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Reframing Libel: Taking (All) Rights Seriously and Where It Leads

Alastair Mullis and Andrew Scott*

Abstract: In preparing this paper, we have returned to first principles and re-evaluated fundamental aspects of libel law, its purposes, its substance, and its processes. Our thinking has been informed by, first, philosophical understandings of democracy and the public sphere and in particular the role of freedom of speech and of the media therein, and secondly, the social psychology of reputation and privacy. By doing this, we are able to ground some of the proposals for reform made previously by Index on Censorship, English PEN, Lord Lester, and others. We do so, however, not through the prism of an over-worn emphasis on freedom of expression, but rather by triangulating the rights and interests of claimants, defendants, and the wider public. Ultimately, we recommend a coherent set of significant substantive and procedural reforms that if enacted would enhance access to justice and reduce costs for all but the most serious and/or most damaging libels. This involves the recommendation of the introduction of a two-track libel regime.

INTRODUCTION

Libel reform is happening. Earlier this year, Lord Lester sponsored a path-finding – if ultimately abortive – reform Bill in the House of Lords. The Government has recently confirmed that it has started work on a draft Defamation Bill, and that this will be complete by March 2011. A period of consultation is planned after

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publication of the draft Bill, and it is currently proposed that a Defamation Bill will be introduced in the second session of this Parliament.¹ No one contests that there are problems with the existing law and practice of libel. If the Government does not renege on a good number of the proposals set out in the Lester Bill, however, it will have missed an historic opportunity to reframe the law so as properly to value and balance personal and social interests in expression, reputation, and access to justice. Our basic complaint regarding both the Index on Censorship / English PEN report,² and the Lester Bill has been that they over-emphasise freedom of expression to the virtual exclusion of other important values.³ In consequence, they focus in large measure upon revising the substantive law of libel. Our view has been that the primary problems in this area concern procedures and costs. We think that there is a real risk that because the Lester Bill has now taken the floor, it will continue to distract attention from the key problems.

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

In the paragraphs that follow, first, we review and develop the principles that should underpin the libel regime. Secondly, we consider the purposes of libel law and reflect on how the revised understanding of the foundational principles should influence regime design. We conclude by sketching the outlines of a two-

¹ Ministry of Justice, *Business Plan 2011-2015*, 19.

² Index on Censorship / English PEN, *Free Speech is Not For Sale* (2009), at <http://www.libelreform.org/our-report> (last visited November 2010) [the Index / PEN report].

³ A. Mullis and A. Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2009) 14(6) *Communications Law* 173; 'Lord Lester's Defamation Bill: A Distorted View of the Public Interest?' (2010) (7 July) *Inform*.

track libel regime that is consonant with the underlying principles on which any such regime must be based.

PRINCIPLES UNDERPINNING THE LIBEL REGIME

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

TAKING FREE SPEECH SERIOUSLY

The central importance in a democracy of freedom of expression is universally recognised. It is regularly reiterated by European and domestic courts.⁴ It is a mainstay of liberal political theory. Our thinking has been informed by Habermas’ theories of communicative action, discourse ethics, and the public sphere, which comprise a seminal contribution to the literature on ‘deliberative’ or ‘discursive democracy’.⁵ The starting point is Habermas’ identification of a series of normative standards for human conduct that are implied in every communicative act (the ‘inescapable presuppositions of speech’). This understanding is then correlated with the depiction of society as composed of ‘system’ and ‘lifeworld’ to offer a two-tiered model of the democratic constitution. The first tier comprises the ‘public sphere’, wherein proceeds the open discussion between disparate citizens, interest groups, organisations, and expert commentators of all issues of mutual concern. Obviously, the mass media offers a significant platform for public

⁴ In *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, for example, the European Court of Human Rights noted that ‘[freedom of speech is] one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment [...] applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”’ at [87]. Similarly, in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 1 AC 115, Lord Steyn explained that ‘freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J [...] “the best test of truth is the power of the thought to get itself accepted in the competition of the market” [...] thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power’ at [126].

⁵ *ibid.*

sphere representations and – to some extent – discussion. In addition, however, ‘a portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body’.⁶ That is, on every occasion on which people discuss matters of mutual, public concern. On the second level are the legally constituted institutions of government, responsible for the formal transposition of the collective political will into positive law. The role of constitutional critique and scholarship is twofold: to consider the extent to which the constitution allows powerful interlocutors to subvert the integrity of the public sphere, and to assess the coherence of the articulation between the two tiers in terms of both processes and outcomes.

Manifestly, libel law is one aspect of the constitution of the public sphere, and is therefore – notwithstanding its primary focus on the determination of individual interests – an important subject for constitutional critique. There are few people who do not recognise the strictures that the current libel regime can impose on free speech. There is clearly potential for misuse of libel law to preclude investigative journalism, to stifle scientific and medical debate, to undermine the important work of human rights organisations and other NGOs, and to invite the strategic legal tourist from abroad. To the extent that the law allows powerful individuals or corporate entities to ‘chill’ important, warranted comment concerning themselves, their activities, their products or their ideas, it is socially dysfunctional. Where we have differed from others in recognising this potentiality is in identifying costs, processes, and remedies rather than the substantive law as the key issues to be addressed.

One of the important features of Habermas’ work is the contention that rights are considered to be ‘relational’ in origin. They are derived from the fact of society and are not primarily inherent in individuals. Their importance and value are not just personal or individual; they are also social in character. This is clear as regards freedom of speech in the emphasis placed on the interests of the wider public in the rendition of the standard arguments from democracy and from truth.⁷ It also applies to the rights to privacy and to reputation. Moreover, the potential for divergence between the interests of the media and those of the audiences for its output must not be overlooked.⁸

This suggests a further respect in which the current law of libel does not adequately secure the provision of full and accurate information on matters of public importance. This is its failure sometimes to ensure the correction of error,

⁶ J. Habermas, ‘The Public Sphere: An Encyclopedia Article (1964)’ (1974) 1(3) *New German Critique* 49, 49.

⁷ See generally, E. Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2nd ed, 2005), ch 1. These ideas are encapsulated in the comments of Lord Steyn in *ex parte Simms* (see n 4 above).

⁸ This was reflected in the recent comments of J. Tugendhat in *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB) to the effect that ‘it is not to be assumed that news publishers are always concerned to protect the Art 10 rights of the public’ at [61]. In contrast, it was elided by Lord Lester when acting as Chair at the ‘Reframing Libel’ symposium (City University London, 4 November 2010), who explicitly assimilated the media and the public, suggesting that their respective interests were entirely mutually held.

with the result that the wider public is often left misinformed by false publications.⁹ This situation arises on account of a number of systemic weaknesses. First, limitations on access to justice for claimants can mean that some errors are never challenged. Secondly, the award of damages alone for vindication does not necessarily highlight mistakes that have been published,¹⁰ and if apologies and corrections are made this is often done without what might be considered to be due prominence. Thirdly, the manner in which the *Reynolds* public interest defence currently operates masks the fact that the impugned publication has not been demonstrated to be true, and the claimant is left without vindication of reputation. Whether such continuing misinformation is in the public interest can be reasonably questioned.¹¹ This need not be the impact of a coherent libel regime. In our view, libel law can be constructed so as to form part of the ‘discursive constitution’. Perhaps paradoxically, it can be so designed as to promote freedom of expression, and to secure the provision to the general public of the fullest possible information on matters of collective importance. Mandated discursive remedies – such as corrections, apologies, and rights of reply – could serve these objectives.

TAKING REPUTATION SERIOUSLY

Some uncertainty surrounds the status of reputation in law. A notable development in Convention jurisprudence concerns the drawing of the concept within the ambit of Article 8 ECHR.¹² Yet, reputation – by dint of being

⁹ The imperative of making such corrections is recognised in journalists’ own statements of professional ethics – see for example the PCC *Editors’ Code of Practice*, clause 1(ii) (‘a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published’); NUJ *Code of Conduct*, clause 3 (‘[a journalist] does her/his utmost to correct harmful inaccuracies’) – although it is a common complaint that such principles are much-honoured in the breach. Interestingly, as regards the ‘Comment is free’ section of its website, *The Guardian* provides an automatic right of reply to any person mentioned in a published article (see <http://www.guardian.co.uk/commentisfree/series/response>). The failure to ensure the correction of misinformation can also be seen as a shortcoming of the American approach to the defamation of public figures. Traditionally, this concern has been addressed by a relatively high and generalised commitment to journalistic ethics that insists upon fact-checking and the correction of error. It may be, however, that the inadequacies of this ‘cultural’ form of regulation are exposed when confronted with more ‘populist’ forms of media content such as that reflected in publications such as the *National Enquirer* or broadcasters such as Fox.

¹⁰ Although Clause 1(iv) of the PCC *Editors’ Code of Practice* provides that ‘a publication must report fairly and accurately the outcome of an action for defamation to which it has been a party’. Libel claims that are settled will often include an agreement that an appropriate correction and / or apology will be published, and sometimes that an apologetic statement in open court will be made.

¹¹ J. Coad, ‘Reynolds and Public Interest: What About Truth and Human Rights?’ (2007) 18(3) *Entertainment Law Review* 75.

¹² The first jurisprudential association between the protection of reputation and the right to private life was made only in 2004. In *Radio France v France* (2005) 40 EHRR 706, the court observed – in a passing reference only – that ‘the right to protection of one’s reputation is of course one of the rights guaranteed by Article 8 of the Convention’, at [31]. Shortly afterwards, in *Chanay v France* (2005) 41 EHRR 29, the court proceeded on the basis that the inclusion of an individual’s reputation as a value actively protected under Article 8 was routine, at [70]. This shift was subsequently alluded to in a number of further cases –

determined by aggregating the appraisals made of an individual by other people – is quintessentially public in nature. The emerging case law therefore immediately begs the question of how reputation can be protected as an aspect of one’s private or family life.

The first strands of this jurisprudence were roundly rejected by some notable commentators. Robertson and Nicol, for example, were categorical in their derision of what they considered to be an ‘impermissible slight [*sic*] of hand’.¹³ They asserted that the recognition of reputation as a component of Article 8 was the ‘careless’ and ‘illegitimate’ result of ‘overworked judges and their registrars churning out decisions’.¹⁴ They viewed the equation between reputation and privacy as a ‘brazen’, ‘plainly wrong [...] aberration’, and the fruit of European judges’ ‘unprincipled and unprecedented frolics’.¹⁵ Irrespective of this critique, the development has subsequently been confirmed in a number of Strasbourg decisions, and has also been endorsed in domestic jurisprudence. In the first of the European decisions, *Lindon, Otchakovsky-Laurens and July v France*, an expanded justification for the inclusion of reputation as a component of Article 8 was developed in a concurring judgment.¹⁶ In *Pfejfer v Austria*, the Strasbourg court demonstrated incontrovertibly for the first time, and at some length, how the balancing of Articles 8 and 10 should proceed in defamation actions.¹⁷ Some subsequent decisions of the European Court, however, have been more equivocal.¹⁸ Notwithstanding this, the development was considered and affirmed by the Supreme Court in *Re Guardian News & Media Ltd*.¹⁹

None of this case law particularly answers the normative question as to quite why a ‘right to reputation’ should be considered to fall within Article 8. There is a persuasive answer, however, and it is to be found in the social psychology canon.²⁰

see for example *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 41 at [91]; *White v Sweden* (2008) 46 EHRR 3 at [26]; *Lempool v Belgium*, Application No 64772/01 (unreported, 9 November 2006) at [67]. For an excellent overview and discussion of this development, see H. Rogers, ‘Is There a Right to Reputation?’ (26 October 2010) *Inform*, part one, and (2010) (29 October) *Inform*, part two.

¹³ G. Robertson and A. Nicol, *Media Law* (London: Sweet & Maxwell, 5th ed, 2007), 67.

¹⁴ *ibid.*

¹⁵ *ibid.*, 70.

¹⁶ (2008) 46 EHRR 35.

¹⁷ (2009) 48 EHRR 8.

¹⁸ See for example *Karako v Hungary*, app.no 39311/05 (ECtHR, unreported, 29 April 2009).

¹⁹ [2010] UKSC 1 at [37]–[42], *per* Lord Rodger. See also, *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462 at [68]; *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 at [20]; *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) at [39].

²⁰ See generally N. Emler, ‘A Social Psychology of Reputation’ in W. Stroebe and M. Hewstone (eds) (1990) 1 *European Review of Social Psychology* 171. Our adoption of this literature is unlikely to be considered exceptional by those who have considered the function and design of defamation law. Professor Eric Barendt’s rumination, in ‘What is the Point of Libel Law?’ (1999) 52 *Current Legal Problems* 110, made precisely this point, and has been the starting point for much recent reflection. Earlier still, the seminal article on reputation and defamation by Robert Post has also informed much subsequent research – see ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 *California Law Review* 691. Post considered that reputation could be understood in different ways, as property, as honour, and as dignity. In the last respect, he noted that a person’s dignity depends on whether others in the community give him the deference that is his desert as a full member of society. As he explained, ‘our own sense of intrinsic self-worth, stored in the deepest recesses of our “private personality” is perpetually

In social psychology, for over one hundred years, it has been absolutely standard, generally accepted knowledge that the opinions of others become incorporated into the individual's sense of self-worth. In 1902, Charles Cooley developed the framework of the 'looking-glass self'.²¹ In 1934, George Herbert Mead described a similar process, and observed that 'we are more or less unconsciously seeing ourselves as others see us'.²² Subsequently, these formulations have been revised somewhat, and three components of self-worth have been identified: self-appraisals, the actual appraisals made by others, and the individual's perceptions of the appraisals made by others (or 'reflected appraisals'). Interestingly, considerable research indicates that there is a stronger relationship between reflected appraisals and self-appraisal, than between actual appraisals and self-appraisals.

Social psychology tells us that it is primarily the perceived level of esteem that we think others hold for us that affects our judgments of self-worth. Hence, it is not difficult to appreciate why libellous publications might undermine an individual's sense of self-esteem; how defamatory statements can impact upon our capacity to engage in society. Over time, and drawing on the concepts of human dignity and autonomy, Strasbourg jurisprudence has expanded the coverage of Article 8 to encompass both a person's physical and their psychological integrity.²³ In light of this, it is perfectly reasonable to contemplate a Convention right to reputation. It is also easy to understand why libel law should correct for harms to self-esteem caused by false statements.

In terms of the level of compensation that might be necessary to address harms of this type, it is important to appreciate that the level of esteem in which we think others hold us is not the singular determinant of self-worth. Often, perhaps usually, the influence of reflected appraisals will be trifling relative to other factors. Hence, in standard cases the appropriate measure of damages might be expected to be quite low. On occasion, however, the psychological impact of perceived reputational harm may be devastating. Referring to the impact of publication of details and video footage of his private sexual behaviour, Max Mosley has commented that:

dependent upon the ceremonial observance by those around us of rules of defence and demeanor, thereby protecting the dignity of its members', 710. He considered that, denied such deference, a person's intrinsic sense of his own self-worth and dignity is diminished. A similar idea was aired by the Marchoness de Lambert in *Advice of A Mother to her Son: A Tract Particularly Recommended to His Son by Lord Chesterfield*, 'the love of esteem is the life and soul of society; it unites us to one another: I want your approbation, you stand in need of mine. By forsaking the converse of men, we forsake the virtues necessary for society; for when one is alone, one is apt to grow negligent; the world forces you to have a guard over yourself. In *Practical Morality, or, a Guide to Men and Manners* (William Andrus, 1841), 155.

²¹ C. Cooley, *Human Nature and the Social Order* (New York: Scribner, 1902).

²² G.H. Mead, *Mind, Self and Society from the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press, 1934), 68.

²³ See for example *Von Hannover v Germany* (2005) 40 EHRR 1 at [33]. In *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, Lord Bingham noted that "'private life" has been generously construed to embrace wide rights to personal autonomy' at [28].

[...] if somebody takes away your dignity, for want of a better word, you can never replace it. No matter how long I live, no matter what part of the world I go to, people will know about it [...] People do not [snigger behind your back and make jokes] but you know that they know [...] you go into any place, a restaurant or anything and nobody says anything but you know they all know. You know that in any country you go to, and I go all over the world, I know they all know and that is not very nice for me [...] the suffering [newspapers] impose not just on the victim but on his family is really, really serious.²⁴

In his judgment in the associated privacy action, Mr Justice Eady affirmed that ‘the claimant [...] is hardly exaggerating when he says that his life was ruined’.²⁵

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

[...] with the possible exception of murder, it is difficult to think of any charge more calculated to lead to the revulsion and condemnation of a person’s fellow citizens than that of the systematic and sadistic abuse of children [...] [the defendants] must have appreciated too that the claimants’ lives would never be the same again. It would not have taken much imagination to visualise the virulence of the reactions they would stir up in the general public. The two claimants recalled in evidence how they had to leave in haste their homes, families and career prospects. They had to go into hiding.²⁶

Asked during cross-examination how she had felt in the months following publication of the allegations, Reed explained ‘low enough to think my family would have an easier life without me [...] I would sit at the top of Marsden cliffs in my car with the engine running’.²⁷ For such very significant harms, the libel regime should provide access to very substantial compensatory damages.

²⁴ House of Commons Culture, Media and Sport Committee (2009-2010), *Second Report: Press Standards, Privacy and Libel*. HC 362-II (London: The Stationery Office Limited), Ev 56.

²⁵ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [236].

²⁶ *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB) at [1538]-[1539].

²⁷ B. Woffinden and R. Webster, ‘Cleared’ *The Guardian* (31 July 2002). A similar illustration can be seen in the admission by Professor Phil Jones of the University of East Anglia Climate Research Unit that he had contemplated suicide following allegations that he had manipulated research data concerning the impact of human behaviour on the global climate. Professor Jones was subsequently exonerated of wrongdoing – see A. Laing, ‘“Climategate” Professor Phil Jones “Considered Suicide Over Email Scandal”’ *Daily Telegraph* (7 February 2010).

TAKING ACCESS TO JUSTICE SERIOUSLY

Access to justice is important in terms of both principle and practice. In terms of principle, there is a clear association between such access and the rule of law.²⁸ It is not impossible to imagine a disgruntled claimant, too poor to go to the law, somehow taking the law into their own hands. This may seem fanciful, but its plausibility has been thoroughly demonstrated in Heinrich Böll's classic novel *The Lost Honour of Katharina Blum*. It is also possible to understand the curiously one-sided representation of the problems of libel law in the national press as a specific response to the frustration of some defendants in the face of what they perceive as obvious, but intractable, injustice.

On the practical side, the chilling effect of the very high potential liability in costs for defendants under the current libel regime has rightly been a primary focus of the libel reform debate. Estimates vary, but it is not uncommon for it to be suggested that contested actions will likely result in costs bills that run into the millions of pounds.²⁹ As a matter of logic, the upshot is likely to be that there will be financial incentives to settle cases irrespective of the merits of the claim. For even well-heeled defendants, the potential cost of defending a libel action may sometimes be prohibitive.

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

While the practical difficulty for libel defendants in securing access to justice is much discussed, the converse problems facing claimants are rarely highlighted.

²⁸ See for example Lord Neuberger, 'Has Mediation Had Its Day?' (First Gordon Slynn Memorial Lecture, 2010): 'the law's majestic equality is for civil justice of fundamental importance. Notwithstanding the views of Anatole France to the contrary, equal access to justice for all underpins our commitment to the rule of law. It ensures that we live not under what Friedrich Meinecke characterised as a "*government of will [but under] a government of law*." It ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent – whether that opponent is another such individual, a powerful corporation or the state itself. We should not, in light of this, be too surprised to note that equality before the law, isonomia, – of which equal access to the courts is one aspect – was for the citizens of Athens two and a half thousand years ago, the basis out of which democracy arose'.

²⁹ An oft-cited statistic is that costs of proceedings here are four times as high as the next most expensive European state (Ireland), and 140 times the average cost in other European jurisdictions – see PCMLP, *Comparative Study of Costs of Defamation Proceedings Across Europe* (2008), at <http://pcmlp.socleg.ox.ac.uk/> (last visited October 2010). The sustainability of this research finding has, however, been refuted – see D. Howarth, 'The Cost of Libel Actions: A Sceptical Note' (2011) 70 *Cambridge Law Journal* (forthcoming).

The cost of libel actions is prohibitive for many prospective claimants. Indeed, the one-time ‘rule of thumb’ regarding assessment of the legal risk of publication rested upon the claimant’s means. This calculus has been altered somewhat by the availability of CFAs. That said, CFAs and hence the courts more generally are not available to all prospective claimants, but rather only to those who satisfy the risk management regimes operated by claimant lawyers. Proposals, such as that floated by the last Government,³⁰ or that put forward by Lord Justice Jackson,³¹ to amend the current regime by drastically reducing the available success fees risk exacerbating these concerns. Having conducted a review of the available evidence on the cost of libel proceedings, one commentator concluded that ‘the reality is that we know little about the costs of libel cases, and what we do know does not justify precipitate measures that would have the effect of reducing claimants’ access to justice’.³²

APPLICATION: THE PURPOSES OF LIBEL LAW

In determining the purposes of libel law, a reasonable starting point is to note what are the stated objectives of various remedies currently afforded to successful claimants. In English law, damages are the standard remedy, and four objectives underpinning their award can be discerned: to compensate for distress, hurt and humiliation; to compensate for unquantifiable, presumed reputational harm; to compensate for special (provable) harm, and to vindicate or restore the claimant’s damaged reputation.³³ In the paragraphs that follow we note how these objectives might best be understood in light of the foregoing discussion, and highlight the ramifications of our analysis for the design of a coherent libel regime.

³⁰ The abortive Conditional Fee Agreements (Amendment) Order 2010 proposed under section 58(4) of the Courts and Legal Services Act 1990 was criticised by the House of Lords Merits Committee (HL 94), the House of Commons First Delegated Legislation Committee (30 March 2010), and in debate on the floor of the House of Lords (718 HL Deb cols 1152-1178) before being lost in the ‘wash-up’ before the prorogation of Parliament prior to the 2010 general election. In evidence to the Lords committee, law firm Carter Ruck noted ‘widespread concern within the legal profession that the proposed reduction in success fees would seriously reduce – if not eliminate altogether – the rights of ordinary individuals without substantial means to obtain access to justice in defamation and privacy cases’. Professor Richard Moorhead of Cardiff University concurred: ‘the basic economics of conditional fee agreements would suggest that [...] a level of 10% uplift would prevent all but the most meritorious cases from proceeding on a conditional fee. For rich litigants, this presents no problem, for poorer litigants this presents a major impediment to access to justice’.

³¹ Lord Justice Jackson, *Review of Civil Litigation Costs* (London: Ministry of Justice, 2010), ch 32.

³² Howarth, n 30 above.

³³ *John v MGN Ltd* [1997] QB 586, at [607] (*per* Sir Thomas Bingham MR).

COMPENSATING ARTICLE 8 HARM

As regards the objective of compensating for the distress and injury to feelings caused by libel, it would seem reasonable to assert that the harm that requires compensation in this regard is that identified in the foregoing discussion of social psychology. It is to the extent of such harm that we consider the protection of reputation to fall within the ambit of Article 8 ECHR.³⁴ As noted above, we consider that in the majority of cases the quantum of damages that would be necessary to compensate for the harm suffered by a claimant would be relatively low. In that context, it is reasonable to consider a damages ‘cap’. A figure of £10k has been mooted by some.³⁵ We take the view that a ‘hard’ cap on libel damages would be inappropriate (but see further below). Beyond this, however, understanding this head of damages in line with the above discussion entails a number of ramifications for the design of the libel regime.

Ramifications: Meaning

Disputes about meaning are often central to libel actions, with the result that much lawyers’ time and hence significant legal costs are spent on the matter. This situation arises in part because the law requires a ‘single meaning’ to be inferred from the impugned publication, and the determination of this single meaning is usually left to the jury at the end of the trial. Thus, argument must sometimes be presented to the court – by both parties to the action – relating to meanings that are ultimately deemed irrelevant. If one understands this element of the harm in question as having been caused in the mind of the claimant, then it is the claimant’s inferred meaning that should provide the basis for the subsequent consideration, subject to a test of reasonableness or significance. The reasonableness threshold would introduce a necessary element of objectivity into the exercise. Such a test would speak to the need for a sufficient level of seriousness as is required to engage Article 8 ECHR.³⁶ Hence, the determination

³⁴ Actual harms to reputation speak more to the conception of reputation as property discussed by Post – see n 21 above.

³⁵ In a parliamentary debate, Denis MacShane MP suggested a cap of £10k – 485 HC Deb cols 74WH, 17 December 2008. Moreover, the Index / PEN report also suggested a cap of £10k, but with room for additional sums where special damage can be proven (the report also emphasised the preferability of some form of apology remedy) – see n 2 above. We have previously stated, however, that ‘this level of damages cap is seriously flawed’ on the basis – *inter alia* – that such an award would simply be insufficient to compensate someone in the position of the McCanns or Lillie and Reed (nursery workers accused of child sexual abuse in a public authority report) – see Mullis and Scott, ‘Something Rotten in the State of English Libel Law?’, n 3 above, 177-178. We note also that in a recent public lecture, Lord Hoffmann contrasted the proposed cap with the exorbitant sums that newspapers regularly pay sources for salacious stories – see ‘Lord Hoffmann and Libel Tourism: Three Comments’ (2010) (5 March) *Inform*. No proposal to cap damages was included in the Lester Bill.

³⁶ In *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, Laws LJ commented that the ‘core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable [...] the alleged threat or assault to the individual’s personal autonomy must (if Article 8 is to be engaged) attain “a certain level of seriousness” at [22]-[23]. See also *R (Gillan) v*

of meaning becomes very straightforward. The question is not ‘what is the meaning’, but rather only ‘is the given meaning a capable or reasonable one’.

The ramifications of this approach are very significant. There would be no reason to leave the determination of meaning to a jury. Hence, there would be no reason to persist with the ‘single meaning rule’, a legal fiction – it is obvious that in fact words are understood in different ways by different people – that has been described as ‘anomalous, frequently otiose and, where not otiose, unjust’.³⁷ There would be no need to argue defences relevant to multiple, indeterminate meanings. The claimant would have an incentive to plead mainstream or natural meanings so as to satisfy the reasonableness test.

Ramifications: Defences

The primary defences that would be necessary in the context of the revised approach to compensation for Article 8 harm would be those focused on meaning: justification (truth) and fair comment (honest opinion). There would be no particular need to retain the *Reynolds* privilege, unless the possible quantum of damages is very significant. That defence was introduced to offset the chilling effect of the high costs and potential liability in damages of libel actions. Given the approach to meaning outlined above, the complexity and hence cost of the majority of such actions should be very significantly reduced. It would be faintly comic – and obviously tautological – for defendants to claim that costs remain a significant problem necessitating the retention of a public interest defence to limit the chilling effect of libel, if the primary generator of costs was precisely the defendant’s own choice to rely on that public interest defence. Hence, if damages too are limited, then the logic for the defence dissolves. This is especially the case when one considers that there have always been concerns regarding the pathological consequences of the defence. One complaint regarding *Reynolds* – and the US comparator approach in *New York Times v Sullivan* – is that it displaces all focus away from the truth or otherwise of the allegations made onto the question of whether journalistic practices have been responsible.³⁸ Moreover, claimants do not receive vindication, and inaccuracies that misinform the wider public are not corrected. This argument suggests that a two-track libel regime, with different routes for standard and more serious cases, may be appropriate.

Commissioner of Police for the Metropolis [2006] UKHL 12 at [28] (per Lord Bingham); *Secretary of State for Work and Pensions v M* [2006] UKHL 11 at [83] (per Lord Walker).

³⁷ *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd* [2010] EWCA Civ 609 at [31] (per Sedley LJ). Lord Justice Rimer added that ‘if the single meaning rule does achieve a fair balance in defamation law between the parties’ competing interests, that would appear to be the result of luck rather than judgment [...] the application of the rule can also be said to carry with it the potential for swinging the balance unfairly against one party of the other, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others’ at [43].

³⁸ See for example the contribution of Professor Roy Greenslade to the ‘Reframing Libel’ symposium, n 9 above.

Ramifications: Standing

One significant debate regarding libel reform concerns the question of whether corporations should continue to be permitted to sue in libel, and if so whether they should be subjected to especial requirements such as an obligation to prove damage.³⁹ The current position with regard to damages is that corporations cannot sue in respect of injury to feelings,⁴⁰ but they can recover substantial damages even in the absence of proof of special damage for words that have a tendency to injure them in the way of their business.⁴¹ Under the revised understanding of injury to feelings described above, there would remain no basis for corporations to recover for Article 8 harm.

Ramifications: Costs and access to justice

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

VINDICATING REPUTATION AND COMPENSATING FOR INTANGIBLE HARM

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

Discursive remedies for vindication

The award of damages to vindicate the claimant's reputation was justified by Lord Hailsham in *Cassell v Broome* as necessary 'in case the libel, driven underground, emerges from its lurking place at some future date [...] [to allow the claimant] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'.⁴² Of course, money can be used to serve such a function, but we are not persuaded that it represents the best means of achieving vindication. In other jurisdictions, this function is fulfilled by the provision of a discursive remedy. As Hugh Tomlinson QC has pointed out, 'in many European

³⁹ The Index / PEN report recommended that corporations should be denied standing to sue in libel, and be required instead to rely upon malicious falsehood – see n 2 above. Clause 11 of the Lester Bill provides that corporations should have to prove 'substantial financial loss'.

⁴⁰ *Levis v Daily Telegraph* [1964] AC 234 at [262] (*per* Lord Reid).

⁴¹ *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44.

⁴² [1972] AC 1027 at [1071].

countries the primary remedy is an order for the publication of corrections or apology – often in the form of the publication of a summary of the Court’s judgment. This would provide vindication without the need for substantial damages.⁴³ An alternative would be a mandated declaration of falsity or a right of reply published with due prominence. Such a remedy has been said to be unavailable at common law,⁴⁴ though it does exist under section 9 of the Defamation Act 1996 on the summary disposal of a claim under section 8 of the Act.⁴⁵

In our view, the most effective way of vindicating a person’s reputation is to introduce a new remedy requiring provision of an appropriate discursive remedy. In this respect we agree, in part, with the view expressed in the Index / Pen report that ‘the chief remedy in libel should be an apology, not financial reward’.⁴⁶ The grant of a discursive remedy would remove the need to award damages to vindicate the claimant’s reputation, but would instead provide the claimant with the very thing that most claimants want: a public declaration that they did not do what they were alleged to have done. The chilling effect of a potentially large damages award would be reduced, and importantly – if we are serious about achieving one of the underlying purposes of freedom of expression – the truth would enter the public sphere and be made available to the public. As the PCC *Editors’ Code of Practice* states, ‘a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published’.⁴⁷ Therefore, we propose the withdrawal of damages for vindication.

Withdrawal of the remedy in damages for intangible harm

In addition to the withdrawal of damages for vindication, we suggest that no award should be made for unquantifiable, presumed harm to reputation. In some respects, this may appear to conflict with our earlier comments regarding the social impact that a defamatory statement can have on a person. We do not underestimate the harm that such a statement can cause to a person’s standing in his community, and indeed social psychological research is beginning to evidence the fact that in many cases reputational damage is likely to linger even after the truth is published. Discursive remedies designed to restore reputation will sometimes not be perfect in effect; they may not entirely eradicate the ‘stain’ on the claimant’s reputation. In the face of such arguments, our reasons for

⁴³ ‘Libel, Damages and Declarations of Falsity’ (2010) (2 November) *Inform*.

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

⁴⁵ Pursuant to Defamation Act 1996, s 9(1), the claimant may obtain such of the following as may be appropriate:

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

⁴⁶ Index / Pen Report, n 2 above, 8.

⁴⁷ cl 1(ii).

recommending that damages for unquantifiable, presumed harm to reputation be withdrawn are largely pragmatic. We take the view that the award of damages under Article 8 ECHR for the pain and humiliation caused by the publication together with an appropriate discursive remedy for vindication will provide an adequate – although admittedly not perfect – remedy for the harm caused. The proposed remedies would give most claimants what they want. They avoid the indeterminacy surrounding the task of fixing on an appropriate sum, and they reflect the underlying importance of freedom of expression.

Ramifications: Determination of meaning for purposes of the discursive remedy

If a new discursive remedy is introduced and damages for vindication and presumed reputational harm are withdrawn, a question arises as to whether it is still appropriate to use the meaning pleaded by the claimant and determined by the judge to be a reasonable one. In other words, if the judge orders the defendant to apologise, in respect of what meaning should the libel be assessed and any apology made? In our view, the continued use of the claimant's meaning(s) remains entirely appropriate. Put another way, all defamatory meanings pleaded by the claimant should, if deemed reasonable by the judge or tribunal, be met with a discursive remedy. Where it is determined that the meaning(s) pleaded by the claimant is in fact a reasonable one, then in effect this entails that some reasonable readers would in all probability have read the words in the way set out. Given this, where no defence is made out it seems entirely appropriate to require the defendant either to apologise for publishing the complained of statement and / or to explain that the impugned meaning was unintended. In either event, the current single meaning rule could be safely abandoned here as in the claim for malicious falsehood.⁴⁸

Ramifications: Corporations, standing, and appropriate remedies

As is implicit in the foregoing, we take the view that – in the absence of proof of special damage – corporations should be entitled only to a discursive remedy, and they should be unable to recover damages for unquantifiable, presumed reputational harm. We have previously noted the importance of the corporate sector to the British economy,⁴⁹ and we view with concern the approach taken in the Lester Bill that would only allow a company to sue if it can prove that the publication of the words or matters complained of has caused or is likely to cause 'substantial financial loss'.⁵⁰ We also recognise the real danger, however, that large and powerful companies may, through the threat of a libel claim, chill legitimate and accurate comment about their conduct. Rather than isolating corporations and specifically limiting their right to sue in any respect, our proposals address

⁴⁸ *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd* [2010] EWCA Civ 609.

⁴⁹ Mullis and Scott (2009), n 3 above.

⁵⁰ Defamation Bill 2010, cl 11.

incidentally the potential misuse of libel by all relatively powerful entities to achieve strategic goals unrelated to the substantive merit of claims.

Ramifications: Defences

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

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

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

Reflections

Clearly there are 'down-sides' for both parties in our proposals. So far as the defendant is concerned, it could be forced to provide a proper and prominent apology or have a declaration of falsity issued against it which would be placed on the record and could be relied upon by the claimant to vindicate reputation. Yet the media, and newspapers in particular, have traditionally been very hostile to the imposition of a mandated apology or declaration of falsity. As the eminent claimant lawyer Keith Schilling has noted, 'newspapers want to pay negligible damages and print a small apology buried away in the middle of the paper – this of

course achieves nothing except to annoy the person injured'.⁵¹ Mandating a discursive remedy would certainly involve interference with the defendant's Article 10 right 'not to speak'. We consider, however, that this would not be disproportionate, especially in light of the countervailing interest of the wider public in being fully and accurately informed on matters of public concern. An obligation to dedicate space to discursive remedies would be commercially disadvantageous: no organisation which relies for its revenue on a reputation for accuracy, probity, and credibility wants to apologise publically for getting facts wrong. The upside for media defendants would be that the public and swift acceptance of error would have the useful, and entirely desirable, impact of enhancing journalistic credibility.

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

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

COMPENSATION FOR PROVABLE HARM

While damages should not be available to vindicate / restore the claimant's reputation or for any unquantifiable presumed reputational harm, we take the view that the claimant should be able to recover in respect of any special damages that

⁵¹ W. Cash, 'Stop the Presses' (2010) (Summer) *Spears* 28, 30.

he can establish. No good reason exists to prevent the recoverability of such damages, and the danger that a substantial claim for special damages may have an unduly chilling effect is mitigated in part by the recognised difficulty of proving such loss.⁵² Abusive threats to litigate could be relatively easily dismissed on the basis of the power of the court to strike out any claim for special damages where it has no reasonable possibility of success.⁵³

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

ENDPOINT: A TWO-TRACK LIBEL REGIME

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

TRACK ONE: SIMPLIFIED TREATMENT FOR THE MAJORITY OF CLAIMS

The first track in this new regime would comprise a much-simplified process. This could be administered by the High Court, but the function might instead be allocated to the County Court, the Tribunals Service, or an appropriately designed (self-)regulator. The overwhelming majority of cases would be addressed by this route. Damages would only be available for psychological harms protected under Article 8 ECHR, but would be capped at £10,000. Vindication would be obtained by an appropriate – and mandated – discursive remedy (correction, apology, right of reply, declaration of falsity). The remedy in damages for intangible harm to reputation would be withdrawn. Special damages for provable loss would be unavailable in this track. Determination of the meaning of imputations would be

⁵² Special damage must actually have accrued before the claim was brought. Neither the apprehension nor the possibility of such damage is sufficient to give rise to a claim. By way of example, in *Michael v Spiers and Pond Ltd* (1909) 101 LT 352, it was held that a threat by the father of the claimant to remove him from his office as director of a limited company unless he could succeed in vindicating his character against the charge of drunkenness was not actionable because he had suffered no temporal loss; the claimant still had his office, and the mere apprehension of its loss was insufficient to amount to special damage.

⁵³ CPR 3.4(2).

much simplified by adopting the meaning(s) inferred by the claimant subject to a test of reasonableness or significance. Truth and fair comment would remain as the primary defences, while in appropriate cases the defendant would also be able to rely on absolute, traditional, or statutory qualified privilege. The rationale underpinning the *Reynolds* public interest defence in track one would disappear. The approaches to substantive questions suggested here would very significantly reduce the complexity and cost associated with particular cases. Hence, it would reduce the chilling effect of the law on publication, and markedly enhance access to justice for defendants and claimants.

TRACK TWO: FULL TRIAL FOR THE MOST SERIOUS AND / OR DAMAGING LIBELS

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

REFLECTIONS AND POSSIBLE CONCERNS

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

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