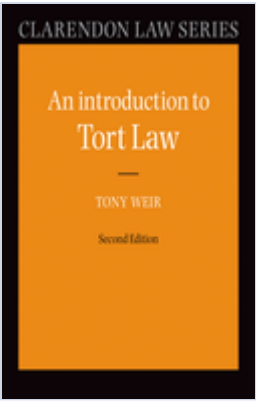

An Introduction to Tort Law (2nd edn)
Tony Weir

12. Defamation

Tony Weir, Fellow of Trinity College, Cambridge

https://doi.org/10.1093/he/9780199290376.003.0012
Published in print: 07 September 2006
Published online: June 2015

Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter deals with the law of defamation. The basic rules of the common law of defamation state that: *A* is liable for saying anything to *C* about *B* which would be apt to make an average citizen think worse of the latter. In principle, *B* can sue *A* without having to show that what *A* said was false, that it caused him any harm, or that *A* was at any way at fault in saying it. The chapter distinguishes between what is 'defamatory' and what is not. It discusses the liability for the act of communication is called 'publication'. It also considers defences: to apparent allegations of fact, the only defences are truth (called 'justification') and privilege; for statements of opinion, which cannot be false but at the most simulated, the defence is 'fair comment on a matter of public interest'.

Keywords: tort law, defamation, defences, truth, privilege, public interest, slander, libel

It is sometimes useful to consider tort cases in the light of the relative values involved. When the law imposes liability on a person, it normally does so because it places a lesser value upon his activity, or his method of conducting it, than on the interest of the victim affected by it: the liberty of the arrested suspect or peace-breaker yields to the proper enforcement of law and order, whereas the security of the vulnerable pedestrian on a marked crossing is regarded as more important than the motorist's interest in belting down the road in his metal carapace.

When one comes to the law of defamation (libel and slander), however, which constitutes a quite distinct chapter of tort law—for it is often said that one cannot obtain damages for injury to reputation except under the law of defamation,[1] and the Court of Appeal once had to be corrected for holding that you couldn't sue in negligence if you couldn't sue in defamation[2]—it is far from clear that the law's priorities are correct. The claimant's interest is in what people think of him, the defendant's interest is in saying what he thinks, or thinks he knows. Reputation against expression, therefore. A balance has to be struck. The common law of England has struck it in quite the wrong way. That is why it has been held substantively unconstitutional in the United States[3] (which quite exceptionally refuses to enforce the judgments of English courts in this matter[4]) and why the Strasbourg court has disapproved of certain aspects of it.[5] Freedom of expression is of course a protected right under the Convention, and our courts are enjoined by the Human Rights Act 1998 to have 'particular regard to the importance of the Convention right to freedom of expression' (not that they do!). Reputation itself, though mentioned as justifying a proportionate restriction of the right of freedom of expression, and now treated as implicitly enshrined in Article 8 about private life(!),[6] is not a specially protected right under the Convention, but it is certainly one of the few protected rights in English law, as one can tell from the absence of any need to prove either fault or damage.

It may be worth asking why freedom of expression is so valued. There seem to be two reasons; first, that the expression of views is useful, secondly that it is fun. But speech is useful only if it is critical (especially of powerful public figures), and it is not much fun to be flattering, so it may be argued that our rules of defamation strike at precisely those instances of self-expression which are most desirable. Robert Maxwell was enabled to continue plundering pension funds because he threatened to sue anyone who was about to tell the world what he was doing, and indeed obtained hefty damages from *Private Eye;* another bullying tycoon sought to stop *Private Eye* from mocking him by threatening to sue the distributors of that admirably disrespectful periodical, and was allowed by the courts to do so.[7]

The basic rules of the common law of defamation can be stated quite simply. A is liable for saying anything to C about B which would be apt to make an average citizen think worse of the latter. Certain qualifications will have to be made later, and it will be seen that one or two defences are available, but in principle B can sue A without having to show that what A said was false, that it caused him any harm, or that A was at any way at fault in saying it. Just consider how remarkable this is in a tort book! Normally in cases where a tortious misrepresentation is alleged, the claimant has to prove falsehood, fault, and loss, as in *Hedley Byrne v Heller*. None of these have to be established where what is said might affect what people think of the claimant. The protection thus afforded to a person's reputation is as strong as that afforded by the law of trespass to his liberty, his person, and the property in his possession—surely more important values—and it is afforded not against positive invasive action but against mere speech, which is a recognised right in itself. The protection may be thought to be all the odder in that the only kinds of harm apt to result from being badmouthed are emotional upset and financial loss, neither of which is very readily redressible in the law even where the defendant's negligence has been demonstrated.

What is Defamatory?

Since these special rules apply only when A's communication to C is defamatory of B, it is essential at the very outset to discover what is ' defamatory' and what is not. It is not defamatory, for example, to say that B has gone out of business (though he may well lose custom if he has not), for no one thinks worse of a person for changing jobs or taking early retirement. In such a case, where the words are not 'defamatory', the normal tort rules apply: unless A was under a special duty to look after his interests, B must show that the statement was false, that A knew it, and that B suffered harm in consequence. But courts have been very generous in treating statements as potentially defamatory and leaving it to the jury to say whether they were really so or not, though even the jury is not asked whether people actually did think worse of the claimant, only whether they might well do so. In one recent case it was held that it was potentially defamatory to call someone ugly,[8] and an actress has sued a journalist for saying she had a big bum.[9] It has been held that it is defamatory to say that a business is insolvent. This seems to be wrong, for though it is certainly defamatory to say of the managing director that he continued to trade knowing of the company's insolvency, since that is an offence, whereas insolvency by itself is just a misfortune,[10] as to the company it appears to be merely a damaging statement, so that the company should have to prove falsehood and knowledge. It should also have to prove that it was damaged, but need not do so, since in 1952 Parliament unwisely dispensed with that requirement in such circumstances,[11] and our courts are perfectly happy to make the Press pay damages to foreign corporations which do not even offer to prove that they have suffered any harm at all.[12] In one nineteenth-century case the House of Lords held that it was not defamatory for a firm to state 'We shall not accept cheques drawn on [the plaintiff]'.[13] It has been roundly criticised for so holding, on the ground that the words were clearly harmful, since people panicked and made a run on the bank in question. But the House was clearly right: the fact that a statement causes harm does not make it defamatory any more than a statement ceases to be defamatory just because it does not seem to have caused any harm. After all, is it to be actionable if a store puts up a notice stating that it does not accept VISA cards?

The Meaning of Statements

Contrary to what is often believed, the truth or falsity of a statement is irrelevant to the question whether it is defamatory or not: truth is a matter of defence only. But it does have to be decided what the statement means, and though a statement can have several different meanings, some worse than others, the law has decided that it can only have one; it is for the parties to propose what meaning should be attributed to it, for the judge to decide which of them are possible, and for the jury to decide which is actual, that is, what the average addressee would understand by it. Libel practitioners have managed, in their own interests, to complicate the law on the question of the meaning of words to a remarkable extent; the degree to which they have done so can be inferred from a provision in the Defamation Act 1996: 'In defamation proceedings the court shall not be asked to rule whether a statement is arguably capable, as opposed to capable, of bearing a particular meaning or meanings attributed to it'. (s 7)

In other torts the matter or manner of pleading is not very important, but in defamation cases it seems actually predominant. Indeed its complexity, leading to what has been described as an 'archaic sarabande',[14] is both the result and the cause of the high specialization of the libel bar, whose members have no incentive to diminish it (even when promoted to the Bench, since some defamation experts have to be there in order to deal with its complexities). Thus with regard to meaning, the rule seems to be that while the claimant must specify the defamatory meaning he attributes to the matter impugned (and within limits he can select the matter he complains of, though not just the meat of an indiscerptible sandwich), the defendant need not plead an alternative lesser meaning but must, if he seeks to justify any particular meaning, give sufficient detail in his pleadings that the claimant knows what case he has to meet. Here there is a 'somewhat subtle distinction… between (a) the meaning of the words complained of for which the defendant contends (as the practice stands at present, the defendant is not obliged to plead that meaning) and (b) the meaning of the words which, if it is the true meaning of those words, the defendant will seek to justify (that is a meaning which the defendant must now spell out sufficiently to enable the plaintiff to know what case he has to meet)'.[15] It is now possible for either party to ask the judge to rule on the acceptability or otherwise of any meaning or meanings of the words complained of. Such rulings gave rise to an unsuccessful appeal by Jessye Norman, complaining that a music magazine had falsely attributed to her the remark 'Honey, I ain't got no sideways'.[16]

In one important case reputable newspapers stated that the Fraud Squad was investigating the plaintiff firm. This was true. The plaintiff argued that this would be understood to mean that the firm was guilty of fraud, while the defendant argued that it meant simply what it said. The House of Lords held that it could not mean that the firm was guilty, but did mean more than it said: the average reader would infer that the firm had behaved suspiciously, so the defendant would be liable unless it could prove that there were adequate grounds for the Fraud Squad's investigation.[17] How, one might ask, is the press to inform the nation of an investigation which is under way? Do the courts not care whether such information may be published, and is the commercial reputation of London Rubber Improvements, actually under investigation, more important than public awareness of the fact? To be noted is that if the imputation is that the plaintiff has behaved suspiciously and the defendant seeks to justify this, he must prove it by reference to actual conduct by the plaintiff and not by reference to the suspicions entertained even by third parties, however trustworthy, including, one supposes, the Fraud Squad itself.[18]

The addressee is taken to be only averagely credulous, but it is accepted that he will understand statements in the light of facts known to him (and perhaps not known to the defendant) which may render an apparently innocuous statement quite damaging ('innuendo'). If so, it must be shown that there were persons who had that special knowledge. In one case *The Sun* reported that in a particular week a young woman had been kidnapped by a dog-doping gang and kept in a flat in Finchley. There was no reference whatever to the plaintiff, but several witnesses knew that he had had that young woman staying in his flat in Willesden the week previous to that stated, and testified that they supposed that despite the discrepancies of time and place the article was referring to the plaintiff. They also said that they didn't believe the supposed imputation. The House of Lords by a majority upheld the jury's decision for the plaintiff on liability, thereby reversing the Court of Appeal, and laid it down as self-evident that it was quite irrelevant to liability whether anyone believed what was said.[19] The reader may be excused for inferring that as soon as the door of defamation is

opened, common sense flies out the window. It is true, however, that there may be no liability if no one in his right mind could believe in the truth of what was said,[20] or if a false impression conveyed by a headline, for example, is immediately corrected by the text.[21]

‘Publication’

The fact that no action lies unless the communication has been made to a third party (a single third party will suffice!) shows that the tort is concerned with reputation rather than self-esteem: you can be as rude as you like *to* a person (provided you don’t cause a damaging physical reaction),[22] or keep doing it (harassment), but you cannot be rude *about* him, unless he is dead (the proposal that speaking ill of the dead should be actionable has fortunately not been accepted, or writing history would be impossible). The act of communication is called ‘publication’ and at common law it was a publication every time anyone communicated anything to anyone else. In the old days when people had secretaries who took dictation and handed the letter back for signature this caused stupid problems, but nowadays, thanks to the Act of 1996, strict liability attaches only to the author, editor, and commercial publisher of the material; others are not liable provided they ‘published’ with reasonable care, having no reason to believe that the material was defamatory. ‘Publication’ does suggest some positive act on the part of the publisher. Do internet service providers qualify as publishers when some subscriber transmits defamatory material? As usual, the common law looks for some analogue in the pre-technical age, and found it in a golf-club where a member posted a defamatory message on the club notice board.[23] The question whether a defendant is liable for failure to act being whether he should have acted, the result in the case of internet defamation appears to be that the service provider is liable only if it had notice of the defamatory nature of the material and failed to remove it.[24] What one spouse says to another is not published at all, a good rule doubtless attributable to the absurd fiction that husband and wife were one person, and therefore one which some rational reformer will soon propose should be abolished simply because the reason for it is poor. It has yet to be decided whether this good rule applies, as it should, between cohabitants in a recognised civil partnership, whose intimacies may well be enriched by defamatory chit-chat.

Libel and Slander

One distinction which rational reformers (perhaps those who cannot distinguish between ‘verbal’ and ‘oral’) have girded against for years is that between writing and speech, for at common law the former is called libel, as opposed to slander, and treated as more serious, since in most cases of slander the claimant must prove damage, whereas in libel he need not do so. Some speech is, however, now treated as libel (broadcasts, plays in commercial theatres) and some spoken defamations are actionable without proof of damage, as when one imputes criminal conduct, repellent disease, incompetence in a job or position, or lewdness in a female (lustfulness in a male being presumably a praiseworthy attribute). The distinction between libel and slander is frequently criticised, but it is sound enough, for unless the claimant can be shown to have suffered some quantifiable harm apart from silly mortification, the courts have better things to do than hear complaints about what was said over the garden wall or at lunch-time in the canteen.

Defences

One would expect the range of defences to be inversely proportional to the ease with which the claimant can state a case. Thus there are many defences to a claim in trespass. In defamation, however, there are only a few, and they turn on a distinction between allegations of fact and statements of opinion. As to apparent allegations of fact, the only defences are truth (called 'justification') and privilege; for statements of opinion, which cannot be false but at the most simulated, the defence is 'fair comment on a matter of public interest'.

It might be thought that in a tort concerned with the protection of reputation it would be open to the defendant to show that the claimant's presumed reputation was totally undeserved, that though he smiled and smiled, yet was he a villain: otherwise one would be rewarding the con-man and the whited sepulchre. It was therefore right that the Defamation Bill 1996 proposed that the defendant might give evidence of the claimant's misconduct in the relevant area of life (for example, that an allegation of fraud in transaction X might attract evidence of fraud in transaction Y, though not evidence of sexual perversion), but this excellent proposal was dropped by our representatives in Parliament (on the basis of a specious argument by a Law Lord) and replaced by a clause which extended *their own right* to sue in respect of allegations about their misconduct in Parliament![25] By an appropriate irony the first beneficiary of this improper substitution, Jonathan Aitken, ended up in jail for causing his daughter to give perjured evidence in his libel action against *The Guardian*. It is more to be regretted that the original clause was displaced, for when a claimant does not deserve the reputation he is presumed to have (and there are many such claimants), all the defendant can try (dangerous though it is) is to plead that what he said was true and thereby bring in relevant material which can be used in mitigation of damages even if the plea fails; and that if he doesn't plead justification he may seek to mitigate the damages by showing that the claimant had a bad reputation, but not, by proving specific acts of wickedness, that he did not deserve the reputation he had, 'case management' being used for this purpose.[26]

Truth

Apart from the statutory rule that one must not dig up and ventilate a convict's peccadilloes,[27] truth is a defence to a claim for defamation. But why should it be for the defendant to prove that what he wrote was true, at least in essence, rather than for the claimant to disprove it, as is normal in claims for misrepresentation? Can the law be so stupid as to suppose that if an imputation is disagreeable, it is more likely to be false than true, that virtue is commoner than vice, competence than fecklessness? The effect of the rule, ironically enough, is that no claimant ever leaves the defamation court 'without a stain on his character', for even if he can run all the way to the bank with his winnings, he has not proved that what the defendant said was false—it is simply that the defendant has failed to prove that it was true, though if he doesn't even try to do so, the judge, disposing of the case summarily, may issue a 'declaration of falsity' and thereby run the risk of rewriting history.[28] This absurd reversal of the normal burden of proof encourages claimants to sue even if they know that what the defendant said was perfectly correct; this is a dangerous ploy, as has been discovered by Oscar Wilde, Jonathan Aitken, Neil Hamilton and Lord Archer among others. Likewise the footballer Grobbellaar must regret suing the newspaper which reported that he had taken bribes and fixed games, for

though the jury awarded him £85,000, presumably on the basis that though he had taken the bribes he hadn't been proved to have earned them by actually fixing any games, the House of Lords, in reinstating the jury's finding of liability which had been reversed by the Court of Appeal, reduced the damages to £1.[29] Of course claimants for personal injuries often lie about the circumstances or extent of their injury, but they cannot, except in the case of psychiatric harm, pretend to an injury when there was none at all.

One might have thought that Grobbellaar would run foul of the provision in the 1952 Act that where words contain two or more charges, a defence of justification is not to fail just because the truth of every charge is not proved, provided that the unproved charge is relatively innocuous in the light of the proven truth of the other charge. How does this square with the observation of Brooke LJ that 'It is no defence to a charge that "You called me A" to say "Yes, but I also called you B on the same occasion, and that was true"'.[30] The answer depends on the charge of which the claimant is complaining. He is entitled to object to a whole article but to complain of only one of the stings within it, and the defendant cannot justify any other if it is clearly separate; but if the charges are intertwined and indissociable it is not open to the claimant to pick and choose. However, the whole article will be before the jury and it will be open to them to find that in the light of the article as a whole, the charge complained of is not defamatory at all; thus the court held that the remark about Jessye Norman's girth, embedded in an article which was generally very laudatory, was not defamatory, but that observations about the effectiveness and genuineness of the marriage between Tom Cruise and Nicole Kidman (shortly to end in divorce) were separate charges not neutralised by an associated article which was very favourable to the latter.

Privacy

We have seen that while liability in defamation depends on the offensive material having been published (which does not mean 'made public') there is no liability if it is proved to have been true. But there may well be liability for making public matters which though perfectly true, were obviously supposed to be kept private, even if no one would think any the worse of the person as a result of the publication. Indeed, while the right to one's reputation is now said to be implicitly enshrined in Article 8 of the Convention of Human Rights, that Article is perfectly explicit about 'the right to respect for... private life', and public authorities, including the courts, are under a duty to safeguard it against invasion by third parties, such as the Press.

In recent years England, stimulated in part by the Convention, has developed a liability for publishing private information. It developed from, and was long called, 'breach of confidence', but as soon as it was decided that the information need not have been confided at all, the name became inappropriate, and indeed it was said, in one of the two decisions which must suffice here, that 'the effect of shoehorning this type of claim into the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law. ' The claim in question was by Michael Douglas and Catherine Zeta-Jones who were determined that no one, not even their 350 guests, should take photographs of their wedding—apart from *OK!* Magazine which had paid them £500K each for the exclusive right to publish them. Alas, *OK!* was scooped by *Hello!,* which rapidly published six illicit photographs for which £125K was paid. In the ensuing trial, the celebrities were awarded £3,750 each for their distress (Ms Zeta-Jones, a talented actress, having professed anguish at having been shown eating her own bridal cake), plus £7,300 each for interference with the commercial exploitation of their

event; *Hello!* was awarded £1 million as assignee of the Douglases' commercial rights. On appeal the awards to the personal claimants were upheld, but the decision in favour of *Hello!* was reversed, on the ground that the Douglases' interest in the confidentiality of the information was not transferable and had not been transferred, so that *Hello!,* as a mere licensee, could not complain of interference with property rights, but only (unsuccessfully) with their business.[31]

The other English decision to mention is the claim by Miss Naomi Campbell who was said by the defendant newspaper to be having treatment for drug addiction and was shown, in a photograph taken covertly, leaving premises identifiable as those of Narcotics Anonymous. Since Miss Campbell had previously said that she was not on drugs, she did not complain of the statement that she was an addict (to stay as thin as a rake, it is best to be one) but only of the revelation that she was undergoing treatment, which she said was a private matter. The Court of Appeal held that the text was unobjectionable and that the photograph added nothing to it, but a bare majority of the House of Lords held that the photograph made all the difference (as it had in the *Douglas* case) and reinstated the trial judge's award of £2,500 compensatory and £1,000 aggravated damages,[32] thereby entitling the claimant (and her legal advisers) to a huge sum in costs (the bill submitted, yet to be taxed, was over £1 million), huge because the lawyers had stipulated for twice their normal fee in the event of success, even as marginal as it was in this case.[33]

A decision in Strasbourg must be mentioned, for our courts are required to have heed to what falls from the judges there. Princess Caroline of Monaco—who does not sell, but only sues—had been snapped dining with her family in the back room of a restaurant, and while the German courts had awarded damages in respect of the photograph of the children, they denied the claim of the mother since she was a 'public figure par excellence', every one of whose doings were of public interest (though Goodness knows why!). This was held to put Germany in breach of its treaty obligations under the Convention: even photographs of public figures par excellence may be published only when they are engaged on public activities (launching yachts and opening hospitals?). So there we are, or probably will be.

Privilege

There is a distinction between what the public is interested in (of which the Press must be fairly good judges) and what the judges think is of public interest (of which…). This distinction lies at the heart of the defence of privilege which is all the Press can rely on if, when sued for defamation, they cannot prove the truth of what they have reported. Privilege is sometimes *absolute,* in the sense that (like a finding of 'no duty' in negligence) no inquiry into the communicator's attitude or conduct is permitted. Sometimes absolute privilege is accorded by statute, as to the Director of the Competition Commission, but the judges have been very reluctant to find absolute privilege, though they and the other lawmakers enjoy it in court and Parliament respectively.

Normally the privilege is *qualified* in the sense that even if the facts alleged are admittedly false the claimant will fail unless he can establish that the defendant was actuated by malice, that is, did not really believe in the truth of what he said or was motivated by some oblique purpose. When does such privilege attach? It attaches when the situation is such that a decent person who believed in the truth of what he had to say would think it

right to say it, hurtful though it was. He has to say it to the right person, however. The traditional formula was that the defendant must have been under a kind of a duty to speak (though it is surely odd to say that you have a right to speak only when you are under a duty to!), and the recipient must have a proper interest in the matter. For centuries this made it virtually impossible for the press to invoke privilege, for they had no *duty* to disseminate information—they did it for gain—and they were addressing the whole world, whether or not it was at all interested. This meant that the papers were liable if they got their facts wrong, however hard they had tried to get them right. Some freedom of expression!

In 1999, however, the House of Lords, faced with a claim by the Prime Minister of Ireland in respect of a suggestion that he had misled his Parliament, held that qualified privilege can indeed be invoked by the media. The House did not, however, abandon, but only weakened, the twin requirements of duty in the defendant and interest in the addressee (the public). The decision, ungenerous as it is, has been applied rather ungenerously by the lower courts, one judge, indeed, going so far as to hold that the Press had no privilege unless they could be blamed for not publishing what they did! The courts still insist on the primacy of matter published being 'in the public interest': only of such matter has the public a right to be informed and the Press a duty to inform them. Once this requirement has been met, the conduct of the journalist is scrutinised in order to see whether he has met the courts' exacting standards of responsible journalism. It is normally essential, among other factors listed in a quasi-legislative manner by Lord Nicholls, for the matter to be put to the person affected, even if the question would be futile, like asking George Galloway whether he really was a traitor.[34] But at least, and at last, exculpation is now possible, for it has certainly taken long enough for the courts to go any way towards respecting the freedom of the Press to inform the receptive electorate of the shenanigans of the temporarily great, the apparently good and the certainly rich.

In one case where a newspaper was held liable because it had made no investigations of its own, the Court of Appeal reversed on the ground that the newspaper was simply reporting, without adopting, what had been said ('reportage')—a majority decision subsequently cold-shouldered.[35] Statute does, however, permit reportage, if fair and accurate, of what is said to or by a large number of specified bodies with public functions.[36] Two points should be noted. First, the statutory provision was necessary in order to avoid the effect of the common law rule that merely to repeat defamatory matter uttered by someone else renders you liable. Secondly, in certain listed cases the privilege is lost if the publisher declines to publish a reasonable letter or statement by way of explanation of contradiction, the only instance in Britain of the useful continental device of 'right of reply'.

Comment

Fortunately one's freedom to express one's *opinions* does not depend on one's duty to do so. Even so, there are limits, and they are too restrictive. First, the matter on which comment is made must be 'of public interest'; gossip, the most interesting part of any conversation, is forbidden, but public performances may be criticised, even quite sternly. Secondly, the facts on which the comment is based must be indicated clearly enough to show that the statement is indeed the maker's opinion on those facts, and furthermore the facts must be accurate. This is a regrettable restriction: surely one should be free to comment on the basis of what one believes to be true. A judge once said to a doubtless impressionable jury that comment could hardly be fair if it

were based on inaccurate facts! At least the judges do not have to agree with the comment impugned: the comment need not be 'fair', only honest—the ventilation of opinions you do not hold is not protected. But suppose the commentator, though honest, is spiteful. It has often been said that the defence fails if the commentator was actuated by 'malice', which is rather worrying, since in the academic world at any rate, negative comment is as often the result of personal animosity as of genuine difference of opinion. Lord Nicholls, sitting in Hong Kong, has caught this hare: 'Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence.'[37] His Lordship distinguished the defence of privilege, which is granted for a particular purpose and fails if the occasion is used for any other, from the defence of fair comment, whose purpose is to simply to permit the citizen to state his honest opinions regardless of his motive.

Legislation

Although legislation has sometimes made the situation worse (for example, by dispensing with the need to prove damage in certain cases of slander) it has gone some way towards moderating the common law's ingrained antipathy to freedom of expression. Under the Defamation Act 1996 summary judgment is now possible, and the courts can now control the ludicrous, antisocial, and profitable excesses of the specialist bar. They can also now exercise some control over the awards of damages made by the jury, for if the courts put an absurdly high value on a person's reputation when formulating the rules of liability, the jury still does so when it comes to awarding damages. The Strasbourg Court frowned when a jury awarded the sum of £1.5 million,[38] and the Court of Appeal has laid down restrictive rules.[39]

Concluding Remarks

In 2005 the Strasbourg court had another occasion to consider the English law of defamation. It arose out of the famous *McLibel* case in which McDonald's sued two unwaged pamphleteers who had accused it of shabby and shady practices. The damages of £60K awarded after a trial which lasted 313 days were reduced by the Court of Appeal, after 23 days of argument, to £40K, and the House of Lords refused leave to appeal. The doughty defendants went back to Strasbourg and complained that they had not been given a fair trial (Art 6) since they had not been granted any assistance with their defence, and that their freedom of expression (Art 10) had been infringed. The court there upheld their complaints, and awarded them €35K non-pecuniary damages between them: 'the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation.'[40] This will not, of course, put an end to the flow of smug pronouncements 'of the highest authority' (in England) to the effect that the English law of defamation is fully consistent with Article 10 of the Convention.

The Strasbourg court was much affected by the absence of legal aid for the individuals here, who were not suing but were being sued and were trying to defend their right of freedom of expression. Claimants seeking damages for alleged injury to their reputation also get no legal aid, but the substitute provided by Parliament is even worse: lawyers can take up a case on the terms that they will get double if the case is won, thereby increasing the bill for costs payable by the defendant should he lose, costs which the solicitors already have an incentive to inflate. The chilling effect on the Press is admitted by the House of Lords, as is their inability to do anything about it. Those in doubt should read the case about the costs claimed by Naomi Campbell (see p. 185), who could well have afforded to meet the costs herself.[41]

Even before this deplorable situation, it was surprising how many claims were brought by persons such as police constables who were not obviously rich enough to face the expense. The explanation is that their claims were funded by their trade union. (Advice to the reader: do not say that you were thumped in the police cell unless you can prove it to the hilt.) Somewhat similarly, local councillors, in order to assuage their umbrage, used to use the name (and funds) of the local authority to bring suit, until the House of Lords had the good sense to stop that.[42] So, too, individuals with corporate associations have the company join them in the suit (the company need not prove any loss) and then get the costs from the shareholders. The message is: if you want to muzzle someone, just use the tort of defamation! You will find the legal profession eager to help you (and themselves). There is a lot of money here. Defamation is quite big business. The 'honey-pot', as one judge has called it, attracts a lot of bees and bears. In 2004 no fewer than 267 proceedings for defamation were started in the Queen's Bench (as against 749 for personal injury, 119, for other negligence (including professional negligence) and 30(!) for other torts—trespass, nuisance, assault, wrongful arrest). Hardly marginal, then.

One cannot conclude these observations about this tort, which is a blot on the lawscape, without adverting to the oddity, perfectly manifest in the law reports, that a tort designed to protect reputation should attract and reward the most disreputable and shabby elements of civil society, and not only our fellow-citizens: disreputable foreigners come here to sue for libel much as adulterers used to flock to Nevada for a quick divorce.[43] Anyone tempted to join the list should remember two things: (1) to claim within a year of the publication, an unusually short period;[44] (2) to stay alive, for the claim collapses on the death of the party allegedly defamed, as well as that of any human defendant.[45]

Notes

1 *Lonrho v Fayed (No 5)* 1994] 1 All ER 188.

2 *Spring v Guardian Assurance* [1994] 3 All ER 129.

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

4 *Telnikoff v Matusevich* 702 A2d 230 (Md 1997).

5 *Tolstoy Miloslavsy v United Kingdom* (1995) 20 EHRR 442 (damages), *Steel v United Kingdom* (2005) 41 EHRR 22 (legal aid).

6 *Cumpana v Romania* (2005) 41 EHRR 200 at 91.

7 *Goldsmith v Pressdram* [1977] 2 All ER 566.

8 *Berkoffv Burchill* [1996] 4 All ER 1008.

9 *Cornwell v Myskow* [1987] 2 All ER 504.

10 *Aspro Travel v Owners Abroad* [1996] 1 WLR 132.

11 Defamation Act 1952, s 3.

12 *Jameel v Wall Street Journal* [2005] EWCA Civ 74.

13 *Capital and Counties Bank v Henty* (1882) 7 App Cas 741.

14 *Morell v International Thomson* [1989] 3 All ER 733 at 734.

15 *Prager v Times Newspapers* [1988] 1 All ER 300 at 311.

16 *Norman v Future Publishing* [1999] EMLR 325.

17 *Lewis v Daily Telegraph* [1963] 2 All ER 151.

18 *Shah v Standard Chartered Bank* [1998] 4 All ER 155.

19 *Morgan v Odham's Press* [1971] 2 All ER H56.

20 *Blennerhassett v Novelty Sales* (1933) 175 LTJ 393.

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

22 *Wilkinson v Downton* [1897] 2 QB 57.

23 *Byrne v Deane* [1937] 1 KB 818.

24 *Godfrey v Demon Internet* [1999] 4 All ER 342.

25 Defamation Act 1996, s 13.

26 *Burstein v Times Newspapers* [2001] 1 WLR 579.

27 Rehabilitation of Offenders Act 1974, s 8.

28 Defamation Act 1996, s 9(1)(a).

29 *Grobbellaar v News Group Newspapers* [2002] UKHL 40.

30 *Cruise (andKidman) v Express Newspapers* [1999] QB 931.

31 *Douglas v Hello!* [2005] EWCA Civ 595.

32 *Campbell v MGN* [2004] UKHL 22.

33 *Campbell v MGN (No. 2)* [2005] UKHL 61.

34 *Galloway v Telegraph Group* [2006] EWCA Civ 17.

35 *Al-Fagih v HH Saudi Research and Marketing* [2001] EWCA Civ 1634.

36 Defamation Act 1996, s 15.

37 *Cheng v Tse Wai Chun Paul* [2000] HKCFA 88.

38 *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442.

39 *John v MGN* [1996] 2 All ER 35.

40 *Steel v United Kingdom* (2005) 41 EHRR 22.

41 *Campbell v MGN (Costs)* [2005] UKHL 61.

42 *Derbyshire CC v Times Newspapers* [1993] 1 All ER 1011.

43 See *Berezovsky v Forbes Inc* [2000] 2 All ER 986, especially per Lord Hoffmann, dissenting.

44 Limitation Act 1980, s 4A.

45 Law Reform (Misc Prov) Act 1934, s