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The Draft Defamation Bill - A Radical Change?

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Abstract

In 2010 Lord Lester introduced a draft defamation Bill to Parliament in order to address pre-existing problems with the current laws relating to defamation. This article will assess what these problems are, and whether the Bill adequately solves them. Through study of the current statutes, case law and commentaries from the field of defamation, it appears that the problems are less fundamental than they appear. Although there are issues which severely hinder freedom of expression, namely the reversed burden of proof (which considers the defendant guilty until proven innocent) and the cost of actions, these are not dealt with within the Bill. This article asserts that although Lord Lester's draft defamation bill may be an attempt at bringing clarity, it will not fundamentally change the current law of defamation if it is to be enacted.

I. Introduction

The law of defamation has sought to strike a balance between reputation and freedom of expression. In Britain, the current view is that the law is 'archaic, illiberal and unbalanced'[1] and leans towards safeguarding reputation, with only grudging merit given to free speech. Due to the Human Rights Act[2] the balance must now be found between the Article 8 right to respect for private and family life and the Article 10 which outlines the right to freedom of expression, both of which are given equal significance. Despite this, there is a worry that with these changes the law has 'gathered inconsistencies and become overly complex'.[3] Therefore moves for legislative reform have been made in the form of Lord Lester's Defamation Bill. Looking at sections of the Bill in turn, what

[1] Mullis and Scott, Lord Lester's Defamation Bill 2010: A distorted view of public interest? (Communications Law 2011).
[2] Human Rights Act 1998.
[3] Catherine Rhind, Reforming the Law of Defamation: An Honest Opinion (In House Lawyer 9th September 2010).

are the problems with the current law and will this Bill solve them?

II. 'Responsible publication on matters of public interest'

In Reynolds v Times Newspaper[4] a common law defence for quality investigative journalism was set out by the House of Lords, specifically through the ten criteria laid out by Lord Nicholls. This appeared to be a modernising move towards protection for the media and freedom of expression. However, Reynolds' privilege has not lived up to its reforming nature. Lord Nicholls' ten criteria have been employed as challenges which the media almost inevitably cannot pass all of, and because 'a reciprocal duty and interest for a statement to be made to the public at large arises only in exceptional circumstances'[5] trial judges are reluctant to find a story to be privileged. There have been attempts however to return to the original progressive spirit of Reynolds. In Jameel v Wall Street Journal[6] Lord Hoffman criticised the approach of the lower courts applying the Reynolds criteria as 'ten hurdles at any of which the defence may fail'[7] and said they should be applied in the liberalising spirit in which they were intended. So there is hope that this defence will become the protection for responsible journalism that it was designed to be.

The Defamation Bill builds on the Reynolds notion of 'responsible publishing' and codifies Lord Nicholls' criteria. However, the considerations of the source and status of the information, the tone of the article and whether the gist of the claimant's argument is included are conspicuously missing from the legislation. In Reynolds Lord Nicholls stated 'It is elementary fairness that... a serious charge should be accompanied by the gist of any explanation...given'. [8] Accordingly, it seems an extremely important factor to be

[4] [2001] 2 AC 127.
[5] Jacob Rowbottom, Libel and the Public Interest (Cambridge Law Journal 2007).
[6] Jameel v Wall Street Journal Europe SPRL (No. 3) [2006] UKHL 44.
[7] Ibid.
[8] Reynolds (n 4) at 206 per Lord Nicholls.

removed. Equally, the status of the information can be crucial as 'the blaring headline of accusation on page 1 becomes a tepid reference in the graveyard of page 2'.[9] The Bill suggests that only the collecting of information need be responsible, rather than the story itself. Another problem with the legislation is that Section 1(4)(g) mentions 'codes of conducts or other relevant guidelines'[10] which makes the section too media-specific and 'leaves hanging the question of whether bloggers and NGOs would be able to avail themselves of such a defence.'[11]

It is somewhat unclear as to whether this common law principle should be enforced through legislation at all. Arguably 'codification trades the flexibility of a common law approach for, in Desmond Browne QC's phrase, "the straightjacket of legislation"'.[12] Lord Nicholls himself has stated 'This solution has the merit of elasticity'[13] but immediately qualified his statement with: 'Hand in hand with this advantage goes the disadvantage of an element of unpredictability and uncertainty.'[14] For the media statutory intervention is certainly welcome, especially given the additional margin of error that the omitted criteria afford them. But does it promote freedom of expression too far at the cost of defence of reputation?

III. 'Honest Opinion'

The Bill renames the defence of 'fair comment' as 'honest opinion'. This is logical as fair comment doesn't require fairness, only an opinion which could honestly be held in the situation, based on true facts. It is difficult however to distinguish between fact and comment as facts require proof in order to be factual. This difficulty was highlighted by the

[9] Flood v Times Newspapers [2010] EWCA Civ 804 at [119].
[10] The Defamation Bill 2010.
[11] Siobhain Butterworth, Lord Lester's Defamation Bill should be more radical (The Guardian 23rd June 2010).
[12] Jenny Alia and Phil Hartley, Tipping the Balance (161 New Law Journal 376 2011).
[13] Reynolds (n 4).
[14] Ibid.

case of British Chiropractic Association v Singh[15] where the Court of Appeal concluded that 'if the communication is offered as a contribution to a debate on a matter of public interest that may be enough for the communication to be treated as comment'.[16] This is considered a widening of the defence and places 'an expansive gloss on the defence of fair comment'.[17] In The United States the position has long been that 'under the First Amendment there is no such thing as a false idea... we depend for its correction not on the conscience of judges and juries but on the competition of other ideas'.[18] This places admirable trust in the value of the marketplace of ideas rather than on correctional litigation.

Section 3(6) The Bill also changes the requirements of the defence, stating: 'no account is to be taken of – (b) whether the defendant first learned of the facts or material before or after publication'.[19] This contradicts all previous rules, as the test is whether a reasonably minded person could hold the opinion based on the facts before him, and as Lord Denning said 'No ordinary human person can look into the future and comment on facts which have not yet happened'. [20] In considering whether the same would apply if the facts had happened but were not known to the commentator Justice Eady said 'Logic would appear to suggest that one can hardly comment on matters of which one knows nothing, any more than one can comment on facts which have not yet happened'. [21] This broadens protection for freedom of expression significantly. But essentially 'the opinion delivered must still be one that is honest, so no matter how wide-reaching the facts included by the defendant are... [they] will

[15] [2010] EWCA Civ 350.
[16] You can't dust for comment: British Chiropractic Association v Singh (Communications Law 2010).
[17] Richard Mullender, Defamation, Fair Comment and Public Concerns (Cambridge Law Journal 2010).
[18] David Elder, Freedom of Expression and the Law of Defamation: The American approach to problems raised by the Lingens case (International and Comparative Law Quarterly 1986).
[19] The Defamation Bill 2010 s3(6)(b).
[20] Cohen v Daily Telegraph Ltd [1968] 1 WLR 916 .
[21] Lowe v Associated Newspapers Ltd [2007] Q.B. 580

not be able to strongly defend negative commentary with impunity.'.[22]

IV. Truth

The Bill renames the 'justification' defence as one of 'truth'. This again is logical as a statement does not have to be justified to comply with the defence; it simply has to be true. This defence is based on the basic assertion that 'the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess'.[23]. Apart from this it does not substantially alter the defence. The burden of proof remains with the defendant, which is one of the main areas where the Bill lacks radicalism. Arguably this simple transfer of the burden of proof would offer much greater protection for freedom of expression as proving claims based on anonymous sources or those who have left the country or died can be impossible for journalists, whereas claimants are 'in the best position to say precisely what is true and what is false about defamatory statements'.[24] Mullis and Scott consider the current law to be preferable as it 'forces a publisher, when considering whether or not to publish, to focus particular attention on whether the statement can be justified.'[25]

V. Responsibility for Publication

Distributors and wholesalers can already use the defence of 'innocent dissemination' unless they ought to have known that a publication was likely to contain libelous material. The Defamation Act 1996 extended this to include live broadcasts, and internet providers and hosts are also protected[26], but this Bill gives them absolute privilege. This 'would appear to remove any incentive for an ISP to remove

[22] Catherine Rhind (n 3).
[23] M'Pherson v Daniels 109 E.R. 448 (1829).
[24] Siobhain Butterworth (n 11).
[25] Mullis and Scott (n 1).
[26] The EU Electronic Commerce Directive 2000/31/EC.

material even if that material is found to be defamatory.'[27] The Bill includes provisions for corrective measures, namely that defendants have 14 days from the complaint to remove the article. This is clear and precise and should help such matters be resolved without litigation. Under the 'had no reason to believe' [28] clause which currently applies, controversial publications can struggle with distribution as stockists fear being sued. One such example is the satirical magazine Private Eye which was 'once banned by W H Smith... [and is considered] the bane of the corrupt and super-rich'.[29] This can limit freedom of expression and if the Bill offers greater protection to third parties in the chain of distribution then this will be a success for public debate and freedom of expression.

VI. 'Multiple publications'

Under the current provisions claimants have to sue within a year of the last publication of the defamatory matter. This means that publishers are liable for however long the book is in circulation or article can be found in an internet database; something which is understandably unpopular due to the ease with which electronic material can be copied and shared. The Bill would change this to a year from which the publication was first made, but this could be unfair where the defamatory material was published on a relatively unknown website or similarly obscure forum but then brought to wider attention later on. 'In the online environment, the availability of past statements can continue to be horrendously damaging'[30], but the Bill appears to overlook this issue. This change will impact greatly on claimants wishing to protect their reputations, and could allow malicious publications to go unpunished.

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[27] Mullis and Scott (n 1).
[28] Defamation Act 1996 s1(1)(c).
[29] Mary Brodbin, Private Eye: The first 50 years (The Socialist Review November 2011).
[30] Mullis and Scott (n 1).

VII. 'Action for defamation brought by body corporate'

The Bill proposes that corporations would have to prove a likelihood of financial loss to bring an action in defamation. There have been calls to stop corporations being able to sue at all after the embarrassment of the so-called 'McLibel' case where a legal battle was fought between the might of the McDonalds Corporation and two protestors. However, the criticism from the European Court of Human Rights in that case was based on 'the absence of legal aid for the defendants [being] a breach of Art. 6 of the European Convention on Human Rights, and...the presumption of falsity and level of damages [breaching] Art. 10 of the Convention.'[31] Therefore, a proof of financial loss requirement wouldn't solve these issues, and could be economically problematic as businesses often rely heavily on reputation and good-will, the damage to which may not immediately present itself financially. Equally, a prompt action could curtail a statement before it has its potential financial impact, yet this in itself will make the statement un-actionable. This could prove to be damaging to small businesses, as the Bill affects all corporations regardless of size or wealth.

VIII. 'Harmful event in cases of publication outside the jurisdiction'

Due to the relatively sympathetic laws in the United Kingdom it is suggested that a problem of 'libel tourism' exists. For instance, foreign publications can be sued in Britain even if there has only been a single publication, due to a 160 year old rule.[32] However, an English court can refuse a case which would be more suitably tried elsewhere. This is known as the forum non conveniens doctrine, and will be applied:

> '...where the court is satisfied that there is some other available forum, having competent jurisdiction, which

[31] Eoin O'Dell, Defamation Reform in England and Ireland after McLibel (Law Quarterly Review 2005).
[32] Duke of Brunswick v Harmer 1849 14 QB 185.

> is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice'.[33]

As Lord Scott said 'it would be ridiculous and fundamentally wrong to have these... cases tried in this country, on a very small and technical publication'.[34] This has been effective in stopping American litigants. But any British action to remedy this perceived problem further would be limited by the Brussels Convention[35] which allows actions to be brought in any EEC country where publication occurs. Nonetheless, it appears that the issue of 'libel tourism' has been exaggerated. Afia and Hartley have stated that "In 2010, there were a grand total of three cases (out of 83) involving a foreign claimant and defendant".[36] The Bill handles this issue by leaving the courts to assess whether there has been significant damage to reputation in this jurisdiction with regards to the extent of publication outside of it. This is confusing as the claimants reputation can be significantly damaged in Britain even if the majority of publications did not occur here. This proposal will most likely lead to lengthier trial processes in the few foreign actions brought in Britain.

IX. Other Issues

The main issue not dealt with in the Defamation Bill is the cost of actions. This has been highly controversial with huge sums awarded to sympathetic claimants, a worrying lack of legal aid and no-win no-fee style legal firms charging extortionate rates. As Roderick Moore states: 'On one hand, rich crooks can use the law to cover up their crimes, while on the other hand, ordinary people who find themselves the victims of smear campaigns are left with no means of redress.'[37] The problem is no longer with juries awarding

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[33] Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460.
[34] Kroch v Rossell [1937] 1 All ER 725.
[35] 1968.
[36] Jenny Afia and Phil Hartley (n 12).
[37] Roderick Moore, The Case for Reforming the Libel Laws (Libertarian Alliance 2000).

ridiculous damages as 'in 1991 the Court of Appeal was empowered... to substitute its own award in place of excessive damages'.[38] The main concern has now become the fact that legal fees incurred in pursuing an action often outweigh damages recovered. Creating access for less wealthy claimants through conditional fee agreements has meant a doubling of costs for the losing party. With this in mind David Howarth conducted an in-depth statistical analysis on the issue and produced convincing evidence to support his claim that 'the vast majority of libel cases cost relatively little'[39] and therefore 'we do not know enough to justify a moral panic about libel costs.'[40] Any move to remedy this problem through legislation would be problematic; were the CFA firms' fees cut they would be more careful about the cases they took, limiting access to the justice system further. Relatively high costs also act as a deterrent to publishers and ensure that they don't irresponsibly publish unjustifiable stories.

X. Conclusion

Lord Lester has admitted that the proposed Defamation Bill is for the most part an attempt to codify the current law, and upon analysis this appears to be true. Greater media freedom has been granted through less stringent criteria for responsible publication and the extension of the fair comment defence. The most far reaching change is probably the multiple publication rule, as this could have severe adverse affects upon claimants. Equally a change in the requirements for corporate bodies would appear to cause more problems than it solves, but this is a minor issue. The Bill extends freedom of expression protection, and although some feel it does not go far enough, clarification is important in the law. Case-law can only do so much and as has been evidenced in the lower courts decisions in Jameel can actually be applied wrongly and against the spirit intended. The main

[38] Robertson and Nicol, Media Law (Penguin Books 2007).
[39] David Howarth, The Cost of Libel Actions: A Sceptical Note (Cambridge Law Journal 2011).
[40] Ibid.

criticism is that the burden of proof is not reversed but as politicians are often the subject of tabloid attacks it seems unlikely that this fundamental change will be granted swiftly. This Defamation Bill is not radical, but it doesn't need to be. The British defamation laws are not as flawed as they are perceived to be.

BIBLIOGRAPHY

Books

Robertson and Nicol, Media Law 5th Edition (Penguin Books 2007).

Cases

M'Pherson v Daniels 109 E.R. 448 [1829]
Duke of Brunswick v Harmer [1849] 14 QB 185
Kroch v Rossell [1937] 1 All ER 725
Cohen v Daily Telegraph Ltd [1968] 1 WLR 916
Reynolds v Times Newspaper [2001] 2 AC 127
Jameel v Wall Street Journal Europe SPRL (No. 3) [2006] UKHL 44
Lowe v Associated Newspapers Ltd [2007] Q.B. 580
Flood v Times Newspapers [2010] EWCA Civ 804 at [119]
British Chiropractic Association v Singh [2010] EWCA Civ 350

Journals

Alia J and Hartley P, Tipping the Balance (161 New Law Journal 376 2011).
Elder D, Freedom of Expression and the Law of Defamation: The American approach to problems raised by the Lingens case (International and Comparitive Law Quarterly 1986).
Howard D, The Cost of Libel Actions: A sceptical note (Cambridge Law Journal 2011).
Moore R, The Case for Reforming the Libel Laws (Libertarian Alliance 2000).
Mullender R, Defamation, Fair Comment and Public Concerns (Cambridge Law Journal 2010).
Scott A and Mullis A, Lord Lester's Defamation Bill 2010: A distorted view of public interest? (Communications Law 2011).
O'Dell E, Defamation Reform in England and Ireland after McLibel (Law Quarterly Review 2005).

Rowbottom J, Libel and the Public Interest (Cambridge Law Journal 2007).
You can't dust for comment: British Chiropractic Association v Singh (Communications Law 15(3), 90-93 2010).

Legislation

Brussels Convention 1968
Defamation Act 1996
Human Rights Act 1998
The EU Electronic Commerce Directive 2000/31/EC
The Defamation Bill 2010

Newspaper/Magazine Articles

Brodbin M, Private Eye: The first 50 years (The Socialist Review November 2011).
Butterworth S, Lord Lester's Defamation Bill should be more radical (The Guardian 23rd June 2010).
Rhind C, Reforming the Law of Defamation: An Honest Opinion (In House Lawyer 9th September 2010).