SALLIE SPILSBURY

MEDIA LAW

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DEFAMATION

> The law of defamation has attained a degree of refinement and sophistication besides which the equitable doctrine of the constructive trust is a model of clarity and simplicity.[1]

THE CIVIL LAW

The law of defamation is primarily concerned with the protection of the *reputation* of individuals and corporations. If I were to make an unjustifiable statement about X, X may be able to bring a claim against me in defamation, provided that the statement is damaging to his standing amongst reasonable members of society. The relief available to X would include damages to compensate him for the damage to his reputation and an injunction to restrain further publication of the allegation.

The procedure relating to defamation claims has evolved into one of the most technical areas of civil litigation. It remains to be seen to what extent the Civil Procedure Rules (CPR) will succeed in practice in their objective of simplifying the legal process. The Defamation Act 1996 has introduced a number of procedures which are also designed to simplify defamation litigation, most of which have very recently been implemented. Again, it is too early to assess the impact of these measures at the time of writing. Before the introduction of the CPR, a defendant to a libel claim could generally expect to be embroiled in protracted and expensive litigation which often came to have little relevance to the original publication which ostensibly formed the subject matter of the action.

In recent times, the damages awarded to successful claimants spiralled out of control. Take, for example, the following typical awards:

- £200,000 awarded to the pop star Jason Donovan over an article in *The Face*, suggesting that he was a liar and a hypocrite by denying that he was gay;
- £45,000 awarded to the well known businessman Victor Kiam over an allegation in a national newspaper that Mr Kiam was financially ruined. The award was made even though the newspaper immediately retracted the statement and published an apology;

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1 Millet LJ in *Gillick v BBC* [1996] EMLR 267, p 274.

- £750,000 awarded to the footballer Graeme Souness over a statement made by his former wife that he was a tight fisted 'dirty rat'.

The size of awards such as these operate to deter many members of the media from making contentious allegations. We shall see in this chapter how the balance which, in the past, has been overwhelmingly favourable to the claimant in a defamation claim, is beginning to operate more fairly. Defamation does, however, remain one of the most significant restraints on media freedom. The chilling effect which the threat of a defamation claim might have on freedom of expression have been recognised at the highest level.[2]

What is defamation?

Damage to reputation

A defamatory statement is a statement which has a tendency to damage a party's reputation. The tendency to cause damage is a prerequisite to the cause of action. It is not defamatory to make a critical statement which does not have a tendency to cause damage, even if the statement turns out to be untrue.

To make the statement that company X's product (say, an electric fan) is dangerous, because the company neglects to take vital health and safety precautions during the manufacturing process, might be defamatory. The statement would cause damage to X's reputation as a responsible manufacturer (as well as reducing its profits). The statement may also damage the personal reputation of each of X's directors with responsibility for ensuring that the product is manufactured safely. The statement could be understood to portray them as having a cavalier attitude towards health and safety issues. The directors (and, for that matter, any other employees with responsibilities for complying with health and safety regulations) might be able to sue for the damage to their respective reputations if they can show that reasonable readers would have understood the statement to refer to them.

On the other hand, if I were to say that company X's electric fan is not as efficient as the fan produced by a trade rival, my statement is unlikely to be defamatory. Although it may result in lost sales, it cannot really be said that it has damaged X's reputation or that of its directors or employees. It is a statement about X's product, rather than about X or its employees or directors. Even if my statement about the fans was incorrect, X would not have a claim

2 Eg, by Lord Keith in *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, p 1017.

against me in *defamation*. X might have a claim for malicious falsehood. Malicious falsehood is considered in Chapter 4.

What type of material can be defamatory?

Throughout this chapter, reference is made to defamatory 'statements'. However, a cause of action in defamation is not limited to the publication of words. Pictures, cartoons and caricatures can be defamatory, as can other non-verbal statements. In *Monson v Tussaud*,[3] the claimant alleged that he had been defamed by the exhibition of a waxwork effigy of him in close proximity to a number of more infamous figures. The court held that the positioning of the waxwork was capable of being defamatory.

The technical meaning of defamatory

In order to assess the prospects of success of any defamation claim, it is first necessary to determine whether the statement in question is defamatory or, in other words, whether it has a tendency to damage the subject's reputation.

There is no entirely satisfactory definition of 'defamatory', nor for 'reputation'. Those definitions that have evolved through case law are generally illustrations of the ways in which damage might manifest itself. What has been termed 'the classic definition'[4] of the meaning of defamatory was laid down in the case of *Parmiter v Coupland*[5] in the following terms:

> A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to *hatred, contempt or ridicule* … (calculated here bears the meaning of 'likely to').

The *Parmiter* definition was extended in the case of *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*,[6] where it was established that, in addition to exposing the claimant to hatred, contempt or ridicule, a publication would be defamatory if it tends to make the claimant *shunned and avoided*. This was so even where there was no moral discredit on the claimant's part. If a person were incorrectly said to have a seriously infectious disease, he might be able to bring an action for defamation even though no moral responsibility could possibly be placed on him for his condition, the reasoning being that the suggestion of the disease would lower the subject's standing, causing him to be shunned and avoided by society generally.

The above formulae can be too narrow to fit all cases. For example, in *Tournier v Provincial Union Bank of England Ltd*,[7] Atkin LJ observed:

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3 *Monson v Tussaud* [1894] 1 QB 671.

4 *Berkoff v Burchill* [1996] 4 All ER 1010.

5 *Parmiter v Coupland* (1840) 6 M & W 105, p 108.

6 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

7 *Tournier v Provincial Union Bank of England* [1924] 1 KB 461, p 561.

> It is obvious that suggestions might be made very injurious to a man's character in business which would not, in the ordinary sense, excite either hate, ridicule or contempt – for example, an imputation of a clever fraud which, however much to be condemned morally and legally, might yet not excite what a member of a jury might understand as hatred or contempt.

In *Sim v Stretch*,[8] Lord Atkin sought to widen the definition. Concentrating on the essential focus of the defamation action, he applied the following test:

> Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?

Lord Atkin's more all-encompassing approach was also adopted by the Faulks Committee on Defamation,[9] which suggested in its 1975 Report that a statutory definition for defamation should be adopted in the following terms: 'Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.'[10] This definition has never been formally adopted.

Reputation

So far as the meaning of 'reputation' goes, the meaning to be drawn from case law is that reputation is to be equated with the estimation of right thinking members of society/reasonable people generally.

Particular types of reputation

Professional reputation

The law of defamation operates to protect professional reputations from disparagement. Where a person's job performance is criticised, the criticism is capable of being defamatory, even though it may not impute any blame or defect of personal character. The imputation of a lack of qualification, knowledge, skill, judgment or of inefficiency in carrying out professional duties is capable of being defamatory.[11]

Creditworthy reputation

It can be defamatory to say of a person that he is insolvent or bankrupt or a poor payer of debts, notwithstanding that a person's insolvency may not be

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8 *Sim v Stretch* [1936] 2 All ER 1237, p 1240.

9 *Report of the Committee on Defamation*, Cmnd 5909, 1975.

10 Para 65.

11 See, eg, *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 and *Irving v Penguin Books Ltd* (2000) unreported, 11 April, which concerned defamatory allegations about the claimant's abilities as a professional historian.

attributable to any fault on his part. The law takes the view that a person is entitled to a reputation for creditworthiness.[12]

Determining whether the meaning is defamatory: applying the tests

The borderline between what is defamatory and what is not can be difficult to define. *Berkoff v Burchill* is an illustration of the potential difficulties in applying the test.[13] The case concerned comments made by a journalist about the physical appearance of the actor Stephen Berkoff. The journalist described Mr Berkoff as being 'hideously ugly' and compared his appearance unfavourably with that of the monster Frankenstein. Mr Berkoff commenced proceedings for defamation. The Court of Appeal was called upon to decide whether the allegation that someone is hideously ugly was capable of being defamatory of the claimant (that is, capable of having a tendency to damage Mr Berkoff's reputation).

The majority of the Court of Appeal was of the view that the description was *not* capable of being defamatory. Millett LJ was of the view that the words were an attack on Mr Berkoff's physical *appearance,* rather than his reputation. The words did not make Mr Berkoff look ridiculous or lower his standing in the eyes of ordinary people. The journalist had ridiculed Mr Berkoff but, by doing so, she had not *exposed* him to ridicule. He observed that to hold such comments as defamatory would be an unwarranted restriction on freedom of speech. People must be allowed to poke fun at another without fear of litigation.

In a powerful dissenting judgment, Neill LJ drew on earlier authorities to show that to describe someone as being hideously ugly was capable of being defamatory. He observed that the concept of 'reputation' should be interpreted in a broad sense to comprehend all aspects of the claimant's standing in the community. The words had to be judged in all the circumstances of publication, including the particular circumstances of the claimant. Mr Berkoff is an actor and a figure in the public eye. To describe him as hideously ugly was, in such circumstances, capable of lowering his standing in the estimation of the public and of making him an object of ridicule. That would not necessarily be the case if Mr Berkoff were less well known or if he worked in a different profession.

12 See, eg, *Aspro Travel Ltd v Owners Abroad Group plc* [1996] 1 WLR 132.

13 *Berkoff v Burchill* [1996] 4 All ER 1010.

The meaning of the statement

In order to decide whether a statement is defamatory, one first has to determine what the statement actually means. This exercise is not as straightforward as it might at first seem. Often, different people interpret the same statement in different ways. It is quite usual in a defamation action for the claimant to assert that a statement would be understood by the ordinary reader to mean one thing and for the defendant to assert a different meaning, often equally credible. For example, consider the following statement: '*X has today been charged with an offence under the Food Act 1984*.'

This statement could be interpreted in a number of different ways. For example:

- X has been charged with an offence – the mere fact of charge; or
- X has committed an offence; or
- X is suspected of committing an offence.

Unusually for civil cases, defamation trials are usually heard by a judge and jury. In cases tried by jury, the meaning to be attributed to a defamatory item is a question for the jury. A judge can be asked to rule whether the item in question is *capable of* bearing a meaning which either the claimant or defendant alleges that it bears. If the judge decides that it is so capable, the actual decision on meaning is for the jury. The jury does not have to accept the meaning(s) put forward by the parties.

The test to determine the meaning of the statement is '*what would the reasonable reader or viewer consider the natural and ordinary meaning of the words to be?*'

When applying this test, the following issues should be borne in mind:

- the meaning of the statement is determined by the reaction of the ordinary, reasonable and fair minded reader or viewer and not by what the publisher intended the statement to mean. It is how words are understood by the notional audience that counts and not how they were meant. This often surprises unwary journalists. The fact that a particular meaning was not intended will not therefore generally provide a defence to a defamation claim. The media should check material to assess all possible meanings that material might reasonably be understood to mean. The temptation to rely on your own subjective interpretation of the material should be avoided. In *Henty's Case*,[14] Cotton LJ observed:

> One must consider, not what the words are, but what conclusion could reasonably be drawn from it, as a man who issues such a document is answerable not only for the terms of it, but also for the conclusion and

14 *Henty's Case* 5 CPD 514, p 536.

> meaning which persons will reasonably draw from and put upon the document;

- although a combination of words may convey different meanings to the minds of different readers, the court is required to determine the single meaning which the publication would convey to the hypothetical reasonable reader and to base any award of damages on the assumption that this is the one sense in which all readers would have understood the statement. This single meaning is known as '*the natural and ordinary meaning*' of the publication. The reasons behind this 'one meaning' rule derive from the entitlement to a jury trial in most defamation cases. It is for the jury to determine meaning, rather than the public at large. This, coupled with the fact that, unless one settles on a particular meaning, one cannot judge the extent of the damage suffered by the claimant in a reliable way, has led to the establishment of the 'one meaning' rule;[15]
- words should be interpreted in their ordinary and natural sense.[16] Meanings which emerge only after a strained or forced interpretation of the statement should accordingly be rejected;[17]
- the natural and ordinary meaning of words will include implications or inferences which a reasonable reader, guided by his general knowledge and unfettered by the strict legal rules of construction, would draw from the words on reading between the lines. One should therefore avoid too literal an interpretation of the words used;[18]
- It is the broad impression conveyed that has to be considered. The reasonable reader or viewer would not engage in an over-elaborate analysis of the words used. The case of *Skuse v Granada Television*[19] concerned a television documentary broadcast as part of the 'World in Action' series. The natural and ordinary meaning of the documentary was at issue. Sir Thomas Bingham observed:[20]

> In the present case, we must remind ourselves that this was a factual programme likely to appeal primarily to a serious minded section of television viewers, but it was a programme which, even if watched continuously, would have been seen only once by viewers, many of which would have switched on for entertainment. Its audience would not have given it the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts or an academic to the content of a learned article;

15 *Per* Jacob J in *Vodafone v Orange* [1997] FSR 34, p 38. See, also, Diplock LJ in *Slim v Daily Telegraph* [1968] 2 QB 171 for an explanation of the 'one meaning' rule.

16 *Lewis v Daily Telegraph* [1964] AC 234.

17 *Jones v Skelton* [1963] 1 WLR 1362; [1963] 3 All ER 952.

18 *Lewis v Daily Telegraph* [1964] AC 234.

19 *Skuse v Granada Television* [1996] EMLR 278.

20 *Ibid*, p 285.

- in assessing what a reasonable person would think, it should be borne in mind that 'ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question'.[21] On that basis, a statement of suspicion ought not to be interpreted as a statement of guilt. The ordinary reader would not be 'avid for scandal'. In *Capital and Counties Bank Ltd v Henty*,[22] Lord Blackburn indicated 'it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document'.

  Taking our example about the Food Act, the reasonable reader would not infer guilt from the mere fact of charge. He might, however, infer more than that basic fact, perhaps concluding that there must have been something worth investigating about X's activities, that is, reasonable suspicion, rather than actual guilt.

Examples of this principle

Mapp v News Group Newspapers[23]

The case concerned an article in the *News of the World*, headed 'Drug quiz cop kills himself'.

The article consisted of the following text:

> Police Sergeant Gerry Carroll killed himself after being ordered to provide information about ex-colleagues accused of peddling drugs. Sergeant Carroll, 46, shot himself through the head in a cell. He was custody officer with the drugs squad in Stoke Newington, north London, when eight fellow officers were alleged to have been involved in drug dealing and bribery. The accused officers have been transferred to other police stations while an investigation is carried out.

The claimants were amongst the officers transferred to other police stations during a major police investigation into police corruption in Stoke Newington. The claimants pleaded that the article had the following defamatory meaning:

> That the claimants were guilty of involvement in drug dealing and bribery, that Sergeant Carroll had been in a position to know this because he had been working with the claimants at the time and he had killed himself because he would otherwise have to confirm the claimants' involvement.

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21 Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, pp 258–60.

22 *Capital and Counties Bank Ltd v Henty* (1882) 7 App Cas 741, p 786.

23 [1997] NLJR 562.

The court was asked to rule as a preliminary issue whether the article was capable of bearing that meaning. The Court of Appeal took the view that it was not. Hirst LJ indicated that it would be virtually impossible to suggest that the words complained of impugned actual guilt of drug dealing and bribery on the part of the claimants, unless the meaning of the article was transformed by the reference to Sergeant Carroll's suicide. But, the court held, the meaning was not transformed by the reference to suicide. The reasonable reader could interpret the reference to suicide in a number of more plausible ways; for example, that Sergeant Carroll was overwhelmed by stress or depression for reasons unconnected with the investigations. The words were not capable of imputing actual guilt on the part of the officers.

On the other hand, the words were capable of suggesting that there were reasonable suspicions that the officers were guilty of the offences under investigation. It may still be defamatory to say of someone that they are under suspicion of malpractice. In the *Mapp* case, the claimants were allowed to amend their pleadings to refer to this lesser allegation.

Goldsmith v Bhoyrul[24]

The claimant was a founder member of a political party, the Referendum Party, which was officially fielding 550 candidates for the 1997 general election. In the run up to the election, an article appeared under the headline 'Goldsmith looks for "dignified exit" from election race'.

The article contained the following comments: 'Sir James Goldsmith has begun to pave the way for pulling his Referendum Party completely out of the general election … Goldsmith is understood to be disenchanted by the lack of popular support for the party and preparing the way for a 'dignified exit' before the deadline to declare candidates …' There was also a photograph of the claimant, under which appeared the following caption 'Goldsmith: ready to pull out of May's general election'.

The claimant alleged that the natural and ordinary meaning of the article taken as a whole included the meaning that he had lied to the electorate and/or misled them about the true intentions of the party by campaigning on the basis that the party would participate fully in the general election when in truth, they had begun to prepare themselves to withdraw from the election.

The court held that, whilst the article attributed a change of attitude on the part of the claimant, it gave reasons for the change, for example, the lack of popular support for the party. Accordingly, the reasonable reader, not being avid for scandal, would not understand the article as a charge of lying or deceit. The words were capable of less serious meanings, such as that the

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

party was not prepared to risk electoral humiliation, but these were not the meanings which had been put forward by the claimant.

More guidance on determining meaning

The item in question should be assessed *as a whole*. When assessing the meaning of an article or a programme, a claimant cannot select part to support the meanings which he alleges that the publication bears and ignore other parts which qualify or negate the defamatory meaning.

In the case of *Charleston v News Group Newspapers,*[25] the claimants were actors who played the characters 'Harold' and 'Madge' in the television series *Neighbours.* The *News of the World* published an article about a pornographic computer game in which the actors' faces had been superimposed on pornographic pictures. The article featured two photographs of the visual displays produced by the computer game under the main headline 'Strewth! What's Harold up to with our Madge?'. The text of the article, and one of the captions under the photographs, explained that the claimants were unwitting victims of the publishers of the game.

The claimants brought an action against the publishers of the *News of the World,* alleging that the photographs published by the newspaper together with the headlines and some of the captions bore the meaning that the claimants had posed for pornographic pictures. The claimants conceded that a reader who read the whole article would realise they had not posed for the pictures, but argued that a substantial number of the readers would look at the photographs and the headline without reading the text of the article.

The defendants denied that the photographs and words complained of taken in their proper context as part of the whole article were capable of bearing any meaning defamatory of the claimants.

The House of Lords held that the photographs and headline, taken in the context of the entire article, were not capable of bearing the meaning that the claimants had posed for pornographic pictures. *A prominent headline and photograph could not found a claim in defamation in isolation from the related text of the accompanying article.*

It follows that if something disreputable to a claimant is stated in one part of the item in question, but this stain is removed in another part of the same publication, the disreputable comment must be taken together with the more favourable part. In defamation law, this is known as the '*bane and antidote*'. In cases involving a 'bane and antidote', the antidote must be sufficient to counteract the bane if a defamation claim is to be avoided. Factors which might be relevant to this decision are the nature of the defamatory comment, the language of the accompanying text and the way in which the whole of the

25 *Charleston v News Group Newspapers* [1995] 2 All ER 313.

material is set out and presented. The antidote may not counteract the bane where the reasonable reader might not see the explanation. This could occur where the defamatory words appear on a prominent front page splash of a newspaper and the main article, containing the clarification or explanation is printed elsewhere in the publication.

An example of the bane and antidote in operation is the case of *Norman v Future Publishing Ltd*,[26] which concerned a profile of the opera singer, Jessye Norman, which appeared in *Classic CD* magazine. In the course of the profile, the journalist referred to Ms Norman's 'statuesque physique' and made the following observation: 'This is the woman who got trapped in swing doors on her way to a concert and, when advised to release herself by turning sideways replied: "Honey, I ain't got no sideways".'

Ms Norman brought proceedings for defamation against the magazine over the way that it had portrayed her use of language. She alleged that the natural and ordinary meaning of the article was that she had a mode of speech which was vulgar and undignified and/or conformed to a degrading racist stereotype or that she was guilty of patronising mockery of the modes of speech stereotypically associated with certain groups or classes of black Americans.

The Court of Appeal was called on to state whether the statement was capable of bearing that meaning. It held that it was not in the context of the article as a whole. The article was held to be extremely complimentary of Ms Norman, portraying her as a person of high standing and impeccable dignity (in the words of Hirst LJ, 'the very reverse of vulgar'). In the context of the article as a whole, Ms Norman's pleaded meaning was held to be too far fetched.

- The context of the publication of the defamatory words will have a bearing on the conceivable meanings that words bear. For example, where words are spoken in the course of a public meeting, their meaning might be affected by the general course of a speech of which the words formed part.[27]
- The publication should be judged through the eyes of the reasonable viewer or reader who would be likely to read/see the publication in question. For example, where the defamatory statement is made in the context of advertising or marketing, the meaning should be construed as if seen through the eyes of the reasonable reader or viewer to which the claim is addressed.[28] The construction of meaning in an advertising context is considered further in Chapter 4.

26 *Norman v Future Publishing Ltd* [1999] EMLR 325, CA.

27 *Bookbinder v Tebbit* [1989] 1 All ER 1169, CA.

28 *Emaco Ltd v Dyson Appliances* (1999) *The Times*, 8 February.

- The single ordinary and natural meaning is to be determined from the *item*. It is not permissible for a party to a defamation action to adduce evidence about what members of the public actually understood the publication to mean. In *Charleston v News Group Newspapers*,[29] the claimants were not allowed to produce evidence about how many *News of the World* readers had confined their attention to the photographs which purported to show Harold and Madge. The Faulks Committee Report[30] rejected a change in the law which would allow such evidence, observing that to decide otherwise would add heavily to the length and expense of trial and would only cause confusion.

When assessing the item, the expectations and reactions of reasonable fair minded readers should be kept in mind. Material will not be actionable if no one would take it seriously. For example, in the context of advertising, the reasonable reader will be presumed to be accustomed to the ways of advertisers and will generally expect a certain amount of hyperbole which they would not take seriously.[31] Similarly, 'chaff and banter'[32] are unlikely to be taken seriously; nor are items which would reasonably be understood to be humorous.

Is the natural and ordinary meaning defamatory?

Once the natural and ordinary meaning of a statement has been determined, the jury must decide whether the meaning is defamatory (a judge can rule whether a meaning is *capable of* being defamatory, but assuming that the meaning is so capable, the decision is then for the jury).

When considering whether a statement is defamatory, the statement should be considered in the context of its subject. In the *Berkoff* case, it was sufficient that the allegation that the claimant was 'hideously ugly' was defamatory of Mr Berkoff in particular because, he happened to be an actor and someone in the public eye. There was no need for the claimant to go on to show that the allegation would have been defamatory of members of the general public. Similarly, it has been held defamatory to call a beauty therapist a 'boot' (meaning, according to the claimant, an ugly harridan) because, in the claimant's case, it might affect her professional standing, because customers would not want to be attended by an ugly beautician. If the comment had been made about your average solicitor, the defamation claim would perhaps have been less likely to succeed![33]

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29 *Charleston v News Group Newspapers* [1995] 2 All ER 313.

30 *Report of the Committee on Defamation*, Cmnd 5909, 1975, para 103.

31 *Vodafone v Orange* [1997] FSR 34 and *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] 2 All ER 599. This point is discussed further in Chapter 4 in relation to comparative advertising.

32 Millett LJ in *Berkoff v Burchill* [1996] 4 All ER 1010, p 1018.

33 *Winyard v Tatler Publishing Co Ltd* (1991) *The Independent*, 16 August.

It is dangerous to rely on case law as a reliable precedent to determine whether a meaning is defamatory. The views of reasonable people will vary from generation to generation. In 1934, it was thought defamatory to suggest that a woman had been raped. In the case of *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*,[34] Slesser LJ stated: 'One may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in social reputation and in opportunities of receiving respectable consideration from the world.' One would hope that such attitudes would no longer prevail in the 21st century. Reasonable members of society would hopefully not take the view that a woman's standing had been diminished because of a sexual assault.

It is the views of reasonable members of society generally which determine whether a statement is defamatory. In *Byrne v Dean*,[35] it was held that to say that a member of a golf club had informed the police about an illegal fruit machine operating in the club was not defamatory, notwithstanding that the statement lowered him in the estimation of his fellow club members. Respectable members of society would not have thought less of the claimant for bringing the matter to the attention of the police.

Hidden meanings

An item can sometimes mean something which is not apparent from a straightforward reading of the text or a viewing of the programme. This secondary meaning is known as an *innuendo*. The innuendo is dependent on knowledge of special circumstances which convey a secondary meaning which would not be conveyed to persons who do not possess the knowledge of the facts. The special facts relied on to support the innuendo must be known to at least some of the audience *at the time of publication*. A claim will not be actionable if the defamatory meaning arises from facts which became known after publication has taken place.[36]

An example of an innuendo occurred in the case of *Cassidy v Daily Mirror Newspapers Ltd*.[37] The defendants published in their newspaper a photograph of a gentleman called MC (who was a race horse owner) with a young woman. The photograph, which appeared under the headline 'Today's Gossip', was accompanied by a caption which stated 'Mr MC, the race horse owner and Miss X, whose engagement has just been announced'. There was nothing objectionable about the picture or the words. So far as the newspaper

34 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

35 *Byrne v Dean* [1937] 2 All ER 204.

36 *Grappelli v Derek Block (Holdings) Ltd* [1981] 2 All ER 272.

37 *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331.

was aware, the statement about the engagement was true – MC himself had told the reporter that the newspaper could print details of the engagement.

The claimant was the wife of MC. She claimed that her reputation had been damaged by the item as several people who knew her as MC's wife understood from the article that she was not in fact his wife, but that she had been living with him in 'immoral cohabitation'.

The meaning which the claimant alleged that the article bore was not apparent from the face of the item which did not even refer to the claimant. It would only have been apparent to people with the knowledge that the claimant had been representing herself as MC's wife. The defendants were not aware that MC had a wife when they published the picture and caption. The Court of Appeal held that the item was capable of being defamatory of the claimant notwithstanding: (a) that the defendants had not known the true facts; and (b) that the defamatory meaning was only apparent to the relatively few people who knew the claimant to be MC's wife.

Pleading an innuendo

A claimant who wishes to rely on an innuendo must set out all of the facts and matters he relies on to support the innuendo meaning. The claimant may also be required to identify those members of the audience whom he alleges knew the special facts. He does not need to show that those people understood the words to bear the alleged defamatory meaning, simply to prove that they had knowledge of the facts which might have led them to have understood the words in the sense that is alleged to be defamatory.[38] It is then a question for the jury whether the words would in fact have been understood by reasonable people with the requisite knowledge to bear the meaning alleged and whether that meaning is defamatory.

Often, innuendo meanings are unintended. As in the *Cassidy* case, the defendant may not have the special knowledge which would enable it to appreciate the defamatory meaning. This can lead to injustice for the media. However, the introduction of the new unintentional defamation defence (discussed below) will, hopefully, go some way to ameliorating the position. The Court of Appeal in the *Cassidy* case felt that their judgment was just because it was the defendant's failure to check their information that had led to the error. Scrutton LJ observed: '... to publish statements first and inquire into their truth afterwards may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate, it would lead to accuracy and reliability.'[39]

38 *Hough v London Express Newspapers Ltd* [1940] 2 KB 507.

39 *Cassidy v Daily Mirror Newspapers Ltd* (1929) 2 KB 331, p 342.

Another form of innuendo can arise where words could be understood to bear a meaning other than their literal meaning. This issue often arises from the use of slang which has not yet entered everyday language. Where a statement would be understood in a defamatory sense by those with an appreciation of the meaning of the slang, this secondary meaning should be pleaded as an innuendo. It would then be a question for the jury whether a reasonable person with knowledge of the slang would understand the words to bear the meaning alleged and, if so, whether that meaning is defamatory.

The claimant's burden of proof in defamation actions

One of the reasons why the threat of defamation claims weighs so heavily on media defendants is that the burden of proof in a defamation action is very much weighted in the claimant's favour. The claimant has only to prove the following:

- the matter complained of is defamatory (essentially, a tendency to cause damage to the claimant's reputation must be shown); and
- the matter would be understood to refer to the claimant; and
- the matter has been published to a third person.

Where the action is for slander, the claimant will also have to prove that the allegation has actually caused damage (subject to certain exceptions). In other types of defamation cases, a claimant need only show a tendency to cause damage. Damage will be presumed without the need for the claimant to adduce evidence. The distinction between libel and slander is considered below.

The law presumes in the claimant's favour that the words are untrue unless and until the defendant proves to the contrary. We shall see below that if the defendant attempts unsuccessfully to prove that the words are true, it is likely to increase the amount of damages payable to the claimant.

We have considered the law relating to the defamatory meaning above. The second and third factors which the claimant must prove to establish both libel and slander will now be discussed.

Identification

The claimant must show that the material which is the subject of the defamation claim would have been understood to refer to him. Where the claimant is identified, this will be a straightforward matter. But material is capable of being understood to refer to the claimant, even where the claimant is not named or even referred to expressly. As with meaning, the intention of

the publisher is irrelevant.[40] The test is *whether reasonable members of the audience would understand the item to refer to the claimant*. Merely refraining from identifying the subject matter of a statement by name is not, therefore, an effective safeguard against defamation claims.

Identification may be dependent on special knowledge about the claimant which may only be known to a few people. It will be for the claimant to show that at least some of the audience had that special knowledge which would enable them to appreciate that the article refers to the claimant. It is then a question for the jury to decide whether a reasonable reader or viewer with the requisite knowledge would have understood the article to refer to the claimant. It is immaterial to the issue of liability that only a small number of readers or viewers have the knowledge which enables them to identify the claimant.[41]

Identification and groups of people

Where a defamatory statement is made about a class or group of persons without naming a particular individual, the test to determine whether a member of the class or group can bring proceedings for defamation was laid down by the House of lords in *Knupffer v London Express Newspaper Ltd*.[42] The test is *'are the words such as would reasonably lead persons acquainted with the claimant to believe that he was the person referred to*?'.

There is nothing to stop a statement about a group or class of people being actionable, provided that the words would reasonably be understood to refer to each member of the group. In practice, a statement about a large group of people is generally not actionable, because of the difficulties of establishing that the claimant was, in fact, included in the defamatory statement. To say that all lawyers are thieves is unlikely to be actionable by any particular lawyer, unless there is something to point to him particularly.[43] But to say that all of the lawyers in the media department of a particular firm are incompetent might well be actionable. It is more likely that the statement would be understood by the reasonable reader or viewer to refer to a particular individual. Factors which may be relevant are the size of the class, the generality of the charge and the extravagance of the accusation.

The *Knupffer* case concerned an article about a pro-Hitler movement of Russian *émigrés* which was allegedly trying to infiltrate the USSR in the early 1940s. The group was described in the article in sketchy terms as being 'established in France and the US' with secret agents able to enter and leave

40 *Hulton v Jones* [1910] AC 20.

41 Although the extent of knowledge may be relevant to the amount of damages which the defendant is ordered to pay.

42 *Knupffer v London Express Newspaper Ltd* [1944] AC 116.

43 *Eastwood v Holmes* (1858) 1 F&F 347, p 349.

the USSR at will. The claimant was a Russian resident in London. He brought an action in defamation, alleging that the article would reasonably be understood to refer to him. The House of Lords unanimously held that it would not. The size of the class of Russian émigrés was too broad.

Unintended identification

Sometimes, a person can be mistakenly identified as the subject of a defamatory statement. The fact that the defendant did not intend to refer to the particular claimant will not prevent a claim being brought. The test is whether reasonable people would believe that the statement referred to the claimant. In the case of *Hulton v Jones,*[44] the defendants published defamatory statements in an article about a fictitious person, which it called 'Artemus Jones'. The name chosen by the defendants happened to be the name of the claimant. The claimant brought proceedings for defamation, alleging that certain of his acquaintances believed that the article referred to him. The House of Lords held that the correct approach was to decide whether sensible and reasonable people reading the article would think that it concerned a real or an imaginary person. If they would think that the character was imaginary, the words were not actionable. If the reasonable and sensible readers who knew the claimant would suppose the article to concern a real person who was the claimant, the action would be maintainable.

On the basis of the court's approach in the *Hulton v Jones* case, most cases where the name of a real person is used in a fictional work would not be actionable in defamation. The reasonable and sensible reader or viewer would appreciate that the work is fictional and that the material did not concern a real person. To underline this belief, publishers and programme and film makers often include a statement that all characters are fictional and that any references to individuals is unintentional.

Identification by association

Where someone is identified in an article or programme, the identification could also infer a reference to some other person by association. The *Cassidy* case is an example of this.[45] The claimant could be identified by association with her husband. In that case, Scrutton LJ stated 'I think it is clear that words published about A may indirectly be defamatory of B. For instance "A is illegitimate". To persons who know A's parents those words may be defamatory of A's parents'.[46] This would be the case even though A's parents were not named.

44 *Hulton v Jones* [1910] AC 20.

45 *Cassidy v Daily Mirror Newspapers Ltd* (1929) 2 KB 331.

46 *Ibid*, p 338.

Publication

The claimant also has to prove that the defamatory material has been communicated to a third party. Publication is not actionable if the material is only communicated to the claimant. There must be publication to at least one other person. The concept of publication is not confined to a publication to the general public. A private letter which A writes to B, containing a defamatory statement about C, would be an actionable publication. Nor does the publication have to be in a permanent form. A could tell B about C, and A's oral remarks could be an actionable publication. In most cases involving the media, the publication will generally be a communication to or accessible by the general public. An actionable publication can also take place on the internet either by transmission by e-mail, publication on a website or the posting of defamatory material on a bulletin board or a usenet newsgroup. Publication on the internet is discussed further below.

Each publication of the defamatory material gives rise to a separate cause of action. Every copy of a newspaper or book or every broadcast of an item is a separate publication giving rise to its own cause of action.

Libel and slander

The law draws a distinction between a publication in a permanent form (a libel) and publication in a non-permanent form (a slander). Spoken words will generally be slander, whilst written words will be libel. Section 166 of the Broadcasting Act 1990 provides that publication of words during a broadcast programme on television or radio, whether to the general public or not, is to be classed as libel. Similarly, the Theatres Act 1968 provides that words spoken during the performance of a play should also be treated as libel.

The distinction between libel and slander is important in the context of what a claimant must prove to succeed in its claim. Libels are actionable *per se* without the need to prove that damage has actually been caused by the publication. The law presumes that a libel has caused damage to its subject.

Slander generally requires the claimant to prove that damage has been suffered. There are exceptions to this rule where the slander concerns one of four types of subject matter, namely:

- the imputation of a crime punishable by imprisonment;
- the imputation of certain types of diseases which are likely to deter persons from associating with the claimant (for example, venereal diseases);
- disparagement of the claimant in his profession, trade or business;
- an imputation of unchastity in a woman.

In each of the above cases, the slander will be actionable without proof of actual damage.

Who may sue for defamation?

Any living person may bring proceedings for defamation.

Dead people

Under civil law, the estates of dead people cannot commence proceedings, no matter how untrue or defamatory a statement may be.[47] The reputation of a dead person is deemed to die with him. The Faulks Committee was of the opinion that the law does not adequately take into account the interests of the public and near relatives of the deceased in protecting a deceased's reputation from unjustified damage. It recommended that a new cause of action should be introduced, exercisable by the estate of the deceased. The remedies available for this cause of action would include a declaration that the statement was defamatory and an injunction to restrain further publication. It would not include damages. The proposed cause of action would have a limitation period of five years of death. The recommendation was never adopted.

Trading corporations

A trading corporation has a reputation separate from that of its members, directors or employees. It is entitled to sue in the same way as individual claimants. However, care should be taken to ensure that it is the *corporation's* reputation which is actually affected. The defamatory comment must reflect on the corporation itself[48] before the corporation can properly bring proceedings. A corporation cannot sue over what is in reality an attack on its officers or employees.

Although corporations can bring proceedings for defamation, the heads under which they can recover damages are narrower than for individuals. Corporations cannot recover damages for distress or hurt feelings. These can make up a substantial part of an individual claimant's damages. On the other hand, a company may be able to obtain compensation for damage to its goodwill in appropriate circumstances.[49]

47 It would seem that a prosecution for criminal libel might be brought in respect of allegations about a dead person. Criminal libel is considered at the end of this chapter.

48 *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011.

49 *Per* Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, p 262.

Non-trading corporations

Non-trading corporations may also bring proceedings for defamation, at least over allegations which damage its 'business' activities or standing. A trade union may successfully bring proceedings over statements which adversely affect its ability to keep members.[50] Similarly, a charity may sue where the effect of the statement is to impede its ability to carry out its charitable objects.[51]

Organisations which may not bring proceedings for defamation

There are certain types of organisation which *cannot* bring proceedings for defamation. Currently these are as follows:

- government bodies;[52]
- local authorities;[53]
- political parties;[54]
- nationalised industries.[55]

The categories of organisation which are not permitted to bring a claim in defamation are not closed.

The reasoning behind these prohibitions from bringing actions is the public interest which the court has found to exist in the uninhibited public criticism of bodies which put themselves forward for office or who are democratically elected to govern or responsible for public administration. As Lord Bridge has observed:

> In a free democratic society, it is almost too obvious to need stating that those who hold office in Government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.[56]

As we saw in Chapter 1, the same sentiments have been articulated by the European Court of Human Rights in relation to Art 10 (freedom of expression).

An unsuccessful attempt to widen the categories of prohibited claimants occurred in the well known litigation which McDonald's Restaurants

50 *National Union of General and Municipal Workers v Gillan* [1945] 2 All ER 593.
51 Lord Keith in *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534.
52 *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534.
53 *Ibid*.
54 *Goldsmith v Bhoyrul* [1998] QB 459.
55 *British Coal Corpn v National Union of Mineworkers* (1996) unreported.
56 *Hector v AG of Antigua and Barbuda* [1990] 2 All ER 103, p 106.

commenced against London Greenpeace activists Helen Steele and Dave Morris. Steele and Morris argued that multinational commercial corporations such as McDonald's should not be permitted to sue for defamation. Their argument was that multinational corporations have such an effect on the lives of people around the world that the public interest strongly favours the ability for people to make unfettered criticism of their actions.[57] The Court of Appeal lost no time in rejecting their argument.[58] It pointed out that the basis on which it was decided that a local authority could not maintain an action for libel did not apply to commercial corporations, however large, which were constitutionally in a different position. It was not open to the court, as opposed to Parliament, to invent a category of commercial corporation which should not be able to maintain an action for defamation.

The courts have stressed that organisations which are prohibited from suing in the civil courts retain the right to bring a private prosecution for criminal libel (considered below). They can also bring proceedings for malicious falsehood, provided that they can prove the necessary elements of that cause of action.[59] Although the decision that public bodies retain these rights may be open to challenge under the Human Rights Act 1998 on the ground that they are limitations on freedom of expression which are unnecessary in a democratic society. For the time being at least, it is not the case that the media have complete freedom to criticise public bodies, especially where the criticism is made without positive belief in the truth of what is stated.

The prohibition is on organisations, rather than individuals

Significantly, where a defamatory comment about a prohibited organisation such as a local authority identifies an individual member of the above organisations, it *remains open* for the individual to bring a civil claim in defamation.

In *Derbyshire CC v Times Newspapers Ltd*, the Court of Appeal declined to extend the prohibition on defamation claims to individual members of the claimant county council – a conclusion confirmed by the House of Lords. Butler-Sloss LJ referred to the retention of the right for the individual to sue in defamation as 'a valuable, although indirect, additional protection for the local authority'.[60]

57 See John Vidal's book on the *McDonald's* case, *McLibel*, 1997, Macmillan, for a more eloquent version of the argument.

58 *McDonald's v Steel and Morris* (1999) unreported.

59 *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534.

60 [1992] 3 All ER 65, p 96.

The efficacy of the objective of facilitating unfettered public criticism of government and local authority activities must be open to doubt where the individual members of government retain the right to sue in defamation.[61] Although a local authority has a reputation distinct from that of its councillors and officials, a slur on the local authority is invariably capable of being understood as a slur on the officials concerned. The *Derbyshire* case concerned articles in *The Times,* questioning the propriety of certain investments which the council had made for its superannuation fund. Defamation proceedings were brought by the local authority and by the councillor responsible for the investment. Whilst the local authority could not maintain its action, the councillor could.

The public interest in unfettered public discussion of governmental activities would have been better served if the individual members of the bodies in question were also prohibited from bringing civil claims for defamation in respect of defamatory comments made about their performance in office. The individuals would still be able to bring civil proceedings for defamation in respect of allegations made about their personal life which could not have a bearing their professional role.[62]

Another alternative open to the courts would be to allow officials to bring civil defamation proceedings for comments made about their official roles and duties only in cases where the individual claimant can show that the claim would be in the public interest. This approach is akin to breach of confidence cases which are brought by the Crown.[63] The Crown has to demonstrate as part of its positive case that it is in the public interest that the confidentiality of the material in question be preserved. On this approach, a would-be defamation claimant would have to show that it is in the public interest that it sues in defamation about disparaging comments about his performance in office. In the light of the comments in the *Derbyshire* case about the public interest in uninhibited criticism, he would face an uphill struggle in doing so.

The recent House of Lords decision in *Reynolds v Sunday Times*[64] has confirmed that the defence of qualified privilege may extend to publication of defamatory allegations which are in the public interest. Allegations about an official's performance in office may very well be in the public interest. Although a public official is not debarred from bringing a claim in defamation for such allegations, the media will have the benefit of the qualified privilege defence, provided that it acted responsibly when publishing the allegations.[65]

61 For further detail, see Barendt, E, 'Libel and freedom of speech in English law' [1993] PL 449.

62 This is in line with the jurisprudence at the European Court of Human Rights as discussed in Chapter 1.

63 *AG v Jonathan Cape* [1976] QB 752.

64 *Reynolds v Sunday Times* [1999] 4 All ER 609.

65 Qualified privilege is discussed below.

Who may be sued?

The claimant has a cause of action against anyone who is involved in the publication of the defamatory material, even if they had no direct responsibility for or editorial control over the contents of the publication. At common law, liability is strict. There is an actionable publication even where the publisher was not aware that a publication contained defamatory material. In the case of a newspaper or periodical, proceedings can therefore be brought against the following parties:

- the person who made the defamatory comments in the article, say in an interview;
- the journalist who wrote the item containing the comments (even though he did not originate them);
- the editor of the publication;
- the publishers of the publication;
- the printers who printed the publication;
- the distributors of the publication;
- the retailers who sell the publication.

The commencement of or the threat of proceedings against parties with no direct control over content, such as retailers or distributors, has often been the most effective option available to a claimant for getting a publication containing defamatory material off the shelves. Retailers are unlikely to want the nuisance value of a defamation claim against them. They are unlikely to have involvement in the content of the allegations or any personal motives for defending the claim. From their commercial viewpoint, it will often be more efficient to accede to a claimant's request that the publication be withdrawn from sale than to defend the case on its merits. They are also more likely to have deeper pockets than the publication in question and so more likely to be able to pay substantial damages and costs. This was particularly the case before the introduction of the innocent dissemination defence contained in the Defamation Act 1996 (discussed below), which now provides a defence for parties with no editorial responsibility where they can show that they took reasonable care in relation to the publication.

The position of internet service providers

In the case of *Godfrey v Demon Internet Ltd*,[66] the court had to consider the position of the defendant internet service provider (ISP) which provided usenet facilities to its customers. The defendant carried a usenet newsgroup.

66 *Godfrey v Demon Internet Ltd* [1999] EMLR 542.

This is a system by which postings (or articles) are sent by internet users to particular forums. Such a posting is readable anywhere in the world by an internet user whose ISP offers access to the newsgroup in question. As part of its service, the defendant stored postings within the newsgroup which were then available to be accessed by its customers. Someone unknown made a posting to the defendants' news server. The posting purported to come from the claimant, but it was actually a forgery. The posting was described by the court as 'squalid, obscene and defamatory' of the claimant.

The court held that an ISP such as the defendant was in the same position as a bookseller who sells a book defamatory of the claimant. Whenever there is transmitted from the storage of their news server a defamatory posting, they publish that posting to any of their subscribers who accesses the newsgroup containing that posting. Demon subsequently settled the action, reportedly agreeing to pay £15,000 damages and £230,000 costs.[67]

The defence of innocent publication

The Defamation Act 1996 introduced a statutory defence to a defamation claim for parties who, although they are technically publishers, do not have primary responsibility for the content of what they publish. Section 1 of the Defamation Act 1996 provides the defence for such parties provided that the party can prove that it: (a) took reasonable care in relation to the publication; *and* (b) did not know or had no reason to believe that it caused or contributed to the publication of a defamatory statement. Note that these criteria are not alternatives. They must both be proved. The defendant must take reasonable care and have no reason to believe. The onus is on the defendant to prove that it meets these conditions. We will look at the provisions of the section in more detail.

Primary responsibility

The defence is *not* available to the author, editor or commercial publisher of the statement complained of or their employees or agents to the extent that the employees or agents are responsible for the content of the statement or the decision to publish it. Authors, editors and commercial publishers are assumed to have primary responsibility for content (s 1(1)(a)).

For the purposes of the defence:

- *author* means the originator of the statement, but does not include a person who did not intend the statement to be published at all. If there were no

67 (2000) Law Soc Gazette, 20 April.

intention for the statement to be published, it would seem that an author could still rely on this defence (s 1(2));

- *editor* means a person having editorial or equivalent responsibility for the content of a statement or the decision to publish it (s 1(2));
- *publisher* means a commercial publisher whose business is issuing material to the public or a section of the public, who issues material containing the statement in the course of that business (s 1(2)).

The defence *will* be available to parties whose involvement is restricted to the following activities, or activities which are analogous to them in relation to the defamatory material:[68]

- printing;
- producing;
- distributing; or
- selling,

the material containing the defamatory statement.

Where the defamatory material is a film or sound recording, the defence will be available to those involved in:

- processing;
- making copies of;
- distributing;
- exhibiting; or
- selling,

the film or sound recording containing the statement.

A person involved in processing, making copies of, distributing or selling any electronic medium in or on which a statement is recorded, or in operating any equipment or system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form, will not be considered the author, editor or publisher if that is the only extent of his involvement.

The broadcaster of a live programme will not be liable in respect of the broadcast of a defamatory statement in circumstances in which it has no effective control over the maker of the statement.

An ISP, or other provider or operator of a communications system by means of which the defamatory statement is transmitted or made available, will not be liable for the statement, provided it is made by a person over which it has no effective control.

68 Defamation Act 1996, s 1(3).

The court can extend the above situations by analogy in a case which does not fall within the above provisions. The crux is essentially whether the defendant has responsibility for content or the decision to publish.

Reasonable care and reason to believe (s 1(5))

In determining whether a person without primary responsibility took reasonable care or had no reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard should be had to the following:

- the extent of that person's responsibility for the content of the statement or the decision to publish it;
- the nature or circumstances of the publication; and
- the previous conduct or character of the author, editor or publisher (if the publication in question is notorious for its involvement in defamation actions, presumably the defendant will be expected to be more vigilant in checking for defamatory material than in the case of more innocuous publications).

There has been little case law interpreting this section. In *Godfrey v Demon Internet Ltd*[69] the defendant ISP relied on the s 1 defence in relation to its provision of a usenet newsgroup on which a defamatory statement had been posted. The court held that, because the claimant had given the defendant notice that he considered the posting to be defamatory and had requested its removal from the usenet news server, the innocent dissemination defence had not been made out in relation to the period after notice had been given.

The court adopted the following approach:

- was the defendant an author, editor or commercial publisher for the purposes of s 1(2)? On the facts, the defendant was not an author, editor or commercial publisher for the purposes of the Act;
- the court should then consider whether the defendant had taken reasonable care in relation to the publication *and* whether it did not know, and had no reason to believe that what it did caused or contributed to the publication of the defamatory statement. On the facts, the judge thought that the defendants were 'in an insuperable difficulty' in meeting these criteria once they knew of the defamatory posting, having been put on notice by the claimant, and yet neglected to move it from their news server. So great was this difficulty that the judge felt able to strike out the innocent dissemination defence on the ground that it disclosed no sustainable defence. He described it as 'hopeless'.

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69 *Godfrey v Demon Internet Ltd* [1999] EMLR 542.

The *Godfrey* case concerned a statement which was obviously defamatory. The judge was clearly of the view that having been put on notice by the claimant, the statement should have been removed. The case leaves open what the position would be where it is not so clear that a statement is defamatory. Should the service provider or other defendant remove such a statement simply because the claimant has asked it to, or is it entitled to form its own view about whether the statement is defamatory? Does the claimant have to provide a full complaint about the statement or is an unsupported complaint sufficient to give the defendant reason to believe that it has caused or contributed to a defamatory statement? These issues are still to be clarified.

Another area requiring clarification in relation to reasonable care is the extent to which a party with no direct editorial control is required to monitor the material with which it is involved for defamatory content. There is a draft EC directive concerning electronic commerce which provides that ISPs are not obliged to monitor their services for unlawful content.[70] Once in force, the directive will help to clarify the position in so far as service providers on the internet are concerned. The Defamation Act 1996 tells us that one of the factors which is relevant to the availability of the innocent publication defence is the nature or circumstances of the publication. Presumably, a busy printing company or large retailer which handles a large quantity of material would not be expected to monitor each publication. The position might be different for bodies such as ISPs which store postings sent in by others. Are they expected to monitor the postings for defamatory material? If they do provide a monitoring service, are they more or less likely to be found to lack reasonable care if that service misses a defamatory posting? We will need further cases before these matters are clarified.

A further example of the operation of the innocent publications defence occurred recently in litigation commenced by the opinion poll organisation MORI against the BBC. The action concerned allegations which Sir James Goldsmith made about MORI during a live radio broadcast. The BBC relied on a defence under s 1 of the Defamation Act. MORI sought to show that the BBC had not taken reasonable care in relation to the broadcast. It should have realised that Sir James Goldsmith was prone to making controversial remarks and should not have interviewed him without a delay device, which would enable the deletion of controversial material before it was transmitted. The action settled whilst the trial was taking place. It is accordingly unclear whether the BBC could have escaped liability by relying on the s 1 defence.

70 COM (1998) 586 2000/C 128/02, Art 15.

Defamation and limitation

The limitation period for defamation actions is one year from the date of publication. If proceedings are not commenced within this period, limitation may be raised by the defendant as a defence to the proceedings. Section 5(4) of the Defamation Act 1996 allows the court discretion to extend the period where equitable to do so, having regard to the degree to which the claimant will be prejudiced by not being able to bring an action and the degree to which the defendant will be prejudiced if the claimant is allowed to bring the action.[71]

OTHER DEFENCES TO DEFAMATION CLAIMS

The Faulks Committee identified defamation law as having two basic purposes. The first is protection of reputation. The second is the preservation of the right to free speech. It observed that the two purposes necessarily conflict, but that the law was sound if it preserves a proper balance between them.[72] That balance arises from the existence of a number of defences to defamation claims which are intended to protect in appropriate circumstances a defendant's right to express what he wishes at the expense of a claimant's reputation. The question whether the balance comes down fairly in the interests of freedom of expression is an issue which will considered in this chapter. The defences at issue are examined below.

Defences involving proof of truth: justification and fair comment

> It has to be remembered that the defences of justification and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected.[73]

Justification: statements of fact

Where a statement of fact is defamatory, there will be a complete defence to the claim if the defendant can prove on the balance of probabilities that the natural and ordinary meaning of the statement, or the gist of it, is true. The defence is known as *justification*. Note that the onus of proof is on the

71 The court has considered the operation of s 5(4) in *Hinks v Hinks* (2000) and *Smith v Probyn* (2000) unreported.

72 Faulks Committee, *Report of the Committee on Defamation*, Cmnd 5909, 1975, para 19.

73 Neill LJ in *McDonald's v Steel and Morris* (1999) unreported.

defendant. *The law will presume that the statement is false, unless the defendant can prove otherwise*. The defendant does not have to prove the truth of every last detail of its statement, but the substance of it must be proved.

The defendant must prove the truth of the statement using admissible evidence. Often, defendants struggle to do so, even if their statement was thoroughly researched and verified before it was made. For example, interviewees who were quite happy to help a journalist with his investigations may get cold feet about appearing in court to give evidence. It is not unusual for defences to collapse in these circumstances. A defendant who pleads justification invariably faces an uphill struggle. As Lord Keith recognised in *Derbyshire CC v Times Newspapers Ltd*:[74]

> Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

Defamation trials are not public inquiries. They are rarely the most appropriate for arriving at 'the truth'. They are civil trials to be played by the rules of litigation. The defendant bears the burden of proving that a statement is true. The claimant will seek to undermine its opponents' position by use of the means available to it. These will include rigorous cross-examination, objection to the admissibility of evidence and the taking of procedural and technical points of procedure and pleading.

The general rule is that, before making a plea of justification, the defendant should believe his words to be true and to intend to prove them at trial. There should also be reasonable evidence to support a plea of justification or reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial.

The defendant is entitled to make use of all sources of material available to him in order to support a plea of justification. This will include not only the sources available at the time that the statement is made, but also sources which may become available as part of the litigation process, including evidence which the claimant may give during cross-examination or documents which are obtained from the claimant during the disclosure and inspection process.[75]

The standard of proof

The defendant generally has to prove the truth of the substance of its allegations on the balance of probabilities. In *Irving v Penguin Books*,[76] Gray J

74 *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011.

75 *McDonald's v Steel and Morris* (1999) unreported. The judgment in this case applies equally towards facts which are relied on in support of a plea of fair comment.

76 *Irving v Penguin Books* (2000) unreported, 11 April.

accepted that, where the defendant's allegations are of a serious nature (such as, on the facts of the *Irving* case, the assertion that the claimant, Mr Irving, had deliberately falsified historical evidence), the standard of proof should be commensurately higher to reflect that seriousness.

What must be justified?

The meaning which has to be justified is the natural and ordinary meaning which the jury attributes to the statement. As we have seen, this meaning may not be what the maker of the statement intended the statement to mean. There may also be innuendo meanings and inferences arising from the statement which the defendant did not appreciate, but which will have to be justified if the action is to be defended successfully by a plea of justification. As part of this process, the defendant may seek to justify the meaning which he thinks that the words have,[77] which may be different to the meaning which the claimant seeks to place on the words. As we have seen, the final decision about what the words mean will be for the jury, who will then determine whether the defendant has justified that meaning.

Rumours and hearsay

Where the statement in question purports to repeat a statement made by a third party or to report on rumours and gossip, there is a well established rule that it is not sufficient to prove that the rumour is in circulation or that the third party did in fact make the statement in question. This rule is known as '*the repetition rule*'.[78]

Example 1

If you publish a statement that Y said that X is guilty of a criminal offence, it is not a defence to an action to establish that literal proof. By making the statement, the writer is taken to repeat and endorse what Y said, as Lord Reid has observed: '... repeating someone else's libellous statement is just as bad as making the statement directly.'[79] Your defence of justification must address the substance of what Y said and not just the fact that he said it.[80]

Example 2

X makes a television documentary concerning rumours in common circulation that Mr Grey, a well known politician, is having an affair with his cook. X is

77 See, eg, *Lucas Box v News Group Newspapers* [1986] 1 All ER 177; [1986] 1 WLR 147.

78 See *Stern v Piper* [1997] QB 123; [1996] 3 All ER 385; [1996] 3 WLR 715, for a consideration of the history and merits of the rule.

79 *Lewis v Daily Telegraph* [1964] AC 234, p 260.

80 *Per* May LJ in *Shah v Standard Chartered Bank* [1998] EMLR 597, p 623.

careful to make clear that he is reporting on rumours and that he is not purporting to allege that the rumours are true. Mr Grey brings proceedings for libel, alleging that the natural and ordinary meaning of the programme was that he was having an affair. X will have to prove that the rumours are true in order to succeed in his defence. It will not be sufficient for him to show that the rumours are in fact circulating.

Proving the defamatory 'sting'

It is not necessary to prove that every single factual allegation is true, provided that the overall defamatory impact can be proved to be true. This overall impact is known as the defamatory 'sting'.

Section 5 of the Defamation Act 1952 provides that, where an action for defamation concerns two or more distinct charges against the claimant, a defence for justification will not fail by reason only that the truth of every charge is not proved if the words which are not proved to be true do not materially injure the claimant's reputation, having regard to the truth of the remaining charges.

Adducing evidence of the same type of conduct to support a claim in justification

It will sometimes suit the defendant's purpose to allege that an item which makes specific allegations bears a natural and ordinary meaning which goes beyond the specific allegation. The wider the meaning, the greater the scope for particulars of justification. Take, for example, the case of *Williams v Reason*.[81] The claimant was an international amateur rugby player who sued for defamation over allegations in a newspaper that he was a 'shamateur', that is, that he was abusing his amateur status by writing a book for money whilst he was still playing amateur rugby. The claimant alleged that the words bore the specific defamatory meaning concerning his book.

The defendants contended that the natural and ordinary meaning of the article was wider. It was making a general charge of 'shamateurism' against the rugby player, of which the book was one instance. It suited its purpose to do so because, if the meaning was the general charge, it could adduce evidence to support its plea in justification which went beyond the book. In fact, the defendants wanted to adduce evidence relating to payments which the defendants alleged that the claimant had accepted from a sports equipment manufacturer for wearing their rugby boots. The acceptance of boot money had not been mentioned in the article. This evidence was relevant

81 *Williams v Reason* [1988] 1 All ER 262, CA.

on an overall charge of shamateurism, but not to the specific allegation in the article.

The court held that a defendant was not entitled to rely on a general charge of wrongdoing, unless a wider meaning or a more general charge could fairly be gathered from the words used in the article. A defendant who has made a specific claim ought not to be allowed to justify that claim by reference to other alleged examples of conduct of the same type merely because they relate to the same kind of wrongdoing of which a specific charge has been made. However, where the words could reasonably be understood in the wider sense as making a general charge, the defendant could adduce the evidence. On the facts of the *Williams* case, the court held that the article was reasonably capable of being understood as making a general charge of shamateurism and the defendants were permitted to call evidence about the boot money to justify that general charge.[82]

Separate allegations and evidence of justification

Subject to the above point, where a defendant has published two distinct libels about a claimant, the law permits the claimant to decide which of the libels it wishes to sue over. The claimant can complain about one of the libels and, if it does so, the defendant is not then permitted to justify the libel about which complaint is made by proving the truth of the other libel. For this rule to apply, the libels must be distinctly severable into separate parts. If they are not, the claimant cannot pick and choose between them.[83] This will be a question of fact and degree in every case. Where the separate and distinct libels have a common sting, they ought not to be regarded as separate and distinct allegations. The defendant is entitled to justify the overall sting.[84]

Special rules about references to previous convictions

The fact that a person has been convicted of a criminal offence is deemed to be conclusive proof that he committed the offence and the conviction can be admitted in evidence as proof of that fact.[85]

The Rehabilitation of Offenders Act 1974 provides that certain criminal convictions become spent after a specified period of time. Once a conviction is 'spent', it is treated for most purposes as if it never occurred, the rationale being that a person ought not to be haunted by his past where the conviction was an isolated incident for a relatively minor offence. The Act applies to convictions which have resulted in custodial sentences not exceeding

82 See, also, *Bookbinder v Tebbit* [1989] 1 All ER 1169, CA.

83 *Polly Peck (Holdings) v Trelford* [1986] 2 All ER 84.

84 *Cruise v Express Newspapers plc* [1999] QB 931, CA.

85 Civil Evidence Act 1968, s 13(1).

30 months. The applicable rehabilitation period will vary according to the nature of the offence in question.

Where the media make a statement imputing that the claimant has committed or been charged with or prosecuted for or convicted of an offence which is the subject of a spent conviction, the media may make a plea of justification, referring to the spent conviction, and to adduce evidence of the spent conviction in court.[86] This is subject to the exception set out below.

Exception

Where the claimant can prove that the defendant was actuated by malice when it made the statement, the defendant will *not* be able to rely on the spent conviction.[87] The legal meaning of malice is considered below.

Fair comment: statements of opinion – 'the critic's most valuable defence'

Distinguishing comment from fact

The defence of justification applies to the assertion of facts. Where the defamatory statement is a comment or an expression of opinion, the defence of fair comment may be relevant.

It is sometimes difficult to draw the distinction between an expression of opinion on the one hand (for which the defence of fair comment will be relevant) and an assertion of fact on the other (for which the defence of justification will be relevant). The test as to what is opinion and what is fact is objective – what would ordinary readers or viewers think? The intention of the publisher is irrelevant. The onus is on the originator of the comment to ensure that it is identifiable as comment. The writer or broadcaster must make clear that he is expressing opinion and not making factual statements about the subject matter on which he is commenting. The use of phrases such as 'it seems to me' or 'in our view' will help to establish this, although they will not be conclusive. The decision will depend on a consideration of the words used, taken in their context and the circumstances of publication. It must be clear from the *face of the item* that the comment or opinion *is* comment or opinion, rather than an assertion of fact.

Where it is not possible to make the distinction, the statement will be presumed to be factual.

86 Rehabilitation of Offenders Act 1974, s 8(3).

87 *Ibid*, s 8(5).

Context

The context in which a statement is made is often important in determining whether it is comment or a factual assertion. But consideration of the context in which the statement is made must be confined to the consideration of the document or item in which the comment was actually made.[88] For example, where a statement is contained in a letter, the court is entitled to look at the letter as a whole to determine whether it is comment or fact. *However, the context cannot be considered beyond the document in which the statement is made.* Where a letter was written in response to an earlier article, the court was not permitted to determine the status of the contents by reference to the earlier article.[89] The court observed that the editor responsible should have insisted that the letter in response set out the matters on which it was commenting, to make it clear that it contained comment and not factual assertion.

The facts on which comment is based

In order for a statement to be recognised as comment, it is often necessary to set out or at least to refer to the facts, or some of them, on which the comment is based.

Example

The statement that 'solicitor A is incompetent' is a statement of fact.

However, if the statement is recast to read 'Solicitor A has been found liable for professional negligence on four occasions in the last three years and he must therefore be judged to be incompetent', the allegation of incompetence would be understood as a comment based on the facts of the solicitor's liability in negligence.

In the former case, if I were to defend my statement I would have to prove that my factual assertion of incompetence is true (justification). In the second case, I could rely on the less onerous defence of fair comment.

The facts must be set out in sufficient detail that my assertion of incompetence is capable of being understood as comment by the reasonable reader or viewer. But it is not always necessary to set out all the facts on which the publisher relies in relation to his comment. This will be a question of fact in every case. Where the subject of the comment is already before the public, for example, a book or a play, it may not be necessary to set out any of the facts on which the comment is made provided that the subject matter of the comment is plainly identified in the article. In the case of *Kemsley v Foot*,[90] the

88 *Telnikoff v Matusevitch* [1991] 4 All ER 817, HL.

89 *Ibid*.

90 *Kemsley v Foot* [1951] 2 KB 34, CA; [1951] 1 All ER 331.

comment concerned a criticism of the defendant's newspapers. The criticism did not set out any of the facts on which it was based, although the subject of the comment (that is, the newspapers) was identified. The court held that, given that the defendant's newspapers were before the public, there was no need to set out any supporting facts in order for the statement to be understood as comment.

The requirements of the fair comment defence

Fair comment has been defined as 'the right of the citizen honestly to express his genuine opinion on a matter of public interest, however wrong or exaggerated or prejudiced that opinion may be'.[91] The requirements of the defence of fair comment are less onerous than the defence of justification. The reason for this is the recognition by the courts that freedom to hold an opinion is important in a democratic society. As Diplock J observed in *Silkin v Beaverbrook Newspapers Ltd*:[92]

> Freedom of speech ... is freedom under the law and, over the years, the law has maintained a balance between the right of the individual ... to his unsullied reputation if he deserves it. This is on the one hand. On the other hand, but equally important, is the right of the public which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though this involves strong criticism of the conduct of public people.

This distinction between facts and comments can also be seen in the jurisprudence of the European Court of Human Rights. In the case of *Lingens v UK*,[93] the court emphasised the difference between facts and value judgments. The essence of facts can be demonstrated, but the truth of value judgments is not so susceptible to proof.

The law therefore permits criticism and comment on matters in the public interest provided that the comment is fair. The limits of the defence are wide.

In order to establish the fair comment defence, it must be shown that:

(a) the comment or opinion was:
- based on facts; and
- those facts are true (essentially, the same criteria in relation to those facts as we have seen in relation to justification); and

(b) that the opinion or comment is honest; and

(c) on a matter of public interest.

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91 *Per* Lord Ackner in *Telnikoff v Matusevitch* [1991] 4 All ER 817, p 862.

92 *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, p 517.

93 *Lingens v UK* (1986) 8 EHRR 103.

The supporting facts

The defendant must show that the facts supporting his opinion or comment are true. To falsify or distort facts and then to comment on them as if they were true would not be fair. If the facts upon which the comment purports to be based do not exist, the defence fails, even if the maker of the comment believes the facts to be true and honestly holds the views stated.

The facts which support the comment should not confused with the comment itself. To take our earlier example about the incompetent solicitor: my comment is that he is incompetent. The supporting facts are the previous convictions. To succeed in my defence of fair comment, I would have to prove the truth of the supporting facts (the convictions). I would not have to prove that my allegation of incompetence was true.

The comment is honest

The issue of whether comment is honest involves the following sequence of questions:

- taken objectively, is the comment one that an honest minded person *could* have made on the facts which can be proved to be true? This is for the defendant to prove. The defendant does not have to show that the comment is an honest expression of his *own* views, but merely that the comment is objectively fair;
- if so, is the comment the defendant's honest opinion? It is for the claimant to prove that it is not. The comment will be presumed to be an honest expression of the defendant's views, unless the claimant proves otherwise.

Even if the comment taken objectively satisfies the first question, that is, it is an opinion which a reasonable person could have held on the facts, the claimant will succeed in his claim if he/she can show that the comment was not honestly held by the defendant on a subjective level. If the comment was not made honestly, it will be considered to have been actuated *by malice*.

'Malice' is a technical term that will arise again in relation to other defences considered in this chapter. It is considered in detail in the context of the defence of qualified privilege.

We will look at the above questions in more detail.

Step 1: the objective test

The question for the jury is 'would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?'.[94] This can be rephrased as 'could a fair man, holding a

94 *Merivale v Carson* (1880) 20 QB 275, p 280, *per* Lord Esher.

strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view – could a fair man have been capable of writing this?'.[95] This question has to be decided *without reference to the personal motivation of the defendant*.

The jury should put aside their own opinions. The test is not whether they agree with the comment. If that were the case, the right to express an opinion would be severely curtailed. As Diplock J explained: 'The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test.'[96]

A comment might be unfair on an objective basis where it amounts to little more than abuse or invective against the claimant. However, countless cases caution against drawing the limits of fair comment too narrowly. The issue is objective honesty. So, for example, if comments would appear to be exaggerated, it will not follow that they are not honest comments. Similarly, if comments appear to be overly prejudiced, it will not follow that they are not honest. The limits of the right to comment are wide.

Step 2: the subjective test

It is for the claimant to show that, whilst the comment or opinion is capable of being honestly held on an objective basis, it was not held honestly by the defendant. This is a subjective test which will depend on the defendant's motivations in making the comment. Motive will generally have to be inferred from what the defendant said or did or knew.

The comment is in the public interest

The concept of public interest in fair comment defences is much wider than we will encounter in relation to copyright infringement and breach of confidence. In *London Artists v Littler*,[97] Lord Denning observed 'whenever a matter is such as to affect people at large, so that they may be legitimately *interested in* or *concerned at*, what is going on or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment' (italics for emphasis). This stretches beyond the public actions of public officials. In the *London Artists* case, a threat to the running of a play in London's West End because of the withdrawal of three of the actors was considered to be in the public interest, because of the public's interest in the theatre.

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95 *Per* Diplock J in *Silkin v Beaverbrook* [1958] 2 All ER 516, p 520.

96 *Per* Diplock J in *ibid*, p 518.

97 *London Artists v Littler* [1968] 1 All ER 1075; [1968] 1 WLR 607.

Fair comment and the critic: an example

Journalist A reviews a play which has just opened in the West End. His review is very short and consists of the following remarks.

> The play is obscene. It concerns promiscuity and drug taking amongst homosexuals. The playwright is the most debauched and sordid writer of his generation.

The playwright, B, brings proceedings for defamation against A, alleging that the natural and ordinary meaning of the review is that he is a sordid and debauched person. A denies that meaning. He pleads that the review was an expression of his opinion and means that B writes about sordid and debauched subjects, rather than a personal attack on B's character.

A will first have to convince the jury that the words are an expression of his opinion, rather than an assertion of fact. A might have made this clearer by prefacing his final sentence with an expression like 'in my view' or 'the nature of B's work suggests that ...'. If the jury decide that the statement is an assertion of fact, A will have to rely on the defence of justification, which will entail him proving that B is the most debauched and sordid writer of his generation according to the jury's interpretation of the meaning of that sentence. If the jury decides that it is comment, A can rely on the defence of fair comment. He must show:

- the facts which support his comment are true. A is not restricted to the supporting facts which he refers to in the article. However, assume that A's supporting facts are the content of the play which is the subject of the review. A must prove that what he says about the play's content (promiscuity, drug taking and homosexuality) is correct. If it turns out that A has never seen the play and has misrepresented its contents, A's defence will fail at the first hurdle;
- assuming that A can satisfy the above, A must then show that his comment about B is one which a reasonable man (although prejudiced) could have held. A's own state of mind will be irrelevant to this question, as will the personal views of the jury. A's comment may be interpreted to be a personal attack on B's private character, rather than his work. If so, a jury may find that, taken objectively, the comment goes beyond the limit of an opinion that a reasonable reader (albeit a prejudiced one) could hold on the basis that a reasonable person would not cast aspersions about a man's private character because of what he chooses to write about.[98] If the jury think that, the defence must fail;
- if A succeeds in convincing the jury that his comment was objectively fair, the onus switches to B to prove that A does not honestly hold the opinion that he expressed. If, for example, there is a past history of animosity

98 See, eg, *Merivale v Carson* (1880) 20 QB 275.

between A and B, the jury may be prepared to infer that A published his comment to get even with B, rather than as an honest expression of his sincerely held view;

- A must also show that his comment was made on a matter of public interest. This is a matter for the judge. Case law suggests that matters to do with the theatre are of legitimate concern or interest to the public. A may however find it more difficult to show that an attack on B's private character is in the public interest.

Privilege

The defence of privilege, unlike the defences of justification and fair comment, is not dependent on proving the truth of what is asserted or commented on. It applies in circumstances where the law recognises that the public interest requires freedom of expression, even where that expression consists of defamatory and untrue statements. There are two types of privilege – absolute privilege and qualified privilege.

Absolute privilege

Absolute statement is a *complete defence* to a claim of defamation and so acts as a bar to an action in defamation – even where the defamatory allegation is untrue. The defence of absolute privilege differs from the defence of qualified privilege in that it will not be defeated by malice. Absolute privilege is the most powerful defence and the type of statements to which it applies is strictly defined. The categories of most relevance to the media are as follows:

- statements made in the course of parliamentary proceedings in either House of Parliament or in parliamentary committees. Note that this does not apply to media reports of parliamentary proceedings which are the subject of *qualified* privilege;
- statements made in the course of court proceedings. This extends to civil and criminal cases and covers all participants in such cases: the judge, the barristers, the witnesses and the parties to the action. There is no statutory definition of the meaning of 'court proceedings'. However, the Defamation Act 1996 extended absolute privilege to *reports* of court proceedings and defines what is meant by 'proceedings' in that context.[99] It would make sense if the same definition also applied to statements made *in* proceedings, although there is no authority on this point at the time of writing. There is a body of case law pre-dating the 1996 Act on the

99 Defamation Act 1996, s 14.

question of what constitutes 'court proceedings'. This is beyond the scope of a book on media law, where the onus will generally be on what can be reported rather than what can actually be said. The statutory definition of 'court proceedings' is considered immediately below;

- reports of court proceedings provided that the report is fair and accurate and published contemporaneously with the proceedings. The defence extends to any court in the UK, the European Court of Justice or any court attached to that Court, the European Court of Human Rights and any international criminal tribunal established by the security council of the United Nations or by an international agreement to which the UK is a party (such as a War Crimes Tribunal).[100] 'Court' is also defined to include any tribunal or body exercising the judicial power of the State. The privilege will not attach to non-State tribunals, such as professional disciplinary bodies. It would also seem that it would not apply to arbitrations to which the parties to a dispute voluntarily submit themselves. Arbitrations usually take place in private in any event;
- official reports of parliamentary proceedings. This category does not extend to the media. It is restricted to reports made by or under the authority of either House of Parliament.[101] For example, the content of *Hansard* is protected by absolute privilege.

Qualified privilege

Qualified privilege attaches to specific types of statement which are considered below. Unlike absolute privilege, qualified privilege will always be destroyed if the maker of the statement was actuated by *malice* when he made the statement. The burden of proof in relation to malice rests on the claimant who must show that the defendant was motivated by malice and, as a result, the defence of qualified privilege is not available. As Slade J has observed, 'malice has nothing to do with the creation of privilege, but only with its destruction'.[102]

The meaning of malice

The authoritative consideration of malice is contained in the decision of the House of Lords in *Horrocks v Lowe*.[103] The legal concept of malice is broader than the dictionary definition of wickedness or evil intent. For a defamation

100 Defamation Act 1996, s 14. This is the statutory definition referred to above.

101 Parliamentary Papers Act 1840, s 1.

102 Slade J in *Longdon-Griffiths v Smith* [1951] 1 KB 295, p 304.

103 *Horrocks v Lowe* [1975] AC 135.

lawyer, a statement is made maliciously for one of two reasons. The first is where the publisher does not have a positive belief in the truth of what he publishes. This is a *subjective test*. Where the maker is reckless as to the truth or falsity of his statement, he will be deemed to have made the statement without positive belief. Recklessness means an indifference to the statement's truth or falsity. The onus is always on the claimant to prove a lack of honest belief and the burden is inevitably a heavy one.

This test for malice is not to be equated with negligence, impulsiveness or irrationality. As Lord Diplock observed:[104]

> The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest, the law must take them as it finds them. In ordinary life, it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfections of the mental process by which the belief is arrived at, it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.

The second way in which a statement can be made maliciously is where the defendant, although having an honest belief in his statement, misused the publication for a purpose other than for that which privilege is granted. The commonest case is where the *dominant* purpose for which the statement was published was not, for example, the performance of a duty or the protection of an interest, but instead to give vent to ill feeling towards the person who is the subject of the statement. The claimant must show what the defendant's dominant motive was when they made the statement to establish malice on this ground. If it was an improper motive, that will be sufficient to establish malice, even though the defendant believed his statement to be true.

The existence of malice is a question of fact for the jury.

The claimant will rarely be in a position to give evidence about the defendant's state of mind or motivation. Malice will generally have to be inferred from what the defendant said or did or knew. The words used and the circumstances of the publication will be relevant. According to Lord Diplock, 'juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one which is lightly satisfied'.[105]

104 Lord Diplock in *Horrocks v Lowe* [1975] AC 135.
105 *Ibid.*

Malice and unintended meanings

The natural and ordinary meaning conveyed by a statement is an objective test. The meaning actually intended by the maker of the statement is irrelevant. But the question whether a statement was made maliciously is a subjective test. So what if the natural and ordinary meaning of the defendant's words is found to be A, but he actually intended the words to mean B and positively believed in the truth of meaning B? Is he malicious vis à vis meaning A? Case law suggests that in such circumstances a claimant's case on malice will fail.[106]

Malice and co-defendants

Qualified privilege is a defence for each of the defendants. If malice is proved against one defendant, it will not automatically be found in relation to the other defendants.[107] So, if two journalists are co-defendants in a libel action over a story appearing under both of their by-lines, but in respect of which they each wrote distinct parts, if malice is alleged and proved against one journalist, it would not automatically prevent the second journalist from relying on the defence of qualified privilege.

Qualified privilege: specific classes of report

The Defamation Act 1996 lists a number of types of statements in Sched 1 which enjoy qualified privilege either alone or 'subject to explanation or contradiction', provided always that the subject matter is of public concern and the publication is for the public benefit. The most relevant to the media are:

Part 1

STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT EXPLANATION OR CONTRADICTION

1 A fair and accurate report of proceedings in public of a legislature anywhere in the world.

2 A fair and accurate report of proceedings in public before a court anywhere in the world.

3 A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world.

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106 See *Loveless v Earl* [1999] EMLR 530 and *Heath v Humphreys* (1990) unreported.

107 *Egger v Chelmsford* [1964] 3 All ER 406.

4 A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.

5 A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.

6 A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.

7 A fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world.

8 A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference.

Part 2

STATEMENTS PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

9(1) A fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of–

(a) a legislature in any Member State or the European Parliament;

(b) the government of any Member State, or any authority performing governmental functions in any Member State or part of a Member State, or the European Commission;

(c) an international organisation or international conference.

(2) In this paragraph, 'governmental functions' includes police functions.

10 A fair and accurate copy of or extract from a document made available by a court in any Member State or the European Court of Justice (or any court attached to that court) or by a judge or officer of any such court.

11(1) A fair and accurate report of proceedings at any public meeting or sitting in the UK of:

(a) a local authority or local authority committee;

(b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority;

(c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision, by Her Majesty or by a Minister of the Crown or a Northern Ireland Department;

(d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision;

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision.

(2) …

(3)A fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another Member State.

12(1)A fair and accurate report of proceedings at any public meeting held in a Member State

(2)In this paragraph, a 'public meeting' means a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern, whether admission to the meeting is general or restricted.

13(1)A fair and accurate report of proceedings at a general meeting of a UK public company.

(2)A fair and accurate copy of or extract from any document circulated to members of a UK public company–

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3)A fair and accurate copy of or extract from any document circulated to members of a UK public company which relates to the appointment, resignation, retirement or dismissal of directors of the company.

(4)…

(5)A fair and accurate report of proceedings at any corresponding meeting of, or copy of or any extract from any corresponding document circulated to members of, a public company formed under the law of any of the Channel Islands or the Isle of Man or of another Member State.

14 A fair and accurate report of any finding or decision of any of the following descriptions of association, formed in the UK or another Member State, or of any committee or governing body of such an association–

(a) an association formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication;

(b) an association formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with that trade, business, industry or profession;

(c) an association formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of

which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;

(d) an association formed for the purpose of promoting charitable objects or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication.

15(1)A fair and accurate report of, or copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph–

(a) for England and Wales or Northern Ireland, by order of the Lord Chancellor; and

(b) for Scotland, by order of the Secretary of State.

(2)An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

'Court' bears the same meaning and extends to the same bodies as in relation to absolute privilege attaching to reports of court proceedings as set out in s 14 of the 1996 Act.

The reference to 'explanation or contradiction' in Part 2 is to the right of a complainant to publication of a reasonable letter or statement by way of explanation or contradiction of the report. The explanation or contradiction must be published in 'a suitable manner' which must be in the same manner as the publication complained of or in a manner which is adequate and reasonable in the circumstances. Qualified privilege is lost if the defendant refuses or neglects to allow a statement of explanation or contradiction where it is requested.

The list of statements extends to all publications of the above classes of report howsoever published and whether the report is published to the public as a whole or to a section of the public.[108]

Where the material which is published is protected or prohibited by law other than defamation law, for example, by copyright or breach of confidence law or by obscenity laws, the fact that it is included in the above schedule will not protect the publisher from liability under the other law.

108 The 1952 Act only applied to newspapers and the relevant provisions are now repealed.

Fair and accurate reports

It will be seen from Sched 1 above that, in some instances, media reports will attract qualified privilege where they are 'fair and accurate'. The term 'fair and accurate' has been interpreted by the courts.[109] It does not mean that reports must be verbatim accounts of the matters reported on. They must, however, be balanced, presenting all sides of the matter reported on so as to give readers or viewers an overall picture.

The facts reported on should also be correct. Care should be taken to ensure that they are not presented in such a way as to create a misleading impression.

The case of *Cook v Alexander*[110] concerned a media report of parliamentary proceedings. Lord Denning observed as follows:

> When a debate covers a particular subject matter, there are often some aspects of greater public interest than others. If the reporter is to give the public any impression at all of the proceedings, he must be allowed to be selective and to cover those matters only which appear to be of particular public interest. Even then, he need not report it verbatim, word for word or letter by letter. It is sufficient if it is a fair presentation of what took place so far as to convey to the reader the impression which the debate itself would have made on the hearer of it.

Fair and accurate reports of parliamentary proceedings by the media also attract qualified privilege at common law. This extends to proceedings in both Houses of Parliament and in select committee.

Right to reply

Qualified privilege will attach to a statement which is made in rebuttal of, or defence of oneself from, a defamatory attack. As Lord Oaksey observed, '... there is an analogy between the criminal law of self-defence and a man's right to defend himself against written or verbal attacks. In both cases, he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence'.[111]

Where the reply is made in the media, qualified privilege will also protect the media entity which publishes the reply. The privilege will apply to a right to reply, provided that the publicity given to the reply is commensurate with the publicity given to the original defamatory comment and insofar as the response is restricted to the defamatory allegations. In *Adam v Ward*,[112] the claimant, an MP, falsely attacked X, a Major General in the army, in a speech

109 *Cook v Alexander* [1974] 1 QB 280.

110 *Ibid*.

111 *Turner v MGM Pictures* [1950] 1 All ER 449, pp 470–71.

112 *Adam v Ward* [1917] AC 309.

in the House of Commons (the speech was protected by absolute privilege, as we have seen). The Army Council investigated the charge, rejected it and directed their secretary to write a letter to X, vindicating him. The letter contained defamatory statements about the claimant. The letter was released to the press. It was held to be protected by qualified privilege.

The publication by an agent (such as a solicitor) of a reply to a defamatory allegation attracts the same qualified privilege as it would if the publication had been made by the agent's principal.[113]

Qualified privilege at common law – general categories

In addition to the above specific occasions of privilege, there are a number of general occasions which have been recognised as being protected by qualified privilege at common law. The rationale behind these more general occasions is the public interest in permitting free and frank communications about matters in respect of which the law recognises that there is a duty to perform or an interest to protect. In *Horrocks v Lowe*,[114] Lord Diplock observed:

> In all cases of qualified privilege, there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so.

In such cases, reputation has to give way to the wider public interest.

The categories of qualified privilege are not closed.[115] The categories considered below are applications of the underlying principle of public policy. But it has been said that any extension of the categories must fall within established principles,[116] and that 'the principles themselves are not unduly elastic'.

The established categories are as follows:

(a) Statements made where there is a *duty* to communicate information believed to be true to a person who has a *material interest* in receiving the information ('the reciprocity is essential').[117] The duty is not restricted to a legal duty. A moral or social duty to communicate information will suffice.

Example

An MP wrote a letter to the Law Society and the Lord Chancellor, saying that he had been specifically requested by a constituent to refer the claimant's firm of solicitors to the Law Society for investigation and setting

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113 *Regan v Taylor* [2000] 1 All ER 307.

114 *Horrocks v Lowe* [1975] AC 135.

115 *Watts v Times Newspapers* [1996] 1 All ER 152; [1996] 2 WLR 427, *per* Hirst LJ, p 158.

116 *Reynolds v Times Newspapers* [1998] 3 All ER 961, CA, *per* Lord Bingham CJ, p 994.

117 *Adam v Ward* [1917] AC 309.

out the constituent's complaints. The communication was privileged. In general, an MP had both an interest and a duty to communicate to the appropriate body at the request of a constituent any substantial complaint from the constituent.[118]

In order for privilege under this head to be made out, the following questions have to be answered in the affirmative:

- was the publisher under a legal, social or moral duty to those to whom the material was published to publish the material in question (the duty test)?
- did those to whom the material is published have an interest to receive that material (the interest test)?
- regard must be had to the position of both communicator and recipient when deciding whether an occasion is privileged under this head.

(b) Where the maker of the statement has an *interest to be protected* by communicating true information which is relevant to that interest, to a person honestly believed to have *a duty to protect that interest*.

Example

A complaint made to the police or other appropriate authority about suspected crimes.

(c) Where the maker of the statement and the recipient of the information have *a common interest and a reciprocal duty* in respect of the subject matter of the communication.

Example

An invigilator who believed that an exam candidate was cheating had a common interest with the examinees to ensure the fair conduct of the examination and by virtue of that common interest had the moral duty to inform the examinees if he felt one examinee was taking unfair advantage.[119]

118 *Beach v Freeson* [1972] 1 QB 14.

119 *Bridgman v Stockdale* [1953] 1 All ER 1166.

DUTY AND INTEREST: A DEFENCE FOR PUBLICATIONS IN THE PUBLIC INTEREST?

One of the most topical issues in defamation law is the extent to which qualified privilege provides a defence for publication by the media of material which, by virtue of its subject matter, can be said to be in the public interest. If the defence were available, the media could rely on qualified privilege instead of having to rely on the defences of justification or fair comment. Until very recently, the prevailing view was that public interest defence would tip the balance too far in favour of defendants who would no longer be required to prove the truth of what they publish in order to successfully defend an action. This was articulated by Canter J in *London Artists Ltd v Littler*:[120]

> It would indeed be a charter to persons, including those whom counsel for the first plaintiffs classified as the obstinate, the stupid and the unreasonable, to disseminate untrue defamatory information of apparently legitimate public interest provided only that they honestly believed it and honestly thought that it was information which the public ought to have. If that were the law, few defendants would ever again need to plead the defence of fair comment or take on themselves the burden of proving that their comment was founded on facts and that the facts were true.

The Neill Committee agreed. It thought that 'the media are adequately protected by the defences of justification and fair comment at the moment, and it is salutary that these defences are available to them only if they have got their facts substantially correct'.[121]

In the face of such reluctance to introduce a new legal defence for publication of material in the public interest, media defendants have sought to establish a *de facto* public interest defence by reference to the duty and interest qualified privilege criteria. The question for media defendants who seek to rely on this ground of qualified privilege is whether they can meet the duty and interest tests by virtue of the fact that the material which they publish is in the public interest.

The availability of the qualified privilege defence has recently been considered by both the Court of Appeal[122] and the House of Lords[123] in *Reynolds v Times Newspapers Ltd*. This was an action brought by Albert Reynolds, the former Prime Minister of Ireland, against *The Sunday Times* over an article which alleged malpractice whilst carrying out his governmental duties.

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120 [1968] 1 All ER 1075, p 1081 (approved by the Court of Appeal in *Blackshaw v Lord*).

121 *The Report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation*, July 1991.

122 *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961, CA.

123 *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, HL.

The majority of the House of Lords held that the duty-interest test was capable of covering the publication by the media of stories in the public interest, provided that the information published was of sufficient quality to render the occasion of publication privileged.

An analysis of the Court of Appeal and House of Lords' judgments

Court of Appeal

The Court of Appeal's judgment, which was delivered by Lord Bingham CJ, simultaneously widened and narrowed the scope of the qualified privilege as it relates to the publication of material in the public interest. The Court of Appeal expanded the duty-interest test into a three stage test. It reiterated the conventional duty and interest test and added a new third element as follows:

- was the publisher under a legal, social or moral duty to those to whom the material was published to publish the material in question (the *duty test*)?;
- did those to whom the material is published have an interest to receive that material (the *interest test*)?;
- were the nature, status and source of the material and the circumstances of the publication such that the publication should in the public interest be protected in the absence of proof of express malice (the *circumstantial test*)?

The circumstantial test was not put forward before the Court of Appeal by either side, nor was it raised in argument. It had its origins in an earlier Court of Appeal decision,[124] which had emphasised the need to consider the status of a publication in order to decide whether the publication was made on an occasion attracting privilege. The Court of Appeal took hold of this baton and raced much further with it, using it to establish a new circumstantial test of general application to duty-interest qualified privilege. We shall see below that the House of Lords rejected the circumstantial test as an independent third limb of duty-interest privilege, but the spirit of the circumstantial test lives on in the speeches of the Law Lords.

Widening the scope of qualified privilege

The court recognised that it is the *duty* of the news media to inform the public and to engage in discussion of matters of public interest. By public interest, Lord Bingham CJ explained that the court meant matters relating to the public life of the community and those who take part in it, including such activities as the conduct of government and political life, elections and public

124 *Blackshaw v Lord* [1983] 2 All ER 311.

administration and also extending to matters such as (for instance) the governance of public bodies, institutions and companies. Public interest therefore extends beyond the political. He did, however, exclude from the ambit of public interest the disclosure of matters which are personal and private, disclosure of which, he said, could not be said to be in the public interest.

The Court of Appeal also recognised that the public generally has an interest in receiving information published by the media. In modern conditions, the court held, the duty and interest tests should readily be satisfied where the subject matter of the report is in the public interest.

Narrowing the scope of qualified privilege

The sting in the tail of the *Reynolds* judgment was in the application of the Court of Appeal's circumstantial test. This test was described by the court as an essential 'safeguard for truth'.[125] As Lord Bingham stated in the Court of Appeal:

> It is one thing to publish a statement taken from a Government press release, or the report of a public company chairman, or the speech of a university vice chancellor, and quite another to publish a statement of a political opponent, or a business competitor or a disgruntled ex-employee; it is one thing to publish a statement which the person defamed has been given the opportunity to rebut, and quite another to publish a statement without any recourse to the person defamed where such recourse was possible; it is one thing to publish a statement which has been so far as possible checked, and quite another to publish it without such verification as was possible and as the significance of the statement called for. Whilst those who engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact, unless the circumstances of the publication are such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice.[126]

The circumstantial test involves scrutiny by the court of the steps taken to verify the truth of a story, the reliability of the source of the information and whether the subject of an allegation was given an opportunity to rebut the allegation. The Court of Appeal professed that the primary purpose of the circumstantial test was to maintain the proper balance between the claimant and defendant in defamation cases and not to regulate the practice of journalism. However, it is difficult to see how the practical effect of the decision would be anything other than indirect regulation.

125 [1993] 3 All ER 961.
126 *Ibid*, p 1005.

The circumstantial test and the media

From the media's point of view, the Court of Appeal's judgment would undoubtedly lead to delay in publication of stories in many cases. Stories would have to be carefully verified, with an eye to satisfying the court that the story is of sufficient 'status' to justify publication in the public interest. This would be likely to involve more exhaustive checks than might otherwise be made or thought necessary. The requirement that subjects be given the opportunity to rebut allegations has the potential to cause enormous problems in practice. Sometimes, the story will disappear if the subject is alerted beforehand. The subject, having been placed on notice, may seek an interim injunction. These are rarely granted in defamation cases, but a court can be persuaded to grant interim relief where the claimant can assert that other rights are being infringed, such as copyright or breach of confidence. Subjects on prior notice may also destroy vital supporting evidence or fabricate their version of the story.

The circumstantial test has the potential to be incompatible with s 10 of the Contempt of Court Act 1981, which allows journalists to keep their sources confidential (subject to certain limited exceptions). The circumstantial test presupposes that the identity of the source of a story should be made available so that its reliability may be verified. This issue arose in the case of *Saif Al Islam Gaddafi v Telegraph Group Ltd*,[127] which was considered by the Court of Appeal some months after the Court of Appeal judgment in the *Reynolds* case. The defendants in that case sought leave to amend their defence to plead qualified privilege in the light of the *Reynolds* decision. Strict compliance with the circumstantial test would have meant that the defendant would have to identify its source for the story (which concerned the son of the Libyan leader, Colonel Gaddafi). The defendant was unwilling to name its source, fearing that the safety of the source could be endangered if their identity was known. Hirst LJ expressed himself to have experienced considerable anxiety about the compatibility of the *Reynolds* test with the law relating to confidentiality of journalistic sources.

The Court of Appeal's conclusion in the Reynolds *case*

On the facts of the *Reynolds* case, the Court of Appeal held that:

(a) the circumstances in which Mr Reynolds' Government fell from power were matters of undoubted public interest to the people of the UK;

(b) it was clear that the defendants had a duty to inform the public of the matters in question and that the public had a corresponding interest to

127 *Saif Al Islam Gaddafi v Telegraph Group Ltd* (1998) unreported.

receive that information. The duty and interest tests were therefore satisfied;

(c) the circumstantial test was not satisfied. The defendants failed to record Mr Reynolds's own account of his conduct, nor did they alert him before publication to their highly damaging conclusions set out in the article;

(d) given the nature, status and source of the defendants' information and all the circumstances of publication, this was not a publication which should, in the public interest, be protected by privilege.

The House of Lords

When the *Reynolds* case came before the House of Lords, all the Law Lords upheld the finding of the Court of Appeal that a qualified privilege defence might, in appropriate circumstances, be available for publication of material in the public interest. The Law Lords described the Court of Appeal judgment as 'a valuable and forward looking analysis of the common law' and 'an admirable, forward looking and imaginative judgment'. However, each of the Law Lords felt that the Court of Appeal had erred in introducing the circumstantial test as a separate criterion to be established before the duty-interest qualified privilege could be made out.

The majority of the Law Lords were of the view that, notwithstanding that the circumstantial test was no longer a separate requirement, the factors set out in the circumstantial test, or some of them, should, where appropriate, be taken into account in determining whether the duty-interest tests were satisfied.

The duty and interest tests would not automatically be satisfied by virtue only of the fact that the subject matter of the publication happened to be in the public interest. Qualified privilege will not apply by virtue of the subject matter of the publication alone. The value to the public of information (and their interest in receiving it) depends not just on any particular subject matter of a publication, but also on the *quality of the information* which is published. Lord Hobhouse stressed that there is no duty to publish what is not true, nor any interest in being misinformed. The defendant must demonstrate that it acted responsibly in ensuring that the material it published was of a high quality before it could avail itself of a qualified privilege defence. When assessing the quality of a report, Lord Nicholls stressed that the court is not seeking to set a higher standard than that of responsible journalism.

An illustrative list of matters to be taken into account in determining whether a publication is privileged was set out by Lord Nicholls. It consisted of the following factors:

- the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true;

- the nature of the information and the extent to which the subject matter is a matter of public concern;
- the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories (presumably, if sources are being paid, this will increase the risk that the information is not accurate, although this point was not elaborated);
- the steps taken to verify the information;
- the status of the information. The allegation may already have been the subject of an investigation which commands respect;
- the urgency of the matter. News is often a perishable commodity;
- whether comment was sought from the defendant. He may have information others did not possess or have not disclosed. An approach to the defendant will not always be necessary. The requirement that a comment is sought was not to be elevated into a rigid rule of law;
- whether the article contained the gist of the claimant's side of the story;
- the tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact;
- the circumstances of publication, including the timing.

Lord Nicholls went on to say: 'This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.' Lord Cooke thought the above has 'the advantage of underlining media responsibility'. Lord Hobhouse thought that the mere repetition of overheard gossip, whether attributed or not, would not meet the requirements, nor would speculation, 'however intelligent'.

In considering the standard of journalism that would be required, Lord Nicholls considered and endorsed the jurisprudence of the European Court of Human Rights on the reporting of matters of public concern. He stated that a statement of fact raises different considerations than a statement of opinion or comment on a matter of public interest which has an accurate factual basis. Article 10 of the Convention protects the right of journalists to divulge information on matters of general interest, provided they are acting in good faith and on an accurate factual basis. Journalists are not required to guarantee the truth of their facts, but they must act in accordance with the ethics of journalism.[128]

The majority of the Law Lords emphasised the elasticity of their decisions, indicating that it would enable the court to give appropriate weight to the importance of freedom of expression by the media on all matters of public

128 *Bladet Tromso and Stensaas v Norway* (1999) 28 EHRR 534; and *Thorgeirson v Iceland* (1992) 14 EHRR 843.

concern. An encouraging note was sounded by Lord Nicholls, who indicated that 'the press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication'.

Whilst the return to the conventional two stage duty and interest tests gives the court more flexibility than the Court of Appeal decision, it remains to be seen whether the application of the Law Lords' decision will be different in practice to the three stage test. By way of example, consider the statement which the Law Lords made in relation to two of Lord Nicholls' categories – the disclosure of sources and the requirement that the subject of the stories be given a right to comment before publication.

Disclosure of sources

Whilst acknowledging that s 10 of the Contempt of Court Act 1981 gives the media immunity from disclosure of sources, subject to limited exceptions, Lord Steyn observed that: 'If a newspaper stands on the rule protecting its sources, it may run the risk of what the judge and jury will make of the gap in the evidence.' Reliance on the immunity granted by the statute can make it more difficult for a media defendant to rely on a qualified privilege defence to a defamation claim. The inconsistency identified by the Court of Appeal in the *Gaddafi* case has not been remedied.

Lord Nicholls, on the other hand, indicated that a newspaper's unwillingness to disclose the identity of its source should not weigh against it. This would seem to be the better view.

Consultation before publication

Lord Nicholls observed that:

> ... it goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But that cannot be a good reason for omitting, from a hard hitting article making serious allegations against a named individual, all mention of that person's own explanation … Further, it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. An article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported allegation proves to be true.

Lord Steyn indicated that 'a failure to report the other side will often be evidence tending to show that the occasion ought not to be protected by qualified privilege. But it would not necessarily always be so, for example, when the victim's explanation is unintelligible or plain nonsense'.

Clearly, the requirement that reports should be balanced and should include at least the gist of the subject's own account or explanation is to be viewed as the norm. Any departure from this practice would have to be convincingly explained if it is not to scupper qualified privilege. One ground for explanation might be the urgency surrounding publication. The inclusion in Lord Nicholls' list of this as a factor to be taken into account is to be welcomed. It represents an endorsement of the decision of the European Court of Human Rights in *Oberschlick v Austria*[129] that 'news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest'.

Does the House of Lords' decision extend beyond political speech?

Lord Nicholls spoke about the duty of the media and the interest of the audience in reporting and receiving information in the public interest. He drew no real distinction between political information and other kinds of material which could be said to be in the public interest. Indeed, he thought to do so would be unsound in principle: '... the common law should not develop "political information" as a new "subject matter" category of qualified privilege.' Lord Cooke agreed. Lord Steyn also spoke of the 'public interest' as being potentially wider than political information, describing it 'as a corner of the law which could do with the minimum of legal rules'.

Lord Hope thought that where political information is at issue, the duty and interest tests are likely in principle to be satisfied without too much difficulty. He did not consider other types of information, nor did Lord Cooke or Lord Hobhouse.

Lord Steyn also echoed the views of the Court of Appeal that speech about political matters has a higher value than speech about the private lives of politicians, the publication of the latter information being less likely to be in the public interest.

The relationship between malice and qualified privilege

The decision of the majority of the House of Lords and the Court of Appeal blurs the distinction between the defence of qualified privilege and malice. As we have seen, the existence of malice is for the claimant to prove in order to defeat a defence of qualified privilege. But, in effect, many of the factors included in Lord Nicholls' list of factors to be taken into account when assessing the quality of what is published are matters which a claimant might rely on to establish that the defendant was actuated by malice. If a defendant

129 *Oberschlick v Austria* (1991) 19 EHRR 389, p 422, para 59.

has to prove that it has acted responsibly in order to satisfy the duty and interest tests, what function will malice now perform? Does the House of Lords' decision simply shift the burden of proof on malice from the claimant to the defendant, who must now, in effect, show that it was not actuated by malice when it made the publication? These issues will no doubt be clarified as more 'public interest' cases come before the courts.

The danger of blurring the boundaries between qualified privilege and malice was recognised by Lord Hope in the *Reynolds* case. He was concerned to consider to what extent the availability of the defence of qualified privilege should be dependent on the circumstances surrounding publication. In Lord Hope's view, the Court of Appeal's circumstantial test and (although he did not actually express it), by analogy, the criteria identified by the majority of the Law Lords go too wide for establishing whether the defence exists at all. 'It has had the effect in this case of introducing, at the stage of examining the question of law whether the occasion was privileged, assumptions which I think are relevant only to the question of fact as to the motive of the publisher.'

Amongst the questions which, in the opinion of Lord Hope, go to malice, rather than the existence of qualified privilege (that is, to the loss of privilege, rather than its existence), were:

- questions about sources;
- the failure to publish Mr Reynolds' own account;
- the failure to alert Mr Reynolds to the newspaper's conclusions that he had lied to the Irish parliament.

No generic right to qualified privilege

All the Law Lords rejected the introduction of a generic defence of qualified privilege which would apply, in the absence of malice, to all political statements simply by virtue of the nature of the subject under discussion.

Counsel for the defence had invited the House of Lords to develop English law along similar lines to the 'public figure' defence first enunciated by the US Supreme Court in the case of *New York Times v Sullivan*.[130] It was held in the *Sullivan* case that public officials should not succeed in an action for defamation, unless the claimant could show that the defendant was actuated by malice. The defence was extended in subsequent US cases to cover publications about all public figures. Counsel for the defendants in the *Reynolds* case argued for a similar generic type privilege to cover the publication of speech concerning political figures. Lord Steyn set out two reasons for declining to endorse the availability of a generic defence which

130 *New York Times v Sullivan* (1964) 376 US 254.

would apply across the board to particular categories of case, regardless of individual circumstance. His views were endorsed by the other Law Lords. The reasons he gave for his views were:

- English law generally will not compel a journalist to reveal his sources. By contrast, a claimant in the US is entitled to a pre-trial inquiry into the sources of a story about him and the editorial decision making. Without such an inquiry, a claimant in England would be at a substantial disadvantage in showing malice, making it 'unacceptably difficult for a victim of defamation and false allegations to prove reckless disregard of the truth';
- a generic right to qualified privilege is contrary to the jurisdiction of the European Court of Human Rights which, in cases of competing rights and interest (freedom of expression versus the right to an untarnished reputation), requires that they be balanced against each other, as opposed to one automatically wiping out the other.

Evaluation of the Reynolds *decision*

Overall, the majority decision of the House of Lords is probably something to be welcomed. We have a decision establishing that the media have a duty to report on matters of public interest and the public has an interest in receiving such stories. That is something which, in itself, is of significant value. The rejection of the circumstantial test as a separate limb in its own right to a factor to be taken into account in determining duty and interest is also to be welcomed. Similarly, the general tenor of the speeches of the Law Lords leaves room for hope that the media's role as watchdog and bloodhound will be recognised as legitimate and protected. But, as is often the case, the devil is in the detail. How will the judiciary assess the quality of material? Will the problems identified in relation to the Court of Appeal's circumstantial test still occur? They certainly have the potential to do so.

The majority test carries with it an element of uncertainty. The Law Lords spoke of the elasticity of their decisions as a desirable feature. Editors can, on one level, take comfort from Lord Nicholls' view that all that is required is responsible journalism but do we, at the time of writing, have any consensus on what that might involve? This may become clear as a body of case law emerges over time to act as guidance but, in the meantime, the uncertainty is likely to be another aspect of the chill factor which the potential for defamation actions continues to exert over the media generally.

The question also arises as to whether the courts are the most suitable bodies to determine the scope of responsible journalistic practices in the first place. In the *Reynolds* case, counsel for the defendant argued that such an approach would place the courts in the position of censor or of a licensing body. Lord Nicholls countered this argument by highlighting that the court

has the advantage of being impartial, independent of government and accustomed to deciding disputed issues of fact. In a sideswipe at the press, he indicated that 'the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence'. The broadcast media may have a degree of righteous indignation that they are, by implication, tarred by the same brush. The decision of the Law Lords does not give any indication that different categories of media defendant should be treated differently.[131]

Offer of amends defence

The offer of amends defence to a defamation claim was introduced by ss 2–4 of the Defamation Act 1996.[132] It provides that a defendant may be able to offer the claimant a public correction, apology and damages in order to bring an action for defamation to an end. Where the offer is rejected, the fact that the offer was made can be used as a defence in the proceedings.

At the time of the passage of the Act through the House of Lords, Lord Kilbracken described the defence as 'an important new provision – a fast track procedure – which should have the effect of reducing the immense cost of litigation to all parties and saving the time of the courts'.

The procedure

In order to benefit from the defence, an offer of amends has to be in writing and expressed to be an offer made pursuant to the Act. The offer can relate to the statement generally, or it can be limited to a specific defamatory meaning which the person making the offer accepts that the statement conveys. In the latter case, it will be known as a *qualified offer*. If it is a qualified offer, the offer must state that fact. The offer must be made before the defendant serves its defence.

The offer to make amends must offer:

- to make a suitable *correction* of the statement concerned and a sufficient *apology* to the aggrieved party;
- to *publish* the correction and apology in a manner that is reasonable and practicable in the circumstances; and
- to pay the aggrieved party such *compensation* (if any) and such costs as may be agreed or determined to be payable.

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131 For an early example of the application of the *Reynolds* approach, see *Saad Al-Fagih v HM Saudi Research and Marketing (UK) Ltd* (2000) unreported.

132 It did not come into force until 28 February 2000.

The offer has to deal with each of the above elements. It need not, however, set out the precise steps to be followed or the wording of the apology/correction. Once the defendant agrees to the offer in principle, the Act provides for enforcement mechanisms where the detail cannot be agreed.

Once made, an offer can be withdrawn at any time before it has been accepted. The renewal of an offer which has been withdrawn is to be treated as a new offer.

Where the offer to make amends is accepted by the aggrieved party, he may not bring or continue with defamation proceedings against the person who has made the offer (but he can continue against other persons involved in the publication).

He may take steps to enforce the offer of amends in the following ways:

- where the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply for a court order to give effect to the agreement. The agreement will then be embodied in the court order and non-compliance with it will potentially be punishable as a contempt of court;
- if the parties do not agree on the steps to be taken by way of correction, apology and publication (despite there being an agreement in principle), the party who made the offer may take such steps as he thinks appropriate and may, in particular:
    - make the correction and apology by a statement in open court in terms approved by the court; and
    - give an undertaking to the court as to the manner of their publication.

There is no reference in the Act to the court having the power to determine the terms of the apology or the method of publication (other than via a statement in open court). In this regard, the Act reflects the concern expressed by the media during the passage of the Bill at the prospect of the court deciding the prominence and wording of apologies and corrections. Newspapers feared that they would be ordered to print apologies on their front page whilst broadcasters, who are generally reluctant to concede broadcast apologies at all, because of their restricted airtime, were resistant at the idea of having to devote valuable airtime to publication of apologies pursuant to orders of the court.

As an alternative to leaving this issue to be determined by the court, the Act now provides that the defendant is free to do as it wishes vis à vis the apology and correction, but the adequacy of the defendant's decision can be reflected in any damages which the court orders under the offer of amends procedure, either to *increase* or decrease the amount of damages payable:

- if the parties do not agree on the amount of compensation, the court will determine it on the same principles as damages in defamation

proceedings, taking into account 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;

- if the parties do not agree on the amount to be paid by way of costs, it should be determined by the court on the same principles as costs awarded in defamation proceedings;
- proceedings under the above are to be determined by a judge without a jury.

Where the offer of amends is not accepted, the fact that the offer was made is a defence to defamation proceedings by the person who made the offer. Where the offer was a qualified offer, it can be a defence only in relation to the meaning to which the offer related. The defendant can choose not to rely on the offer as a defence, but where it does so he may not rely on any other defence (where the offer was qualified this applies only to the meaning to which the offer related). Where the offer is not relied on as a defence, it can still be used in mitigation of damages.

If relied on as a defence, the defence will succeed, unless the *claimant* can show that the party making the offer knew or had reason to believe that the statement complained of:

- referred to the claimant or was likely to be understood as referring to him; *and*
- was both false and defamatory of that party.

But it shall be presumed until the contrary is shown (by the claimant) that the defendant did not know and had no reason to believe that was the case. It is not clear whether ‘reason to believe’ is to be equated with negligence or recklessness. For example, is it sufficient that a claimant can show that, had the defendant taken reasonable care in its research, it would have realised that its allegation was false or defamatory? This question must await clarification by the courts.

Unlike the defences of justification and fair comment, where the offer is relied on as a defence, the burden of proof shifts from the defendant to the claimant to prove that the defendant did not know and had no reason to believe that the statement was false. If the claimant cannot discharge this burden, his claim will fail. It remains to be seen the extent to which the availability of this defence will deter claimants from commencing proceedings or seeing them through once an offer of amends has been made. In theory, this defence may prove to be the most effective weapon in the defendant’s armoury and its introduction was long overdue.

The offer of amends defence will be of enormous assistance in those cases where the libel or slander arose from an honest mistake – for example, mistaken identification or unintended innuendo meanings. Although the offer must consist of an apology and correction which must be published, and usually also a payment of damages and costs, that is likely to involve much less inconvenience, anxiety and expense than a case which is litigated all the way to trial.

Does the offer of amends defence discriminate against broadcast media?

As mentioned above, the broadcast media are traditionally hostile to publishing apologies and/or corrections. Unlike newspapers which contain numerous items and photographs, any of which can be read at any one time, broadcasters are restricted to broadcasting one thing at a time (at least before the onset of digital services). If valuable airtime is taken up by an apology which will be of no interest to the vast majority of viewers, broadcasters will tend to lose viewers.

But an offer of amends under the above procedure *must* include an offer to publish a correction and apology, howsoever publication is effected. For that reason, broadcasters are less likely to be in a position to make use of the offer of amends procedure and defence than the print media. The Act provides that a defendant can choose to publish the correction and apology in whatever medium it considers to be reasonable and practicable if the manner of publication is not agreed. If there are deficiencies in their publication, it will be reflected in an increased damages award. Nothing in the Act provides that the apology has to be in the same media as the original comment. However, one can easily picture an application by an aggrieved claimant that an offer to publish on, say, a website, does not amount to an offer to publish at all for the purposes of an offer of amends. The chances of such an application succeeding will be lessened if the broadcaster combines such a publication with a statement in open court. The difficulties for broadcast defendants are greater than for the press. They do not appear to be insurmountable, but they may lead to broadcast defendants paying higher damages under the offer of amends procedure than their print counterparts.

An alternative offer of amends procedure was laid down in the Defamation Act 1952 and remains in force. It has proved to be overly technical and is very little relied on in practice. For that reason it is not considered in this book.

Consent

Where a claimant has expressly or impliedly consented to publication of defamatory material, the consent will provide a complete defence for the defendant. However, the consent must be specific and given for the purposes in question if the defence is to succeed. A person who agrees to appear on a television programme, for example, will not be taken to have consented to the publication of defamatory material about him during the course of the programme unless he knew of the subject matter of the programme. Similarly, if a person discloses information about themselves in a private context which is then published by the media to the world at large, the limited disclosure is unlikely to be taken to be consent to the wider publication.[133]

Summary procedure

For the first time ever, the Defamation Act 1996 introduced a new summary procedure for the disposal of defamation claims (ss 8–11). Summary judgment had not previously been available for such claims.

The objective behind the new procedure is the introduction of a fast track procedure for appropriate cases so that they can be disposed of without the need for an expensive trial. It is envisaged that the suitability of every claim for summary disposal will be assessed at an interim stage of the proceedings by a judge sitting without a jury. The court may consider the procedure of its own initiative. At that hearing, the judge will decide whether, and how, the claim should be summarily disposed of.

It may dismiss the claimant's claim if it appears that it has no realistic prospect of success *and* there is no reason why the claim should be tried. If either or both of these criteria are not met, the claim ought not to be dismissed.

On the other hand, the court may grant summary judgment to the claimant if it appears that there is no defence to the claim which has a realistic prospect of success *and* there is no other reason why the claim should be tried. Where the claimant does not ask for summary relief, the court will not grant it unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered. The objectives behind compensatory damages are considered below.

In considering whether a claim should be disposed of summarily or proceed to trial, the Act says that the court shall have regard to the following:

- whether all the persons who are or might be defendants in respect of the publication complained of are before the court at the hearing. If an order

133 See, eg, *Cook v Ward* (1830) 6 Bing 409.

for summary relief is made without all the defendants being able to make representations, the order granting relief may be set aside;

- whether summary disposal of the claim against another defendant would be inappropriate. It is possible that summary relief may be granted against one defendant but not against his co-defendants, who may have stronger defences;
- the extent to which there is a conflict of evidence;
- the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication). Subject to the overriding objective (see below), a court is less likely to be inclined to dispose summarily of a case where the defamation is of a very serious nature and/or publication is widespread;
- whether it is justifiable in the circumstances to proceed to a full trial. An example of a case which might fall under this heading would be a particularly complex case which is unlikely to be capable of determination on a summary process but which will require a full investigation of all relevant facts and matters.

In reaching its decision, the court will also have to have regard to the overriding objective and its duty to manage cases, which are both set out at Pt 1 of the Civil Procedure Rules, which provides as follows.

THE OVERRIDING OBJECTIVE

1(1)These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2)Dealing with a case justly includes, so far as is practicable–

(a) *ensuring that the parties are on an equal footing*;

(b) *saving expense*;

(c) *dealing with the case in ways which are proportionate*–

(i) *to the amount of money involved*;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) *to the financial position of each party*;

(d) *ensuring that it is dealt with expeditiously and fairly*; and

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

APPLICATION BY THE COURT OF THE OVERRIDING OBJECTIVE

2 The court must seek to give effect to the overriding objective when it–

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.

COURT'S DUTY TO MANAGE CASES

3(1)The court must further the overriding objective by actively managing cases.

(2)Active case management includes:

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) *identifying the issues at an early stage*;

(c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) *considering whether the likely benefits of taking a particular step justify the cost of taking it*;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

(Italics for emphasis.)

The application of the overriding objective and duty to manage cases, particularly those parts underlined above, is likely to lead to judges being strongly disposed towards the summary disposal of claims, unless there is a reason why summary disposal is not appropriate.

Summary relief

If the court grants summary relief to the claimant, the remedies available to it are set out at s 9 of the Act. It provides that the court may grant such of the following as may be appropriate:

- a declaration that the statement was false and defamatory of the claimant;
- an order that the defendant publish or cause to be published a suitable correction or apology (the content, time, manner, form and place of publication will be for the parties to agree. If they cannot, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with rules of the court. As to time, place, form and manner of publication the court may order the defendant to take such reasonable and practicable steps as the court considers appropriate);
- damages not exceeding £10,000 or such other amount as may be prescribed by order of the Lord Chancellor;
- an order restraining the defendant from publishing or further publishing the matter complained of.

From a claimant's point of view, the summary procedure will be a particularly useful weapon against defendants who do not have a defence to the claim, especially where the main objective of the claimant is to vindicate its good name by the publication of an apology or correction rather than by a large award of damages. The procedure will also offer impecunious claimants (who do not qualify for legal aid for defamation claims) an opportunity for speedy redress against what may be very wealthy defendants.

The potential downside for media defendants is the need for it to have its house in order at a relatively early stage in the proceedings, either to demonstrate that a claimant has no realistic prospect of success at trial or to show that its defence does have a realistic prospect of success.

A defendant is entitled to rely on all the sources of information available to it to justify a statement of fact, including sources which may only become available as the litigation progresses (even information which may only become available during cross-examination at trial), provided that it believes that its words are true and there are reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at trial.[134] If care is not taken, defendants may be denied the opportunity to make use of these later sources of evidence because the court may order summary relief on the basis that on the evidence available at the summary procedure hearing, the defence has no realistic prospect of success. In *McDonald's v Steel and Morris*, the Court of Appeal stressed that the defences of justification and fair

134 *McDonald's v Steel and Morris* (1999) unreported.

comment form part of the framework by which free speech is protected and it is important that no unnecessary barriers to the use of these defences are erected. The application of the procedure for summary disposal is capable of constituting such an unnecessary barrier unless the spirit of the *McDonald's* judgment is kept in mind.

Parliamentary privilege

Article 9 of the Bill of Rights 1689 precludes any court from impeaching or questioning proceedings in Parliament. Prior to the Defamation Act 1996, it was well established that Art 9 prevented the court from entertaining an action *against* an MP or a Member of the House of Lords which sought to make him liable in criminal or civil law for acts done or things said by him in Parliament. This doctrine is known as *parliamentary privilege*. It should not be confused with absolute or qualified privilege.

The Privy Council decision in *Prebble v Television New Zealand*[135] confirmed that this preclusion extended to any party to litigation. It would therefore extend not just to proceedings against MPs, but also to proceedings commenced by MPs where the allegations concerned their parliamentary conduct. It is an infringement of parliamentary privilege for any party or witness in a legal action to call into question words spoken or actions done in Parliament whether by direct evidence, cross-examination, inference or submission.

The practical effect of the above was to preclude MPs from bringing defamation proceedings against defendants who alleged some professional impropriety about the MP. Perhaps the most notorious recent case where this situation arose concerned an article in *The Guardian* in 1994 about the MP Neil Hamilton. The story alleged that Mohamed Al Fayed had paid Tory MPs (including Mr Hamilton) thousands of pounds and other benefits in kind in return for the MPs asking questions in Parliament on Mr Al Fayed's behalf. Neil Hamilton sued the newspaper for libel. In its defence, the newspaper pleaded justification, alleging that, during the period 1987–89, Mr Hamilton had sought and received from Mr Al Fayed money in return for Mr Hamilton's parliamentary services. Mr Hamilton denied receiving payment from Mr Al Fayed.

Under the rules of parliamentary privilege, the parties could not adduce evidence or make submissions about Mr Hamilton's actions in Parliament. *The Guardian* was effectively precluded from linking the alleged payments with the parliamentary services which it claimed that Mr Hamilton had provided. In 1995, Mr Hamilton's action was stayed by the court on the ground that the

135 *Prebble v Television New Zealand* [1995] 1 AC 321.

claims and defences would infringe parliamentary privilege to such an extent that they could not fairly be tried.

But that was not the end of the matter. With the backing of a number of Tory MPs (including Mr Hamilton), an amendment was made to the Defamation Bill which was then going through Parliament to give individual MPs the right to waive their parliamentary privilege. Until the 1996 Act, parliamentary privilege was thought to belong to Parliament as a whole, rather than to any single individual, and so it was thought that no one individual MP could waive the privilege. The Act changed that position. The provision was enacted in part so that Mr Hamilton could pursue his action against *The Guardian*, which he then did (although the case settled before trial).

The provision can be found at s 13 of the Defamation Act 1996, sub-s 1 of which provides as follows:

> 13(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

It can be seen that s 13 is very much a 'claimant friendly' measure. An MP (or former MP) can choose whether or not to waive privilege as it suits. There is no corresponding right given to defendants to force the waiver of privilege.

Where an MP waives privilege, he does so on his own behalf only. His waiver does not affect the operation of privilege in relation to another person who has not waived it.[136] Once Mr Hamilton's case resumed against *The Guardian*, the newspaper sought to adduce evidence relating to a fellow Tory MP, Tim Smith, who had also featured in their article and who had admitted receiving payments from Mr Al Fayed in return for parliamentary services. The court held that *The Guardian* could not adduce such evidence, as it would be protected by parliamentary privilege. Mr Hamilton's waiver of privilege did not operate to waive Mr Smith's privilege. If the action had not settled, the defendants' ability to conduct its defence would have been severely restricted. In effect, the defendants could only put forward half of their case. There must be serious doubts that s 13 is compatible with Art 6 of the European Convention of Human Rights (the right to a fair trial).

Further consideration on the scope of parliamentary privilege occurred recently in another case arising from the Al Fayed-Hamilton saga. The case arose from a Channel 4 documentary about the issues first raised in *The Guardian* article. In the course of an interview which formed part of the programme, Mr Al Fayed stated that he had personally handed cash over to Mr Hamilton on a number of occasions. Mr Hamilton sued Mr Al Fayed for libel. In the meantime, Mr Hamilton's alleged activities had been investigated

136 Defamation Act 1996, s 13(3).

by the internal parliamentary Committee on Standards and Privileges, which made an adverse finding on Mr Hamilton's activities (subsequently upheld by the Parliamentary Commissioner for Standards).

In the light of those adverse findings, the defendants sought to strike out Mr Hamilton's claim on the ground that his case (denying that he had behaved improperly) was, in effect, a 'collateral attack' on the internal parliamentary findings and so infringed the parliamentary privilege which existed in relation to those internal proceedings. The defendants argued that the court might come to a different result from the internal inquiries. The Court of Appeal declined to strike out the proceedings, holding that it would only infringe parliamentary privilege if the claim were clearly a threat to undermine the authority of Parliament. The mere possibility that the court might come to an inconsistent result was not in itself a threat.[137] The House of Lords disagreed with the appeal court's reasoning.[138] Lord Browne-Wilkinson (with whom the other Law Lords agreed) indicated that the consequences of Mr Hamilton's waiver of his protection by way of parliamentary privilege were that any privilege of parliament as a whole would not be regarded as being infringed. The waiver of individual privilege operates to override any privilege belonging to Parliament as a whole. The findings of the internal parliamentary proceedings could therefore be considered by the courts in so far as they related to Mr Hamilton. But if Mr Hamilton had not waived his privilege, it would not be permissible for the courts to consider the proceedings of the parliamentary inquiry.

It is a moot point whether the House of Lords' decision has reversed the earlier finding that waiver by Mr Hamilton did not operate as a waiver by Mr Smith in relation to conduct concerning Mr Hamilton. The House of Lords' case concerned the effect of waiver on parliamentary proceedings, rather than the effect of waiver vis à vis another MP.

REMEDIES

Damages

Compensatory damages

General damages

An award of compensatory damages is usually the primary remedy in a defamation claim. A successful claimant is entitled to receive such sum as will compensate him for the damage to his reputation, vindicate his good name and, in the case of an individual claimant, take account of the distress, hurt

137 *Hamilton v Al Fayed* [1999] 3 All ER 317, CA.
138 *Hamilton v Al Fayed* [2000] 2 All ER 224, HL.

and humiliation. There is no arithmetical formula to govern the assessment of such damages. Factors relevant to an award include the gravity of the libel or slander, the extent of publication and the defendant's conduct after publication. If the defendant tries unsuccessfully to prove that the words are true, it is likely to lead to higher damages. A corporate claimant cannot recover damages for distress, hurt or humiliation, its claim being restricted to loss of income (which is likely to be a special damages claim) and damage to its goodwill.[139]

Over the last 20 years or so, claimants have been awarded a series of awards which were clearly disproportionate to any damage conceivably suffered by the claimant. The awards culminated in an award of £1.5 million in the case of *Tolstoy Miloslavsky v UK*.[140] This award was criticised by the European Court of Human Rights as being excessive and a violation of the defendant's rights of freedom of expression under Art 10 of the European Convention on Human Rights. The European Court indicated that if an award went beyond the proper bounds of protecting the reputation or rights of others, it should be regarded as incompatible with the Convention.

The main reason for the disproportionately large damages awards has arisen from the fact that, unless the case is heard by judge alone, the level of damages is left to be determined by the jury. Judicial reluctance to interfere into the jury's province tended to result in judges confining their directions on quantum to a statement of general principles, rather than giving specific guidance on the appropriate level to award. In the leading case of *John v Mirror Group Newspapers*,[141] Sir Thomas Bingham MR likened the jury's position to 'sheep loosed on an unfenced common without a shepherd' (p 49), lacking an instinctive sense of where to pitch their award.

The succession of disproportionate awards has led to widespread criticism of defamation law amongst the public generally. It was a major contributor to the 'chilling factor' discussed elsewhere in this chapter, operating as an invidious and serious restriction of the media's freedom to report freely on matters of public interest. Defendants know that they are usually at the mercy of juries who are likely to award vast sums of money to claimants. The jury is something of a 'wild card'. It is difficult for media defendants (and, in some cases, their insurers) to organise their business effectively, with appropriate reserves to cover any claims made against them when no one can predict with certainty what the likely band of damages will be.

From the early 1990s onwards, steps were taken to improve the position. The Courts and Legal Services Act 1990 empowered the Court of Appeal to substitute an award of damages for the sum awarded by a jury in cases where

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139 *Lewis v Daily Telegraph* [1964] AC 234.

140 *Tolstoy Miloslavsky v UK* (1995) EHRR 442.

141 *John v Mirror Group Newspapers* [1996] 2 All ER 35; [1996] 3 WLR 593, CA.

the jury's award was either excessive or inadequate.[142] Since the Act came into force in 1991, the court has exercised this power on a number of occasions where the claimant has appealed against the level of award. Its decisions have begun to provide a corpus of guidance which can assist both the parties to an action to assess with some level of confidence what a claim might ultimately be worth, as well as being available to jurors who have to decide how much to award a claimant in any particular case.

The Court of Appeal guidance

In the case of *Gorman v Mudd*,[143] an award by a jury of £150,000 was reduced to £50,000. The claimant, a Tory MP, sued one of her constituents for a libel contained in a mock press release. The document had a limited circulation – it was published to only 91 people – but these were prominent and influential members of her local constituency party. The defendant had advanced and persisted in pleas of justification and qualified privilege. During the trial, the claimant had been subjected to insulting and distressing questioning by the defendant's counsel.

In *Rantzen v Mirror Group Newspapers*,[144] an award to the claimant, the well known television personality and founder of the Childline charity, of £250,000 was reduced to £110,000. The claimant's action was against a national newspaper in respect of articles which alleged that, knowing a teacher to be guilty of sexually abusing children, she had nevertheless protected him, because of his previous assistance in the preparation of a television programme. The Court of Appeal held that, in exercising its power to substitute an award, it should ask itself '*could a reasonable jury have thought that this award was necessary to compensate the claimant and to re-establish her reputation*?'. The jury was entitled to conclude that the publication of the article and its aftermath were a terrible ordeal for the claimant. But the claimant still had an extremely successful career as a TV presenter and was a distinguished and highly respected figure in the world of broadcasting. Her work in combating child abuse had received much acclaim. Judging by objective standards of reasonable compensation or necessity or proportionality, the £250,000 award was excessive.

In *Houston v Smith*,[145] an award of £150,000 was reduced to £50,000. The parties were GPs. The claimant sought damages for slander against the defendant, who had accused him of sexually harassing her and members of her staff. The allegation was made in the practice waiting room in front of a small audience, but it was also subsequently repeated and a defence of

142 Courts and Legal Services Act 1990, s 8(2).

143 *Gorman v Mudd* [1992] CA Transcript 1076.

144 *Rantzen v Mirror Group Newspapers* [1993] 4 All ER 975.

145 *Houston v Smith* [1993] CA Transcript 1544.

justification was advanced and persisted in. Hirst LJ observed that he regarded the substitute award of £50,000 to be 'at the very top of the range for a slander of this kind … Had the slander remained within the confines of the waiting room and, still more, if the defendant had promptly apologised, the appropriate sum would have been a very small fraction of £50,000'.

In *John v Mirror Group Newspapers*,[146] a jury award of compensatory damages of £75,000 was reduced to £25,000 and an award of exemplary damages (see below) was reduced from £275,000 to £50,000. The *John* case concerned an article about the pop star, Elton John, alleging that he was hooked on a bizarre new diet involving him eating food and then spitting it out without swallowing. In relation to the jury's compensatory damages award, the court took into account the prominence of the article and the distress and hurt which the claimant had described in his evidence and the fact that, although the defendant had offered an apology, no apology had ever in fact been printed. It observed that it was not a trivial libel and, given Elton John's international reputation, probably every reader of the newspaper would have known to whom the story referred. Nevertheless, although the article was false, offensive and distressing, it did not attack the claimant's integrity or damage his reputation as an artist. The decision in relation to exemplary damages is considered below.

In *Kiam v Neil (No 2)*,[147] a jury award of £45,000 was left unchanged. The claimant was a successful businessman known for his business flair and success as an entrepreneur. *The Sunday Times* published an article incorrectly alleging that the claimant was being sued by Natwest bank after defaulting on a loan and that he had filed for bankruptcy protection. Three weeks later, the newspaper, having received a complaint from the claimant, published an apology in agreed terms. Notwithstanding publication of the apology, the claimant commenced proceedings for defamation. The judgment of the Court of Appeal highlights the limitations of s 8(2) as a mechanism for the review of defamation awards. First, the court made clear that a defendant must appeal to the court before the court will consider the level of award. The court will not substitute an award of its own initiative. Secondly, the defendant must establish that the award is out of proportion to the damage suffered. The court will not act as an automatic arbiter of awards.

The court highlighted the test propounded by the Court of Appeal in *Rantzen*, namely, 'could a reasonable jury have thought that this award was necessary to compensate the claimant and to re-establish her reputation?'. It emphasised that the jury should be allowed flexibility in reaching the decision. The Court of Appeal must not substitute its own assessment of the appropriate level of award if the above question can be answered

146 *John v Mirror Group Newspapers* [1996] 2 All ER 35; [1996] 3 WLR 593, CA.
147 *Kiam v Neil (No 2)* [1996] EMLR 493, CA.

affirmatively – to do so would usurp the traditional and statutory function of the jury. This is in line with the case law of the European Court of Human Rights, which stated in the *Tolstoy* case that 'a considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case'.[148] On the facts, judged by the criteria of reasonableness and proportionality, the award was not excessive. The libel was widespread, grave and irresponsible. It alleged insolvency against a prominent entrepreneur striking to the core of his life's achievement. The jury was entitled to take account of Mr Kiam's prominence when deciding what figure was required to vindicate his reputation. *The Sunday Times* had made no effort to check the accuracy of its statement and, according to Mr Kiam's evidence (which was not challenged) the libel had had a prolonged and significant effect on him personally.

In *Jones v Pollard*,[149] an award of £100,000 was reduced to £40,000. The case concerned two articles published in the *Sunday Mirror*, alleging that the claimant was a pimp in Moscow and that he was also a party to blackmail of foreign businessmen by the KGB.

The Court of Appeal observed that it was difficult, save in possibly the most exceptional cases, to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravating factors, would be comparable to physical injuries such as quadriplegia, total blindness and deafness, where the top of the range for such awards for general damages is £130,000. The court did, however, stress that £130,000 was not a 'ceiling' on compensatory awards.

Guidance for juries?

One of the most important factors in the 'telephone number' awards of damages over the last 20 years has been the lack of guidance given to juries as to the appropriate level of damages to award. The Court of Appeal has reviewed the extent to which guidance can legitimately be given without usurpation of the jury's role on a number of occasions, most recently in *John v Mirror Group Newspapers*.[150] Under the present law, juries can now be referred to the following material:

- previous decisions of the Court of Appeal using its power to substitute its own award in place of the jury award where the jury award is excessive. It is anticipated that over the course of time these awards will establish standards as to what level of award is 'proper' in certain cases so as to

148 *Tolstoy Miloslavsky v UK* (1995) EHRR 442, para 41.
149 *Jones v Pollard* (1996) unreported, 12 December, CA.
150 *John v Mirror Group Newspapers* [1996] 2 All ER 35; [1996] 3 WLR 593, CA.

guide juries in their awards (although they will not operate as binding precedents);

- the jury should be asked to ensure that their award is proportionate to the damage which the claimant has suffered and is a sum which is necessary to provide adequate compensation and to re-establish reputation;[151]
- judges should ask jurors to consider the purchasing power of any award that they make and of the income it would produce. Juries are often reminded of the cost of buying a car, a holiday or a house;[152]
- the *John* decision established for the first time that juries can now be referred to personal injury awards for pain and suffering and loss of amenity, not in an attempt to equate such awards with defamation awards, but instead as a check on the reasonableness of their proposed award. Sir Thomas Bingham MR observed 'it is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable';
- again following the *John* decision, figures (or suitable brackets for awards) may now be mentioned by counsel for each party and by the judge to the jury 'to induce a mood of realism'. In every case, the jury should be directed that it is for them to make up their own minds and that the figures or financial brackets suggested to them are not binding.

The jury *cannot* properly be directed by reference to previous awards of juries. These will have been made in the absence of any specific guidance and so may be unreliable markers. The Court of Appeal envisaged that this position might change over time as a coherent body of jury awards emerges once the post-*John* guidance rules have established themselves.

It is not permissible for the jury to allow the question of the amount of legal costs which an unsuccessful claimant will have to pay to influence the size of their award.[153]

In *John*, the court expressed the hope that the additional guidance which can now be given to juries would make defamation proceedings more rational and so more acceptable to the general public.

It is debatable whether the *John* guidelines are having the desired effect. Large awards continue to be made by juries. For example, the following amounts have been awarded over the last few months:

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151 *Rantzen v Mirror Group Newspapers* [1993] 4 All ER 975.

152 *Sutcliffe v Pressdram* [1990] 1 All ER 269.

153 *Pamplin v Express Newspapers* [1988] 1 WLR 116.

- £400,000 to a man wrongly accused of rape;[154]
- £105,000 to Victor Kiam over allegations about his business practices;
- £375,000 to ITN and two journalists over allegations that footage of Muslims in concentration camps in Bosnia had been exaggerated by the use of misleading camera angles and editing;
- £85,000 to the footballer Bruce Grobelaar over claims that he accepted bribes in return for fixing the results of football matches.

Under s 12 of the Human Rights Act 1998, courts (including juries) must have regard to the importance of the right to freedom of expression (amongst other things) when considering relief which might affect that right. Once the Act is in force in October 2000, juries will presumably be directed that their awards must both be proportionate to the damage to the claimant's reputation and yet must not stifle the exercise of the right. The potential effect which the Act will have on the size of damages awards was considered in Chapter 2. The Act itself was considered in Chapter 1.

Special damages

Special damages are a type of compensatory damages for loss which is capable of quantification. A typical example is where a claimant claims general compensatory damages for damage to reputation and special damages for loss of business as a result of the libel or slander. The loss of business is generally capable of quantification. The actual loss must be proved by the claimant: (a) to have occurred; and (b) to have been caused by the libel or slander. Special damages do not generally involve the same complexities of quantification as general damages, as the court will usually have the claimant's figures to work from as a base for the award. Unless the case is heard by judge alone, special damages are assessed by the jury.

Exemplary damages[155]

Exemplary damages are additional to compensatory damages. The two types of damages are not alternatives. The function of exemplary damages is to punish the defendant and to act as a deterrent both to the defendant and to society generally. If a claimant is seeking exemplary damages, it must state so in its pleadings and give the facts on which it relies in support. The decision whether to award exemplary damages and, if so, how much, is a matter for the jury. An award of exemplary damages should only be made in exceptional circumstances where *both* of the following factors are present:

154 (2000) *The Guardian*, 8 February.

155 Exemplary damages were also described in Chapter 2.

- the jury is satisfied that the publisher did not have a genuine belief in the truth of what he published. This might be inferred where the publisher suspected that the words were untrue and deliberately refrained from taking obvious steps which would have turned suspicion into certainty. As with malice, where the publisher was reckless as to the truth of what he published, that will equate to publication without positive belief in the truth of the publication. Carelessness alone will not be sufficient to justify an inference that the publisher had no honest belief in the truth of what he published;
- the jury is satisfied that the defendant acted in the hope or expectation of material gain. There must be a belief that he would be better off financially if he violated the claimant's rights than if he did not. Mere publication of a newspaper for profit will not be enough – the claimant must show that mercenary considerations in respect of that particular libel or slander motivated the defendant.

The jury should be directed that the proof of the above factors must be clear. An inference of reprehensible conduct and cynical calculation of advantage should not be lightly drawn.

No award of exemplary damages should be made where the sum awarded as compensatory damages (whether special or general) is sufficient in itself to satisfy the objectives of exemplary damages (punishment and deterrence).

The amount of exemplary damages

The following factors may be relevant in deciding how much should be awarded as exemplary damages:

- the means of the defendant;
- his degree of fault;
- the amount of profit resulting from the publication of the libel or slander.

The damages should not exceed *the minimum sum necessary* to meet the objectives of punishment and deterrence: '... freedom of speech should not be restricted by awards of exemplary damages save to the extent shown necessary for the protection of reputation.'[156] Any award of exemplary damages which exceeds this sum is likely to be an unlawful violation of Art 10 of the European Convention on Human Rights.

156 *John v Mirror Group Newspapers* [1996] 2 All ER 35, p 58.

On the facts of the *John* case, the court held that the jury's award of £275,000 exemplary damages was 'manifestly excessive' against Mirror Group Newspapers, going well beyond the minimum necessary to meet the objectives of such damages, and replaced it with an award of £50,000, so 'ensuring justice is done to both sides and securing the public interest involved'.

Evidence in mitigation of damages

The defendant is entitled to adduce evidence in mitigation of the amount of damages which should be awarded which the jury can take into account when calculating its award.

Evidence in mitigation typically consists of one or more of the following:

- *Evidence of other damages recovered by the claimant or proceedings commenced by the claimant*

  Section 12 of the Defamation Act 1952 provides that where the claimant has already recovered or has brought actions for damages for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded or has agreed to receive compensation in respect of any such publication, the defendant may give evidence in mitigation of damages about such matters.

- *Offer of an apology*

  Section 1 of the Libel Act 1843 provides that the defendant may adduce evidence in mitigation of damages that he made or offered an apology to the claimant in respect of the publication complained of before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology. The defendant must give notice in writing of his intention to rely on such evidence at the time of serving his defence.

- *Offer of amends*

  Where the offer of amends under the Defamation Act 1996 is made and rejected, and the defendant chooses not to rely on it in defence, the offer can operate to mitigate the amount of damages if the defendant is subsequently found liable.

  The extent that the defendants succeed in partially justifying the defamatory imputations complained of may serve to reduce the amount of damages payable.[157]

157 *Irving v Penguin Books* (2000) unreported, 11 April.

- *The claimant's reputation*

  The defendant can adduce evidence to show that the claimant has a general bad reputation at the time of publication. However, the defendant may not rely on particular acts of misconduct of the claimant[158] to support a claim of bad reputation. In the words of the Faulks Committee, 'it is open to the defendant to prove that the plaintiff *did* in fact have a general bad reputation, but not that he *ought* to have had such a reputation'.[159] When the recent Defamation Bill was passing through Parliament, it was generally thought that it would abolish this rule. However, at the 11th hour, the provision was omitted from the 1996 Act. It was feared that the abolition of the rule would result in defendants seeking to uncover misconduct by the claimant which may have no connection with the subject matter of the defamation action, in the hope of reducing the size of any damages award, leading to prolongation of defamation trials and a disproportionate increase in costs. The rule prohibiting evidence about specific misconduct is therefore unaltered. A defendant must confine itself to evidence about general bad character.

Injunctions

A successful claimant will generally be awarded an injunction against the defendant restraining repetition of the defamatory statement. Often, the defendant will give an undertaking instead. Breach of the injunction or of an undertaking to the court will generally be punishable as contempt of court. Media organisations should therefore take care to keep an accessible record of all undertakings they have given or injunctions awarded against them to ensure against unintentional breach. Defendants should take care that the injunction or undertaking is not broader than the defamatory meaning(s) for which judgment has been given. A loosely worded injunction or undertaking could prevent the defendant from publishing any story against the claimant even if it is on a different topic to the alleged libel or slander. A broad undertaking of that type may well be a breach of Art 10 of the European Convention on Human Rights as being disproportionate to the legitimate aim of protecting reputation.[160]

158 *Scott v Sampson* (1882) 8 QBD 491.

159 *Report of the Committee on Defamation*, Cmnd 5909, 1975, para 363.

160 *Tolstoy Miloslavsky v UK* (1995) EHRR 442.

Interim injunctions: prior restraint

It has long been established that, in defamation cases, interim injunctions ought not to be granted except in the clearest of cases where the material is so obviously defamatory of the claimant that no reasonable jury could think otherwise.

Additionally, where the defendant indicates that he will be able to justify the libel or slander if the case goes to trial, no interim injunction should be granted unless the court is satisfied that he may not be able to do so.[161] As long ago as 1891, the judges recognised that 'the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of [interim] injunctions'.[162] The burden of proving that the defendant will not be in a position to justify his allegations rests with the claimant on the hearing for interim relief. The mere assertion that the statement is made maliciously will not in itself be sufficient to justify the grant of an interim injunction.[163]

Where a defendant faces an application for an interim injunction, it should carefully consider whether it will actually be able to justify the contentious allegations in court. If the defendant indicates that it will be able to do so in its evidence, and therefore prevents the grant of an interim injunction, if it cannot then justify the allegations at trial his conduct during the interim injunction application will inevitably increase the amount of damages payable.

Apology

The remedies available in defamation cases do not include the right to an apology or correction. The award of damages and the jury verdict or judgment is considered to be sufficient to vindicate the claimant's reputation. Claimants whose main motivation in commencing proceedings is to obtain an apology should be advised that litigation might not be the appropriate way of achieving that aim. On the other hand, both the offer of amends procedure and the summary disposal procedure, when implemented, do provide for the publication of an apology.

International defamation

Often, publication of defamatory material is not confined to the territory of one State and/or the claimant and defendant may be based in different States.

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161 *Bonnard v Perryman* [1891] 2 Ch 269.

162 *Ibid*, p 284.

163 *Boscobell Paints v Bigg* [1975] FSR 42.

Publications on the internet can, of course, be downloaded around the world. The English courts are often a very attractive forum from a claimant's point of view in which to bring proceedings. At least until the impact of the reforms in the Defamation Act 1996 begin to be felt, the burden of proof on claimants is low and the chances of an award of substantial damages are good. So, in what circumstances will the English courts assume jurisdiction in proceedings concerning a defamatory statement which is published in more than one State? The answer to this question will depend on whether the States in question are parties to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 or the parallel Lugano Convention ('the Conventions') or not.

The Conventions

The Conventions govern jurisdiction as between the Convention States. The provisions which are relevant to defamation claims are Art 2 and Art 5(3). These two Articles are alternatives. Art 2 provides that the general rule on jurisdiction is that a party is to be sued in the country of his domicile. In deciding where a defendant is domiciled, a country will apply the national law of the State in question. If, for example, the English court must decide whether a defendant is domiciled in Germany, it will apply German law to reach its decision (Art 52(2)).

Art 5(3) offers an alternative way in which the courts of a country can assume jurisdiction. It provides that a defendant may be sued in the courts for the place where the harmful act occurred.

A claimant therefore has a choice whether to sue in the country where the defendant is domiciled or where the harmful act occurred. The relationship between the two articles was considered by the European Court of Justice in *Shevill v Presse Alliance*.[164] The case was an action commenced in the English courts by an English claimant against the French publishers of the newspaper *France-Soir*. The newspaper mainly circulated in France. It had a relatively tiny circulation in England. The defendants argued that, under the Brussels Convention, the action should have been commenced in France, as that was where they were domiciled and the place where the harmful event occurred (publication). The English court referred this issue to the ECJ, which ruled that a claimant in defamation proceedings in respect of a publication distributed in several Convention countries could either sue in the country where the publishers of the newspaper were domiciled, where they could claim damages for *all* the harm to their reputation in each of the Convention States (Art 2), or, alternatively, they could commence separate actions in the courts of each Convention State where the newspaper was distributed for the harm

164 *Shevill v Press Alliance* [1995] 2 AC 18.

done to the claimant's reputation in that State (Art 5(3)). The latter option might involve the claimant in a multiplicity of proceedings, but that is a choice for the claimant.

On the facts of the *Shevill* case, the claimant could have sued in France for the harm done to her reputation in all the Convention States where the libel had been distributed or in England for the damage to her reputation in England, as well as, if she chose, the other Convention States where the newspaper had been distributed.

Where an English newspaper or broadcast circulates in Convention States, it can therefore be sued in England for all its publications or in one or more of the States where it is circulated.

Non-Convention States

Where the Conventions do not apply, the question as to whether the English courts have jurisdiction is determined by the English common law. The general principle is that the court must identify the jurisdiction in which the case may be tried most suitably for the interests of all the parties and for the ends of justice. The burden of proof is on the claimant to establish that the English courts meet these criteria.[165]

In defamation claims, it is a prerequisite that the publication or broadcast in question has a degree of circulation within the jurisdiction of the English court. The claimant must also have some kind of connection with, or reputation in, the jurisdiction. It is then a question of degree as to whether England is the most appropriate forum for the action to be tried, bearing in mind all the relevant factors in the case at issue.

Where the English circulation of a foreign publication gave rise to a substantial complaint that a tort had been committed in England, having regard to the scale of the publication in England and the extent to which the claimant had connections with and a reputation to protect in England, England was *prima facie* the natural forum for resolution of the dispute.[166] On the other hand, where there is no complaint of substance that a tort had been committed in England, either because the publication had only an insignificant English circulation or because the claimant had no connection with or reputation to protect in England, the claimant will fail to establish that England was the appropriate forum.[167]

165 *Spiliada Maritime Corpn v Consulex Ltd, The Spiliada* [1987] AC 460.
166 *Distillers Co v Thompson* [1971] AC 458, PC.
167 *Kroch v Rossell* [1937] 1 All ER 725.

Further guidance

Schapira v Ahronson[168]

The claimant was an Israeli citizen resident in London and also a UK citizen. He sued in the English courts for defamation over two articles which appeared in an Israeli newspaper written in Hebrew and printed in Israel. The newspaper had a limited circulation in England. Evidence was produced that the first article had been circulated to 141 readers in England and the second article to 19 readers. The newspaper had a circulation of 60,000 in Israel. The Court of Appeal ruled that the English court did have jurisdiction to hear the case in relation to the alleged damage to the claimant's reputation in England arising from the English circulation of the newspaper. Peter Gibson LJ said:[169]

> Where the tort of libel is allegedly committed in England against a person resident and carrying on business in England by foreigners who were aware that their publication would be sent to subscribers in England, that English resident is entitled to bring proceedings here against those foreigners and to limit his claim to publication in England, even where the circulation of that article alleged to be defamatory was extremely limited in England and there was a much larger publication elsewhere.

Berezovsky v Forbes Inc[170]

The claimant was a businessman resident in Russia and a former member of the Russian Government. He commenced proceedings for defamation over an article in *Forbes* (an internationally published business magazine whose publishers were based in the US). The proceedings were commenced in the English courts and were confined to publication of the magazine within the jurisdiction of the English courts. The magazine had an English circulation of some 2,000 with approximately 6,000 readers. It was also published worldwide on the internet. The court heard evidence that 98.9% of the issue in question was sold in the US or in Canada or to US forces.

The case therefore concerned a Russian claimant suing an American defendant over a magazine with a relatively small circulation in England. Was the claimant able to demonstrate that the English courts were the most appropriate forum for proceedings concerning damage to the claimant's reputation in England?

The Court of Appeal thought he was.[171] and the House of Lords agreed.[172] The claimant's evidence showed that he had a substantial

168 *Schapira v Ahronson* [1999] EMLR 735, CA.

169 *Ibid*, p 19.

170 *Berezovsky v Forbes Inc* [2000] 2 All ER 986, HL.

171 [1999] EMLR 278, CA.

172 *Berezovsky v Forbes Inc* [2000] 2 All ER 986, HL.

connection with England and an important business reputation in this jurisdiction. Whilst the claimant had the closest connection to Russia (where he lived and where the alleged events referred to in the article had taken place), Russia was ill suited to hear the case. The magazine had only a minute circulation in Russia and Russia was also ill equipped to assess the impact of the article in England and the appropriate level of damages, having regard to the extent of the damage caused in England. The defendants, on the other hand, had the closest connection with the US. However, the claimant's connections with the US were far less strong than their connections in England. As with the Russian court, the US court would also be ill equipped to assess the impact of the article in England and the appropriate level of damages, having regard to the extent of damage to the claimant's reputation in England. The Court of Appeal stressed that the countries where the respective parties had the closest connections respectively were important factors to take into account, but they were not determinative. On the facts, they were overridden by the matters set out above.

The fact that the case would involve an understanding of the intricacies and subtleties of Russian political and business life was not considered to be an objection of any weight or significance. The court observed that English juries were capable of grappling with cases concerned with complex events in a foreign country.

In *Chada v Dow Jones and Co Inc*,[173] the Court of Appeal stressed that the *Berezovsky* case did not mean that whenever there has been a publication of an alleged libel in the jurisdiction there was a presumption that England was the most appropriate forum for the claim in respect of the harm suffered in the jurisdiction. The extent of publication in the country and the question of whether the claimant has sufficient connections with and a reputation to protect in England had to be considered. The court stressed that, in considering jurisdiction, the court must give consideration to the reality of the question, and if the reality was one which belonged to a foreign country and, above all, where it was a question which probably would be better tried in the foreign country for any particular reason which appeared in the circumstances of the case, permission ought not to be granted.

173 *Chada v Dow Jones and Co Inc* [1999] EMLR 724, CA.

A global cause of action?

In the *Berezovsky* case, counsel for the defendants argued that the correct approach in multi-jurisdiction cases was to treat them as giving rise to one single global cause of action and then to ascertain where that one cause of action arose. Such an approach would stop a defendant facing a multiplicity of actions by a claimant seeking damages in each State where his reputation has been damaged. It would also make life difficult for those claimants who commence proceedings in England with a view to obtaining a large award of damages from a jury in circumstances where the real damage to their reputation occurred elsewhere. However, the Court of Appeal rejected the approach out of hand, pointing out that it was inconsistent with the basic principle that each publication gives rise to a separate cause of action. The House of Lords has indicated that it is in agreement with the Court of Appeal on this point.[174]

There seems little scope for the development of an international cause of action at least for the foreseeable future. In the meantime, the new regime for guidance for juries, the ability of the Court of Appeal to reduce excessive damages awards, the offer of amends defence and the availability of summary judgment may make England a less attractive forum for those claimants who are motivated more by mercenary considerations than by a desire to re-establish their good name.

A right to a jury trial?

So far in this chapter, we have assumed that a trial in an action for defamation will be heard by a judge and jury. Most defamation trials are tried this way. The mode of trial is governed by s 69 of The Supreme Court Act 1981, which provides as follows:

(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue–
  (a) a charge of fraud against that party; or
  (b) a claim in respect of *libel, slander,* malicious prosecution or false imprisonment; or
  (c) any question or issue of a kind prescribed for the purposes of this paragraph, the action shall be tried with a jury, *unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.*

(The words in italics in this sub-section are known as 'the proviso'.)

174 *Berezovsky v Forbes Inc* [2000] 2 All ER 986, HL.

(2) ...

(3) An action to be tried in the Queen's Bench Division which does not by virtue of sub-s (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

(4) ...

Actions for libel and slander are accordingly tried with a jury unless the proviso applies or the parties to the action elect trial by judge alone. The proviso will apply where the court is of the opinion that the trial involves any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made by a jury.

Where the proviso applies, the court will order trial by judge alone unless it exercises its discretion under s 69(3) of the Supreme Court Act and orders that, notwithstanding the provisions of the proviso, the trial should be heard by judge and jury. However, it will be seen from the cases considered below that, once the proviso to s 69 has been invoked, the court is unlikely to exercise its discretion in favour of trial by jury.

The proviso

The courts have interpreted the proviso strictly, in recognition of the fact that by enacting s 69, Parliament's intention is that, in the ordinary way, defamation actions should be tried with a jury.[175] Unless the court is of the opinion that the criteria in the proviso are satisfied, it must order trial by jury (if one of the parties has requested it), however wide ranging and difficult the issues may be and whatever the judge's personal doubts as to the appropriateness of a jury for the trial of a particular case.

The cases involving the proviso which have been considered by the courts have involved prolonged examination of documents or accounts. 'Examination' has been construed to mean 'careful reading'.[176] In *Goldsmith v Pressdram*,[177] the Court of Appeal held that a jury trial would be inappropriate because resolution of the issues raised would have involved frequent references to statutory provisions and complex documents involving the claimant's share dealings. This exercise would be more conveniently conducted by a judge alone than by judge and jury. In contrast, in *Viscount de L'Isle v Times Newspapers*,[178] whilst the trial would involve a reference to accounts, it would only be necessary to take a 'broad brush' or general overview of the financial situation in question. This would not involve a prolonged examination of the accounts, nor constant references to them. A jury trial was therefore appropriate.

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175 Lawton LJ in *Goldsmith v Pressdram* [1987] 3 All ER 485.

176 Slade LJ in *ibid*, p 496.

177 *Goldsmith v Pressdram* [1987] 3 All ER 485.

178 *Viscount de L'Isle v Times Newspapers* [1987] 3 All ER 499.

The number of documents which will need to be looked at is not conclusive. There may be cases where a substantial number of documents have to be looked at, but no substantial practical difficulties are likely to arise in the examination being made by a jury. On the other hand, there may be relatively few documents, but where a long and minute examination of them is required, a satisfactory examination of them by a jury may present practical difficulties.[179]

The meaning of 'conveniently'

The word 'conveniently' is to be read in the context of the efficient administration of justice rather than in the context of the probable difficulty or otherwise of the issues involved.[180] The question for the court to consider is whether the trial is likely to involve any of the matters referred to in the proviso in such a way as it is likely that the administration of justice will suffer if the trial is with a jury rather than by judge alone. In the *Goldsmith* case, Kerr LJ indicated that 'conveniently' means without substantial difficulty in comparison with carrying out the same process with a judge alone.

In *Beta Construction v Channel Four Television*,[181] Stuart Smith LJ highlighted four main areas in which the efficient administration of justice might be rendered less convenient if the trial takes place with a jury:

- the physical problem of handling large bundles of documents (perhaps where there is a need to cross-refer to different bundles) or documents which are so bulky that they cannot conveniently be looked at;
- the issue of prolongation of the trial. A jury trial inevitably takes longer than a trial by judge alone. Stuart Smith indicated that this is generally an acceptable price to pay for the advantage of having juries decide the issues raised in cases referred to in s 69(1). However, where the prolongation is likely to become substantial because of the number and complexity of documents or scientific or local inquiries, the administration of justice is affected. Substantial prolongation of the trial uses up resources in court and judge time so that they are not available to other litigants (echoed in the CPR overriding objective) but also adds significantly to the cost burden;
- the costs of copying large numbers of documents for the jury members can add significantly to the costs of trial;
- there is the risk that the jury may not sufficiently understand the issues on the documents or accounts (or scientific or local inquiry) to resolve them correctly. A judge may not understand the documents, but he has to give a

179 Slade LJ in *Goldsmith v Pressdram* [1987] 3 All ER 485.

180 *Ibid*.

181 *Beta Construction v Channel Four Television* [1990] 2 All ER 1012.

> reasoned judgment and any error in it can be corrected in court. No one can know the grounds on which the jury reaches its verdict. Where the documents requiring prolonged examination are such that the average juryman cannot be expected to be familiar with them, this risk is enhanced.

This last ground comes perilously close to upholding the notion that trials raising complex and difficult issues ought to be heard by judge alone, at least where the complexity arises from documents, accounts, or scientific or local inquiries, because of the risk of the jury getting it wrong; a notion expressly rejected by the Court of Appeal in the *Goldsmith* case. In the *Beta Construction* case, whilst agreeing with Slade LJ's four grounds in principle, Neill LJ pointed out that the fourth ground was 'a subsidiary point' because juries often have to grapple with complex issues with which they do not deal in their daily lives. Neill LJ did, however, recognise the importance of obtaining a reasoned judgment in some cases.

Discretion

If a defamation case satisfies the criteria in the proviso, the case is *prima facie* unsuitable for trial by jury. The court may still exercise its discretion in favour of jury trial pursuant to s 69(3), but in doing so the emphasis is at this stage *against* trial with juries.[182] Only in rare cases of public importance should the judge exercise its discretion under s 69(3) to order trial by jury notwithstanding the fact that the proviso applies. In *Goldsmith v Pressdram*,[183] the claimant, Sir James Goldsmith, argued that the libels against him attacked his honour and integrity and, given his status as a public figure of some importance, the court should exercise its discretion to order jury trial. The Court of Appeal declined to do so. The mere fact that the allegations were serious and attacked his honour and integrity would not in itself cause the court to exercise its discretion.

A more recent defamation case involving the former MP Jonathan Aitken followed much the same lines as the *Goldsmith* case. It was held that the trial of the action would involve a prolonged examination of documents and that the convenient administration of justice required trial by judge alone. The defendants argued that the court should exercise its discretion under s 69(3) and order a jury trial. The case concerned the claimant's fitness to hold public

182 Neill LJ in *Beta Construction v Channel Four Television* [1990] 2 All ER 1012.

183 *Goldsmith v Pressdram* [1987] 3 All ER 485.

office and the claimant argued that the public interest in allowing a jury trial in such circumstances should be a weighty factor in the court's decision.

The Court of Appeal declined to exercise its discretion in favour of a jury trial. It held that the fact that the proceedings concerned a prominent public figure and raised issues of national interest were factors in favour of jury trial, as was the fact that the case concerned issues of credibility and an attack on A's honour and integrity. But these factors were not overriding considerations in support of a jury trial. The need to obtain a reasoned judgment was also relevant. It was for the court to decide what mode of trial would best serve the interests of justice with regard to both the parties and the public and in view of the complex and controversial nature of the instant case, a trial before a judge alone would be more appropriate.[184]

The *Aitken* decision echoes Stuart Smith LJ's fourth criteria in the *Beta* case – the desirability of being able to see and correct any errors in understanding factual matters which are relevant to the court's findings at trial. Judges give reasoned judgments. Juries do not.

THE CRIMINAL LAW

'*A monstrous offence*' – JR Spencer.[185]

In addition to being a tort, libel (but not slander) can also be a criminal offence carrying a maximum of one year's imprisonment and an unlimited fine[186] or two years' imprisonment and an unlimited fine if the libel is published in the knowledge that it is known to be false.[187] Prosecutions for libel are rare, but the offence remains in existence. The possibility of a private prosecution should never be disregarded. A claimant may, if it chooses, pursue its civil remedies at the same time as launching a private prosecution in respect of the same publication. There is no requirement that the prosecutor has to be the person who is the subject of the libel. In theory, any disgruntled citizen could launch a prosecution over material that he believes to be defamatory of a third party.

The essentials of the criminal offence and the available defences are similar to that of the tort, with the following important differences:

184 *Aitken v Preston* [1997] EMLR 415.

185 Spencer, JR [1977] Crim LR 465.

186 Libel Act 1843, s 5.

187 *Ibid*.

- publication to a third party does not appear to be essential for the criminal offence. An action for criminal libel could theoretically be brought in respect of a publication to the claimant alone;[188]
- there is some authority to suggest that a prosecution for criminal libel can be brought by the estates or families of dead people[189] and members of large groups (even if the particular claimant cannot be identified);[190]
- most significantly, justification is not in itself a complete defence *unless the defendant can also show that the publication was for the public benefit*.[191] The onus is on the defendant to show this public benefit and the burden in doing so will inevitably be a heavy one. The defences of fair comment and privilege will apply (there is no requirement for the defendant to show publication for the public benefit in relation to the latter defences);
- there is no equivalent to s 5 of the Defamation Act 1952. If a defendant wishes to rely on justification (showing also publication for the public benefit), he must therefore prove the truth of every charge that he has published.

It is a basic foundation of criminal law that the prosecution is required to prove its case against the defendant beyond reasonable doubt in order to secure a conviction. The offence of criminal libel is an exception to this rule. The onus on the prosecutor is to show that the words are defamatory and that they refer to him. The burden then switches, as with the tort, to the defendant to prove that his words were true (and that his publication was for the public benefit) or that the facts on which his comment was based were true.

There have been no prosecutions by the State in recent times, but there have been a handful of private prosecutions or attempted private prosecutions. Before an individual can bring proceedings for criminal libel against a *newspaper or periodical* (as defined in the Newspaper Libel and Registration Act 1881) or anyone responsible for such a publication, the consent of a High Court judge must be given.[192] This is intended to act as a check on the commencement of vexatious or malicious prosecutions, but it only applies where the defendant is a newspaper or periodical. If the safeguard is to be truly effective, the need for consent should be extended to a prosecution against any kind of defendant. The House of Lords has also recommended that consent should be required, not from a judge, but from the

188 *R v Adams* (1888) 22 QBD 66.

189 *Libellis Famosis* 5 Co Rep 125a; and *Hilliard v Penfield Enterprises* [1990] IR 38.

190 Osborne (1732) 2 Barnard KB.

191 Libel Act 1843, s 6.

192 Law of Libel Amendment Act 1888, s 3.

Attorney General, but this recommendation has not been implemented by Parliament.

In the past, the criminal law of libel was intended to be used to prevent disorder and, in particular, duelling. Claimants who felt that they had been defamed were encouraged to launch a prosecution against the publisher, rather than to resort to violence. The offence could accordingly be classified as a public order offence. However, the case of *R v Wicks*[193] confirmed that in more modern times it is no longer *necessary* for the claimant to show that the libel is likely to provoke a breach of the peace as a prerequisite to establishing criminal liability. It might still be a relevant factor for a judge to bear in mind when considering whether to allow a prosecution against a newspaper to go ahead, but it is not determination. The *Wicks* decision was confirmed by the House of Lords in *Gleaves v Deakin*.[194]

Leave to prosecute

So, in what circumstances will leave to prosecute against a newspaper be granted?

The leading case is *Goldsmith v Pressdram*,[195] a first instance decision of Wien J which was subsequently approved by the House of Lords in *Gleaves v Deakin*.[196] Wien J laid down the following guidelines:

- the applicant must show a clear *prima facie* case so that is 'beyond argument' that there is a case to answer;
- the libel must be serious – 'so serious that it is proper for the criminal law to be invoked'. The fact that the libel may provoke a breach of the peace will be a relevant factor here;
- the judge must ask himself 'does the public interest *require* the institution of criminal proceedings?' (judge's emphasis);
- it may be relevant that the libel forms part of a campaign of vilification against the applicant;
- the status of the applicant may be relevant. If he holds a position whereby an attack on him raises issues in the public interest, that may make a criminal prosecution more appropriate.

193 *R v Wicks* [1936] 1 All ER 338.
194 *Gleaves v Deakin* [1980] AC 477.
195 *Goldsmith v Pressdram* [1977] QB 83.
196 *Gleaves v Deakin* [1980] AC 477.

Factors which are not relevant

The *Goldsmith* case established that the following factors will *not* be relevant in the decision whether to grant leave:

- the fact that there is no likelihood of any repetition of the libel;
- the question whether an award of damages would provide an appropriate remedy for the applicant;
- the question whether an award of damages is or is not likely to be satisfied by the defendant.

The *Goldsmith* case concerned an application by Sir James Goldsmith, the chairman of a number of large and well known companies, for leave to commence a private prosecution against the publishers of *Private Eye* (which is classed as a newspaper). The application was in respect of articles alleging that Sir James was the ringleader of a conspiracy to obstruct the course of justice over police inquiries into the disappearance of Lord Lucan and reporting that the Bank of England was alleged to have become worried about the applicant. The applicant alleged that the articles formed part of a campaign of vilification against him. *Private Eye* had admitted that its original article (making the conspiracy allegation) was untrue, but had continued their campaign against him with the second article complained of. The court granted leave for the applicant to prosecute. It held that there was a clear *prima facie* case to answer, the libels were serious and that the public interest required the institution of criminal proceedings – particularly relevant here was the evidence of the campaign of vilification and the applicant's professional position, which was such as to make his integrity a matter of general public interest. Sir James Goldsmith was subsequently given leave to withdraw his prosecution after a private settlement was reached with *Private Eye*.

The *Goldsmith* guidelines were also applied in *Desmond v Thorne*,[197] a case which concerned a newspaper article alleging that the applicant had constantly beaten up his girlfriend during what was described as 'a stormy love affair'. The article described him as 'a boastful bully' and as a drunkard. In addition to the *Goldsmith* guidelines, the judge added that, in considering whether to grant leave, he was required to consider all the circumstances surrounding publication and not just the evidence adduced by the applicant in support of his application for leave. The judge was therefore entitled to consider a proposed plea of justification by the defendant and to take into account the likelihood of the defence succeeding by weighing evidence adduced in support of the proposed plea against the applicant's evidence on the leave application.

197 *Desmond v Thorne* [1982] 3 All ER 268.

On the facts, the judge expressed himself to be 'far from satisfied' that there was a clear *prima facie* case. The facts which the applicant admitted took too much of the sting out of the article and the affidavit evidence (which included evidence from independent witnesses) tended to undermine the reliability of the applicant. Further, the position of the applicant was not such as to make his integrity a matter for the public interest. It was accordingly not a case where the public interest required the institution of criminal proceedings.

Should the criminal offence be abolished?

Most of this chapter is devoted to civil defamation law. We have seen that, although recent reforms have begun to even the balance, the tort is by and large a 'claimant friendly' cause of action. Given that claimants have such an effective tool to vindicate their reputations in the civil law, what possible use is the criminal law of libel in modern society? Its original role of keeper of the peace has long gone. The Law Commission has recommended the abolition of the criminal offence.[198] Conversely, the Faulks Committee recommended that the criminal offence remain in being.[199] It drew attention to the fact that the criminal offence fills a lacuna in a number of cases, principally in relation to libels on impecunious people. Legal aid is not available in civil defamation cases. This means that only litigants who can afford to fund litigation have effective redress to the civil courts. The criminal offence offers an alternative method of obtaining redress to those people who are left without any other redress. However it must be queried whether the retention of such a draconian offence is really the best way of filling this gap.

If the offence is not abolished, what changes should be made to it?

Where the proposed defendant is not a newspaper, there are no effective safeguards to ensure that a criminal prosecution in a particular case is justified in the public interest. Consent should accordingly be required before a prosecution for criminal libel may be brought against any kind of defendant.

Even where the defendant is a newspaper and judicial consent is required before a prosecution can be commenced, the test for consent should be made more stringent. Less emphasis should attach to the status of the applicant for leave *per se*. At present, the law makes it easier for public figures to obtain leave on the relatively glib ground that their integrity is a matter of public interest. The concept of public interest should be clarified so that it applies in a

198 Law Commission, *Criminal Libel*, Working Paper No 84.
199 Faulks Committee, *Report of the Committee on Defamation*, Cmnd 5909, 1975, para 444.

non-discriminatory way but, at the same time, ensuring that consent to the prosecution will only be forthcoming in the most serious of cases.

If a criminal offence is to be preserved, permission for the commencement of the prosecution should be granted by the Attorney General in every case. The applicant should have to demonstrate that the alleged defamatory material is of a kind which it is *necessary* in a democratic society to suppress or penalise in order to protect the public interest.[200] If it cannot do so, the prosecution should fail or leave should not be granted. The onus should not be on the defendant to show that its publication was for the public benefit.

The onus should also be on the prosecution to show that the material is false and that the defendant knew it to be so (or was reckless as to whether it was true). The burden of proof would therefore be the opposite to civil cases, but in view of the fact that the defendant's liberty is at stake, the prosecution ought fairly to be in a position to prove its case that the words are untrue rather than rely on a presumption of falsity. The rules on publication and identification should also be brought into line with civil law.

These reforms are the minimum necessary to modernise the offence from the days of the Star Chamber to 21st century society. They are also the minimum required to square with the UK's obligations under the European Convention on Human Rights to safeguard freedom of expression, save where limitation of the right is necessary in a democratic society.

200 Lord Diplock in *Gleaves v Deakin* [1980] AC 477, p 482.