*, n. 98 above, pp. at 13–14.

221 For an alternative solution, see A Mullis and A Scott, "Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation" (2009) 14 *Communications Law* 173–83.

222 See text to n. 132 above.

Libel tourism

Finally, the Bill seeks to address the much vaunted problem of "libel tourism" – the use of English courts by those with little or no real connection to this jurisdiction.[223] This issue is considered extensively by Trevor Hartley's essay in this volume so only brief consideration is required here. The Bill provides:

> **7 Action against a person not domiciled in the UK or a Member State etc**
>
> (1) This section applies to an action for defamation against a person who is not domiciled:
>
> (a) in the United Kingdom;
>
> (b) in another Member State; or
>
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.[224]

In practice it seems doubtful whether this provision is now needed,[225] although it may have some declaratory value. The drafting of the Bill also appears defective in that it refers only to the domicile of the *defendant*. It thus does not make clear that a *claimant* who is domiciled in the UK, but libelled by a non-domiciled defendant, may still sue within their own jurisdiction. In other words, it needs to, but does not, distinguish between: (a) a non-national suing a non-national in an English court (the main libel tourism issue); and (b) a national claimant suing a non-national defendant. The Joint Committee identified this as a drafting problem that required resolution.[226] Additionally, it may be argued that subs. (2) goes too far in providing that England may only be used if it is "*the most* appropriate" jurisdiction. There are clearly persons who have real reputations in a number of different countries; England may not be where they have their main reputation (that will generally be in their country of residence) but they may nevertheless suffer very substantial damage to their reputation in England by a publication accessible all over the world. Were courts to interpret the most appropriate jurisdiction as being the country where the claimant had their main reputation, this could prevent them suing in England in such situations. Courts could, however, remedy this by taking account of the unlikelihood of the person receiving a fair trial in places such as Russia and by having regard to the fact that the *Sullivan* doctrine could

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223 Notably the Law Society thought there was a lack of "substantial evidence" of a problem in this area: n. 16 above, EV 21.

224 The Bill goes on to provide: "(3) For the purposes of this section: (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation; (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention."

225 Craven and White, "Draft Defamation Bill", n. 160 above, Pt 3, point out that: "In cases where the defendant is not domiciled in a Member State the English courts have a discretion to decline jurisdiction if not satisfied that there was a real and substantial tort committed within the jurisdiction (*Jameel* at [70]; CPR 6.37 and Practice Direction 6B para 3.1(9)), or if the Claimant cannot establish that England and Wales is the proper place in which to bring the claim (CPR 6.37(3)). These provisions are already available to the court to prevent 'libel tourism' in an appropriate case – see for example the recent decision in *Firtash* v *Public Media & Ors*, 24/2/11."

226 The government did not accept that re-drafting was required but undertook to indicate its view via Hansard to courts that, where a claimant *was* domiciled in England Wales, then cl. 7(2) should normally be deemed satisfied: JC Report, n. 4 above, paras 56 and 72.

act as a practical bar to success to US "public figures" suing in their own country. Provided it is interpreted in this way, then, the clause may provide, as the Law Society put it, "a useful tool in exceptional cases for exercising its discretion about the most appropriate place for litigation to take place".[227]

6 What is *not* in the Bill

As noted above, perhaps the key things missing from the Bill are the kinds of real reforms to costs and procedure that nearly all agree are a prerequisite for realising real change on the ground. The Joint Committee has some good ideas on early resolution of cases and rigorous enforcement of the pre-action protocol in order to keep costs down and enable unmeritorious cases – or defences – to be swiftly disposed of.[228] But as also noted above, its suggestions will need to be picked up by government – or determined MPs or peers in Parliament – to make their way into the Bill. A hopeful sign here was the evidence given by the government to the Joint Committee, which indicates that active consideration is being given to introducing procedural reforms to defamation law, as proposed in the consultation paper.[229] It is to be fervently hoped that concrete proposals on this are published soon. If that does not happen, a major opportunity will have been missed, and the ability of libel law to chill legitimate public debate will continue, however good the reforms to substantive law turn out to be.

The other main thing missing from the Bill is some kind of restriction on the ability of corporations to sue in libel. The arguments in favour of removing or restricting this right have been set out extensively elsewhere, and there is no need to rehearse them here. It is ironic that, in leaving the position of corporate claimants untouched, the government has refused to make change in one of the areas where those on both sides of the libel reform debate agree that reform is both necessary and right; in this respect the reasoning given for taking no action at all in the consultation document[230] seems wholly unconvincing. Particularly given the new Article 8-focused view of defamation, it seems clear that it is incoherent to treat corporate claimants – who have neither personal integrity, feelings nor dignity – identically with natural persons.[231] It is also notable that a large majority of the notorious cases of the misuse of libel laws to attack scientists or science writers have involved corporate claimants.[232] Howarth, in an article that is largely critical of the current reform proposals, argues that: "Removing corporate rights to sue comes closest to eliminating those cases in which purely scientific debates have become embroiled in defamation."[233] Evan Harris similarly contends that this would "at a stroke remove much

227 See n. 187 above.

228 See, in particular, JC Report, n. 4 above, para. 82: "We believe that ordinarily the first step following the initial exchange of letters under the Pre-Action Protocol should (in the absence of an offer of amends) be mediation or assessment by a suitably qualified third party, known as 'early neutral evaluation'. Mediation could take place under the umbrella of existing bodies or a designated service established by the Government . . . the mediation process must be swift, inexpensive and resistant to delaying tactics. To counter this latter possibility, any failure to engage constructively with the process should be punished if and when it comes to the awarding of costs. If there has been no mediation or neutral evaluation, the judge should have power to order it at the first hearing in the case."

229 Annex D. See n. 132 above (Note on Procedural Issues). And see the government Response, at paras 65–76.

230 See paras 136–45.

231 See, in particular, Mullis and Scott, "Swing of the pendulum", n. 25 above; Howarth, "Libel", n. 26 above.

232 Howarth notes that this holds for "all except one of the cases" referred to in T Brown, "Science and libel" (2011) 122 *The Author* 13. See also the list of cases cited by the Libel Reform Campaign in written evidence to the Joint Committee, n. 11 above, at p. 73.

233 See, Howarth, "Libel", n. 26 above, p. 875.

of the chill from the worlds of investigative journalism and the citizen critic".[234] However, there are good arguments to the effect that this would be too drastic, particularly in the case of small, incorporated businesses, which could be ruined by a defamatory allegation, but would have little or no chance of succeeding under the tort of malicious falsehood.[235] Hence the proposal of the Joint Committee may be a good compromise here. They suggest first limiting libel claims to situations where the corporation can prove the likelihood of "substantial financial loss" ("substantial and serious" would be preferable) and second, requiring the permission of the court for a corporate claimant to sue.[236] The latter proposal would also be a powerful bulwark against the *fear* of even unwinnable libel suits that allows corporations to "bully" scientists and writers. An alternative approach would restrict corporations to discursive remedies, such as a retraction, unless they *can* show substantial financial harm.[237] However, this would still raise the spectre of large legal costs for defendants, continuing the current chilling effect.

7 Conclusion

All of us who care about free speech, and the quality, range and robustness of public debate on all matters of social, intellectual, scientific and political importance, must regard what happened to Peter Wilmshurst, [238] for example, as a something that must, if possible, be prevented from happening again. However, we must also be alive, when seeking to reform defamation law, to the converse possibility: of a newspaper carelessly or wilfully destroying the reputation of an individual and then relying on its greater financial resources and the huge current costs of libel proceedings to deter that person from seeking to obtain a remedy. Libel reform must then pass a twin test: it must do all it can to deter corporate bodies and others from using defamation law to close down legitimate debate and critique; but it must also seek to ensure that individuals cannot have their lives destroyed by careless – or even deliberate – media smears that they cannot remedy. Following the phone-hacking scandal and the revelations by Leveson of the often utterly amoral attitudes of parts of the press, we are surely no longer so naive – if we ever were – as to believe that the latter possibility is not a very real one.

The Bill will not stop the chilling effect of unscrupulous *threats* of legal action, even if implausible. It is impossible for law reform itself to achieve this. But it will – particularly if it adopts the Joint Committee's suggestions in relation to corporate claimants – do much to prevent the attacks upon writers and scientists genuinely pursuing the public interest, who have suffered from unscrupulous libel claims, such as Dr Wilmhurst and others, and for that reason is worthy of support. However, unless the government brings forward proposals to address seriously the problems of cost, complexity and access to justice in libel proceedings, the law may fail the other side of the test: offering reasonable protection to individuals seriously defamed by powerful and deep-pocketed corporate news organisations. 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.

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234 See n. 8 above.

235 See the view of Hugh Tomlinson that "malicious falsehood is a 'non-starter' . . . successful actions are vanishingly rare because the burden of proof is so high": n. 19 above, Q600.

236 JC Report, n. 4 above, para. 116. The government in its Response rejected the first of these as unnecessary, given the fact that claimants must satisfy the new threshold of "serious harm" and in practice corporate claimants will only be able to do this by pointing to the likelihood of substantial financial loss. It also rejected the second proposal (paras 91 and 92).

237 See Mullis and Scott, "Reframing libel", n. 23 above.

238 See his article "The effects of the libel laws on science – a personal experience" (2011) 104 *Radical Statistics* 13–23.