Something Rotten in the State of English Libel Law?

A Rejoinder to the Clamour for Reform of Defamation

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EXECUTIVE SUMMARY

- In recent months, there has been a continuing public critique of the impact of libel law. This has been pursued through newspaper campaigns, Parliamentary activity, and – notably – the publication of an important report by Index on Censorship and English PEN.
- We recognise the potential for misuse of libel law so as to preclude investigative journalism, to stifle scientific debate, to undermine the work of NGOs, or to invite the strategic legal tourist from abroad. We agree that it is timely for a general review of the operation and impact of the law to be undertaken with the object of identifying necessary reform.
- We are concerned, however, that the critique of the libel regime is too broad and the reforms proposed too sweeping and indiscriminate. The public commentary on libel law has been remarkably one-sided, and in some respects dangerously over-simplified. We are nervous that the important societal functions performed by libel law have been underplayed. Libel reform should be coherent, not piecemeal and un(der)-principled.
- We are surprised that the reality of most libel actions – the fact that they involve instances of damaging inaccuracy perpetrated by multinational media corporation defendants and challenged by relatively impecunious claimants – has somehow been lost in the narrative on the need for reform.
- We divide this rejoinder into sections. First, we highlight criticisms of libel law that we feel are based on error or misunderstanding. These include points regarding the need for revision of the existing rules on jurisdiction; the improvement of the public interest defence; the broadening of the defence of fair comment, and for the exemption of internet hosts and online interactive chat from liability.

- Secondly, we respond to criticisms of libel law that we consider misjudged. These include points regarding the reallocation of the burden of proof as to truth/falsity, and the proposal to cap libel damages.
- Thirdly, we highlight those aspects of the criticism that are potentially of substance, and which are deserving of more full attention. These include points regarding the introduction of a single publication rule for online publication; the introduction of a specialised libel tribunal or other cost-saving process change; the denial of standing to corporate entities; relieving the costs burden, and introducing legislation to permit defendants to counter-sue abusive libel claimants.
- Ultimately, we hope to identify those areas of libel law and procedure that might be the focus of constructive revision, and by doing so dismiss as superfluous or worse other mooted reforms. That said, we do not ourselves necessarily advocate change in any of these respects.

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1. In recent months, there has been a continuing public focus on the law of libel. A number of national newspapers have been pursuing campaigns seeking reform publishing regular news items and comment articles;[1] two freedom-of-speech NGOs – English PEN and Index on Censorship – have conducted an inquiry and published an important report;[2] two Parliamentary debates have considered the theme,[3] an eminent lawyer-peer is promising a libel reform bill, and the House of Commons Select Committee on Culture, Media and Sport has been undertaking an extended study receiving evidence from a broad array of highly expert commentators.

2. In principle, we strongly welcome all of these initiatives. We too are concerned at the potential for misuse of libel law so as to preclude investigative journalism, to stifle scientific and medical debate, to undermine the important work of human rights organisations and other NGOs, or 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.[4] We agree that it is timely for a general review of the operation and impact of the law to be undertaken with the object of identifying necessary reform. We welcome the Government announcement that some form of review will be undertaken in this new year.

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[1] These include *The Sunday Times* and the *Guardian*. A number of US papers have been similarly active in criticising UK law.

[2] (2009) *Free Speech is Not For Sale*. Available at: [WWW] http://www.libelreform.org/our-report (accessed January 2010) (the Index / PEN report).

[3] 485 HCDeb cols 69-93WH, 17 December 2008; 497 HCDeb cols 272-295WH, 21 October 2009. Short debates also ensued following the putting of ministerial questions in the House of Lords by Lord Pannick (715 HLDeb cols 673-675, 1 December 2009), and in the House of Commons by Evan Harris MP (503 HCDeb cols 832-833, 14 January 2010).

[4] This was the fundamental concern of the Index / PEN report. It emphasised that "English libel law imposes unnecessary and disproportionate restrictions on free speech, sending a chilling effect through the publishing and journalism sectors in the UK" and that "the law… does not reflect the interests of a modern democratic society".

3. That all said, we consider that the critique of the libel regime is too one-sided and the reforms proposed ill thought-out, too sweeping and indiscriminate. We are sceptical as to whether the substantive law of libel contributes at all directly to the existence of the perceived problems. Where once the law could be rightly lambasted as comprising "a surfeit of technicality, complexity and the absurd",[5] the range of legislative and jurisprudential changes given effect over the last two decades leaves any such critique dated and largely inappropriate. Similarly, while we appreciate the rhetorical strength of the observation that some other jurisdictions have been moved to introduce legislation to block the enforcement of British libel judgments, we do not consider it somehow 'shaming' that this should be the case. In contrast, we do consider that the sheer cost of fighting libel actions – especially with the opportunities for legal pressure and gamesmanship that this allows - can be a real problem.

4. In this context, we have become concerned that the public commentary on libel law has been remarkably one-sided and in some respects dangerously over-simplified. A number of *causes célèbres* have been exploited – on occasion with little concern for the underpinning facts – in order to secure superficial political impact. In our view, while the general call for reform has seemed clamourous, specific proposals are often based either on a dearth of evidence or on misunderstandings of the existing law. In consequence, we are nervous that the important societal functions performed by libel law have been underplayed, and that ill-thought reforms may serve to unbalance the public sphere to the detriment of all in the modern democratic state. Libel reform should be coherent, not piecemeal and un(der)-principled.

5. We do not blame either Index on Censorship or English PEN for this state of affairs; the *raison d'être* of such organisations is to promote the interests of writers and other contributors to public debate. It is natural for such groups to emphasise expression interests and to seek a libel law that is least constraining of speech. We are critical, however, of the performance of the print media. Over the past year and more,

[5] Gibbons (1996) Defamation Reconsidered. *Oxford Journal of Legal Studies*, 16(4), 587-615, 587.

newspapers have presented a singularly one-sided perspective. By casting their commentary as campaigns, they have sought to validate their marginalisation of voices dissonant to the editorial line on the imperative of reform. We would hope that the words of the great C.P. Scott resonate: "the voice of opponents no less than that of friends has a right to be heard… it is well to be frank; it is even better to be fair".[6] We suspect that they will not. These newspapers have subtly aggrandised their own vested interests as a reflection of the public good, and have chosen not to seek to fulfil objectively any conception of their self-assumed role as the 'fourth estate'. The fact is that most complaints concerning damaging media inaccuracy and falsehood involve relatively impecunious claimants who face an uneven legal battle against multinational media corporation defendants. Goliath, it seems, is dreaming he is David.

6. Ultimately, we are interested to promote freedom of speech, but not freedom of all speech. The law and other forms of regulation can legitimately, and indeed must, be used to prevent the media from causing damage out of proportion to the good achieved by openness. In the immediate context, the media should not be free to publish false and damaging allegations without any fear of being put to redress. Any attempt to garner the public benefit that might be achieved by releasing investigative journalists from the strictures of libel law risks absolving less reputable scribes of liability for naked intrusions and falsehoods. If the law can draw – or redirect - the scorpion's sting, then perhaps we'll all make it across the river.

7. In this paper, we seek to provide an accurate and nuanced view of the existing state of the law of defamation. We do not claim that the law is perfect. We respond to the litany of criticisms made of the law of libel in the hope of orienting any reform project towards aspects of the libel regime that may productively be addressed. We are loathe to leave any such agenda-setting function exclusively in the hands of those who stand to gain directly by the emasculation of the law. We are concerned that the

[6] (1921) A Hundred Years. Available at: [WWW] http://www.guardian.co.uk/commentisfree/2002/nov/29/1 (accessed January 2010).

wholesale adoption of the existing range of proposals would result in the death of libel, a scenario that we fear would truly unleash a feral beast.

8. We divide this rejoinder into sections. First, we highlight criticisms of libel law that we feel are based on error or misunderstanding. Secondly, we respond to criticisms of libel law that we consider misjudged. Thirdly, we highlight those aspects of the criticism that are potentially of substance, and which are deserving of more full attention. We hope to identify those areas of libel law and procedure that might be the focus of constructive revision, and by doing so dismiss as superfluous or worse other mooted reforms. We preface these paragraphs with some short, general observations.

General Observations

9. Before addressing directly particular elements of the critique of libel law and proposals for reform, we make a number of related general comments about extant state of the law in this area. First, the critique of libel underplays the real importance of countervailing interests served through the design and operation of the regime. These include personal interests in reputation and privacy, but also wider public interests in the vindication of such personal rights and in the receipt of accurate information from the media. There can only very rarely be any public interest in the receipt of false information. Secondly, if one examines the development of the substantive law of defamation over the last fifteen years, it is striking that every major change has been in favour of greater media freedom. These reforms have made it more difficult, less profitable, and hence less advisable for claimants to sue. Finally, the essential coherence of English law with international standards is reflected in the jurisprudence of international rights organisations. The analytical benchmark provided by the United States is questionable; that jurisdiction adopts an unusual and absolutist approach to the preservation of freedom of speech.

Importance of reputation

10. Given the purposes of the organisations involved in the campaign for libel reform, it is unsurprising that the interest in freedom of expression receives the greatest emphasis. The general failure of newspapers and the Index / PEN report to acknowledge competing social values - save occasionally to state that reputation is not expressly enumerated as a right under the European Convention on Human Rights – is, however, self-serving and myopic. On one hand, it ignores the developing body of jurisprudence in both the Strasbourg and domestic courts to the effect that reputation is a protected interest under Article 8 ECHR. On the other hand, and more importantly, it fails properly to value the importance of reputation. The Index / PEN report does allow that "the state is responsible for finding an appropriate balance between free speech and the protection of reputation".[7] In our view the proponents of the libel reform campaign do not themselves entertain any such balancing exercise.

11. Harm to reputation can be debilitating and perpetuating. Should such harm be caused by the circulation of falsehoods, society has an interest in facilitating redress. Reputation, as Lord Nicholls explained in *Reynolds v Times Newspapers*, does matter, and not merely for its service to the individual concerned:

> *Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad.*.[8]

[7] Index / PEN report, above n 2, 5.
[8] [2001] AC 127, 201.

In light of this, it is important to acknowledge that the creation of a 'chilling effect' on freedom of expression is precisely the purpose of libel law. It prevents unwarranted injury to reputation by means of incautious speech.

12. Any well-structured law of defamation must account for the competing interests at stake. English law is not perfect, but the fact is that the existing law offers a much more satisfactory balance between these competing interests than does the vision proposed by the proponents of sweeping reform. The chilling effect of libel is undesirable only to the extent that it causes true and important information to be withheld from the public sphere. Change the law by all means, but do not do so on the basis of only a partial understanding of the existing law or with an unhealthy bias towards freedom of expression.

Pro-media revision of English libel law

13. The most obvious changes have come in relation to the curtailment of damages and the development of *Reynolds* 'public interest' privilege. Whereas twenty years ago, libel claims were seen by some claimants as a road to untaxed riches, this is no longer the case. The Court of Appeal now exercises considerable control over the level of damages,[9] with the effective maximum now just over £200k. Moreover, the award of even half that amount is a rare occurence. Given that most libel damages are modest and the claimant only recovers a proportion of his costs, even successful libel litigants are often left out of pocket. The development of *Reynolds* privilege and the related 'reportage' defence have widened substantially the room for error afforded to the media when reporting on matters of public interest. Provided that the journalist has acted responsibly and that the matter considered is of public interest, the defence is available.

[9] Under section 8 of the Courts and Legal Services Act 1990, the Court of Appeal enjoys the power to vary an award of damages made by a jury where this is deemed excessive or inadequate.

14. There have been a number of further 'pro-media' reforms. The defence of 'fair comment' has been revitalised and is more accommodating of free speech than previously.[10] Certain legal entities have been found to lack the capacity to bring a claim for defamation,[11] and others treated as effectively libel-proof.[12] The enactment of the 'offer of amends' procedure enables a media defendant that 'has got something wrong' to apologise, and for so doing to get a substantial reduction on the damages that it would otherwise have to pay.[13] The 'summary disposal' procedure under section 8 of the Defamation Act 1996 allows a court, in practice usually on application by the defendant, to weed out weak cases at a relatively early stage. These and other changes warrant the conclusion that the last twenty years have seen a radical shift in the balance of power in defamation claims. The importance of freedom of speech is now more fully reflected in the law than was formerly the case. One consequence has been that it is now more difficult to bring a successful libel claim.

Coherence of English libel law with international norms

15. The Index / PEN report offers a compelling and powerful rendition of the value of freedom of speech.[14] It locates the principle as a cornerstone of democracy, an expectation that must be vouchsafed in practice if the state and the otherwise powerful are to be properly held to account. That journalists should have a central role to play in this exercise is obvious. We agree with the assertion in the report that "so long as [the media] exercise that role responsibly, the public interest is served better by a liberal regulatory regime that allows occasional mistakes, than by a stricter regime that curtails media freedom".[15]

[10] See, for example, the cases of *Branson v Bower* [2001] EWCA Civ 791; *Hamilton v Clifford* [2004] EWCA Civ 1407; *Lowe v Associated Newspapers* [2006] EWHC 320 (QB).
[11] See, for example, *Derbyshire CC v Times Newspapers* [1993] AC 534 (local and central government bodies); *Goldsmith v Bhoyrul* [1998] QB 459 (political parties).
[12] For example, internet search engines when publishing search results - see *Metropolitan International Schools Ltd* v *Design Technica Corp, Google UK Ltd and Google Inc* [2009] EWHC 1765.
[13] See sections 2-4, Defamation Act 1996.
[14] Index / PEN report, above n 2, 4-6.
[15] *ibid*, 4.

16. We part company with the report, however, insofar as it asserts that freedom of expression is not properly valued by the English law of defamation. As noted above, changes in the law over the last twenty years have significantly re-balanced libel law in favour of media freedom. English law has not been found significantly deficient in terms of its compliance with international standards of human rights protection in cases brought before the European Court of Human Rights. Indeed, when compared with the laws of other jurisdictions which have ratified the European Convention (and more generally), English law can be seen to offer significantly greater protection for freedom of expression than most.

17. There are observable differences when comparing the law of England and Wales with that of the United States. Exceptionalism in this respect, however, is generally recognised as being American in flavour. Bound by the First Amendment of the US Constitution, American courts have adopted what can be reasonably described as a fundamentalist approach to the value of freedom of expression. In this 'sanctification' of freedom of speech, the United States utilises a curiously weighted balance in the determination of competition between expression and other social values. There is therefore a heavy burden placed on those who argue for reform by reference to American law to prove that, of all the jurisdictions in the world, the United States has things right in this regard.

Criticism of the Libel Regime: Errors and Misunderstandings

18. In our view, a number of criticisms made of the English libel regime are based upon errors or misunderstandings of the existing legal position. These include points regarding the need for revision of the existing rules on jurisdiction, for improvement of the public interest defence, for broadening of the defence of fair comment, and for the exemption of internet hosts and online interactive chat from liability.

Revising the rules on jurisdiction

19. Perhaps the most often voiced critique of the English defamation regime is that due to the laxity of its jurisdictional rules it encourages the phenomenon of so-called 'libel-tourism'. This was characterised by Lord Pannick in House of Lords debate as the bringing of proceedings "by people who have no connection to this country against publishers who are based abroad, such proceedings being founded on the incidental publication in this country of a few copies of a newspaper, book or magazine published abroad".[16] The authors of the Index / PEN report also suppose that the jurisdictional rules "[expose] the English legal system to abuse by claimants with no reputation to defend in this country".[17] The fact that other jurisdictions - *viz* some states and possibly the federal Congress of the USA - have been moved to introduce legislation to block the enforcement of British libel judgments is also often cited as confirmation of a supposed expansionist asininity of English law.[18]

20. We appreciate the rhetorical strength of the observation that some foreign claimants choose to sue in London and not in their home jurisdictions.[19] The implication that the

[16] 715 HLDeb col 673, 1 December 2009.
[17] Index / PEN report, above n 2, 6.
[18] Macdonald (2009) Libel and the cult of the forbidden. *Guardian*, 10 November; Kampfner (2009) The laws that stain Britain's good name. *The Times*, 10 November; Leader (2009) Rotten laws that strangle free speech. The Sunday Times, 15 November; Leader (2009) Tourist trap: the exploitation of British libel law by overseas litigants is a threat to free speech. *The Times*, 26 November.
[19] The case most often relied upon by those who seek to portray England as a haven for libel tourists is that of *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB). The case is frequently presented in the media as a classic example of a mendacious libel tourist with no connection to the UK abusing the lax English rules of jurisdiction to bring a case against an impecunious and plucky academic. The truth, however, is rather different.
Dr Ehrenfeld is an academic who wrote a book, (2005) *Funding Evil: How Terrorism is Financed* (Bonus Books), in which she identified Bin Mahfouz as a principal sponsor of Al Qaeda and Osama bin Laden. He sued and initially Ehrenfeld appeared ready to contest the matter in court. Indeed, in the preface to her book she wrote that "despite the enormous cost involved, I have taken it upon myself to challenge Bin Mahfouz and provide the UK court with evidence that he in fact supported Al Qaeda"(32). Not only did she state that she intended to prove her allegations true, but at no time did she challenge the court's assumption of jurisdiction despite being advised throughout by expert English solicitors. She did not respond to service of the proceedings at all, and consequently default judgment was obtained.
Bin Mahfouz then applied for summary judgment in order to obtain a correction and an injunction preventing further publication. Mr Justice Eady granted the relief sought. He could have done so simply on the basis that the defendant did not appear. Instead, at the urging of the claimant, he gave careful consideration to the evidence as to the truth or falsity of what had been written, and in addition to awarding damages issued - most unusually - a declaration of falsity. In doing so, he noted (at [71]) that since deciding

regime in this country is draconian is obvious. On analysis, however, we are not persuaded that the British rules on jurisdiction that are said to permit libel-tourism are in themselves at all problematic.

21. Contrary to the rules sometimes posited, the British courts in fact require the claimant to demonstrate, first, that he or she *does* possess a reputation in this jurisdiction, and secondly that defamatory publication has occurred here. Any damages recovered will relate only to the harm caused to the reputation held in this jurisdiction. The courts have a discretion to strike out a claim as an abuse of process where no 'real and substantial tort' has been committed. This is not mere puffery; the discretion has been exercised in a number of recent cases.[20]

22. Admittedly, under these rules jurisdiction is assumed more readily than would be deemed appropriate by some. In terms of damage to reputation, however, what often matters is not the extent of publication, but rather *who* is reading material at a given time. As noted by Mr Justice Eady in *Mardas* v *New York Times*, "whether there has been a real and substantial tort… cannot depend [solely] upon a numbers game".[21] The Index / Pen report proposes that libel cases should be heard in this jurisdiction only if it can be shown that at least 10% of the total number of copies of the

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not to enter an appearance, the defendant had spent some time and effort attacking the unfairness of English libel laws. Rather pointedly, he stated that "the purpose of this exercise is fairly obvious, namely to give the impression that any judgment of the English court is of little significance and does nothing to establish that the allegations are false. That is why it is so important, as the claimants appreciate, to go through such allegations as have been made against them in the past on behalf of these defendants in order to demonstrate their lack of merit. That is why this judgment has gone to such length. It is not a purely formal process and the declaration of falsity which I propose to grant shortly is not an empty gesture".
One cannot help but conclude that a key reason why Ehrenfeld did not enter an appearance in court was because she had been advised that she was likely to lose on the justification issue. Her claim of poverty does not seem compelling in light of the fact that she subsequently pursued lengthy proceedings against Bin Mahfouz in New York, where lawyers' fees are not known for being markedly lower than in London.

[20] *Lonzim plc* v *Sprague* [2009] EWHC 2838 (QB); *Atlantis World Group* v *Gruppo Editoriale L'Espresso SPA* [2008] EWHC 1323 (QB); *Jameel* v *Dow Jones & Co* [2005] EWCA Civ 75. We also note that our courts are bound to apply the decision of the European Court of Justice in *Shevill* v *Presse Alliance* [1995] 2 AC 218. This has the consequence that any citizen of the European Union can sue for libel in any jurisdiction where his or her reputation has been damaged or where a wrong has been committed. This may allow claims that some would regard as libel tourism, but any change in English law necessarily must be consistent with European law.

[21] *Mardas* v *New York Times Company* [2008] EWHC 3135 (QB), para 15.

publication distributed have been circulated here.[22] They also propose that statements made on foreign internet sites should be actionable only when they are advertised or promoted here by the publisher. To our minds, such rules would be entirely arbitrary and unprincipled. They would result in obvious injustices, and would envision the legitimisation of the wanton traducing of individual reputations.

23. At its most basic level, therefore, we are comfortable with the phenomenon of libel tourism. It reflects a divergence of view as to the priorities to be afforded to freedom of expression on one hand, and competing interests such as those in privacy and reputation on the other. Americans are free to choose free speech absolutism; we remain content to be more balanced in our estimation of the relative importance of competing interests.

24. A more powerful complaint open to overseas defendants concerns not the fact of embroilment in British legal proceedings, but the scale of legal costs that they face when this occurs. We would be particularly concerned about this issue where threats to sue are made by powerful overseas interests on the basis of legal argument that is tenuous at best with the aim of precluding critical comment here or in other jurisdictions regarding their activities. The law should not support the efforts of cheats, bullies or tyrants. A resolution of this issue does not, however, require amendment of rules on jurisdiction. These distinct issues are discussed elsewhere in this paper.[23]

Introduction of an improved public interest defence

25. Proponents of libel reform sometimes call for the introduction of a public interest defence for journalists. To suggest that there is no robust public interest defence, however, is simply wrong. The House of Lords has provided – in *Reynolds* v *Times*

[22] Index / PEN report, above n 2, 9 (recommendation 4).
[23] See paras 66-77 below.

Newspapers,[24] as bolstered by *Jameel* v *Wall Street Journal Europe*[25] – a defence of privilege where the subject matter of the publication is of public interest and those involved in the publication have acted responsibly in determining the accuracy of their stories. Thus, even where statements made are factually incorrect and seriously defamatory liability can be avoided. To give an example, the publication of a story by a newspaper citing documents that implicate a British MP in war crimes would be protected by privilege even if the documents were fake provided that the newspaper had taken reasonable care to establish the authenticity of the documents *or* simply reported the fact of the discovery in a neutral and balanced way.[26]

26. In its discussion of this theme, the Index / PEN report calls for the 'strengthening' of the existing public interest defence.[27] First, it is suggested that the defence should be based upon a journalist's belief in the truth and public importance of his or her story. Secondly, it is recommended that when applying the *Reynolds* defence courts should take into account the capacity of the defendant to follow all the steps required. We have serious reservations as to the first of these suggestions, and a short comment to make in respect of second.

27. The first Index / PEN suggestion would see the public interest defence rest on two elements: the journalist's view on the public interest, and his or her belief in the truth of the story. In the first respect, we do not see a strong rationale for moving away from the current position. Relying solely on the judgment of the journalist or editor may leave the test subject to the inclinations and interests of the particular publication. That said, while the current law provides for the court to determine the issue, the legal tests are generous on this point,[28] and senior judges have

[24] [2001] 2 AC 127.
[25] [2006] UKHL 44.
[26] The facts are similar to those of *Galloway* v *Telegraph Group* [2006] EWCA Civ 17. In that case, the defence failed on the facts because the defendants failed to prove they had acted responsibly.
[27] Index / PEN report, above n 2, 9 (recommendation 6).
[28] In *Reynolds*, the Court of Appeal (*per* Lord Bingham) had defined the 'public interest' widely to include "matters relating to the public life of the community and those who take part in it, including… activities such as the conduct of government and political life, elections and public administration, …[and] more widely… the governance of public bodies, institutions and companies".

acknowledged the importance of the professional experience of journalistic and editorial staff.[29] As Lord Nicholls put it in *Reynolds*, "the court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know… [and] any lingering doubts should be resolved in favour of publication". We doubt whether the proposed change would result in many different outcomes in practice.

28. In the second respect, a journalist's honest belief in the truth of what he or she is publishing must be a necessary condition of any public interest defence, but it surely cannot be a sufficient one. Basing the defence merely on the journalist's honest belief as to truth would be a recipe for sloppy journalism in which there would be no incentive for initial, seemingly persuasive sources and indications to be further checked. The existing defence requires the journalist to have validated his or her faith in the story by engaging in reasonable journalistic practice. This seems the more appropriate standard when what is contemplated is the exoneration from liability for misinforming the public and damaging without justification another person's reputation.

29. As to the second proposal made in the Index / PEN report - that the law should take into account the capacity of the defendant to follow all the steps required for a *Reynolds* defence, so as to recognise for example that defendants writing about totalitarian regimes may not be able to corroborate their reports safely - the short answer is that this is already the case. In *Jameel*, their Lordships made clear that "the standard of conduct required of [the media] must be applied in a practical and flexible manner… [i]t must have regard to practical realities".[30] This may include taking account of the particular difficulty in certain regimes of getting to the truth.[31]

[29] See, for example, *Jameel v Wall Street Journal Europe* [2006] UKHL 44, paras 51 (per Lord Hoffman) and 108 (*per* Lord Hope).
[30] *Jameel v Wall Street Journal Europe* [2006] UKHL 44, para 56.
[31] So, for example, in *Al Misnad* v *Azzaman Ltd* [2003] EWHC 1783, Mr Justice Gray commented: "the criteria set out in the speech of Lord Nicholls in *Reynolds* require substantial adaptation to take account of such considerations as the conditions which obtain in Qatar; the difficulties which confront a journalist

Introduction of a broader defence of fair comment

30. Proponents of libel reform sometimes suggest that the defence of fair comment should be expanded. The authors of the Index / PEN report suggest that the defence should be broadened and relaxed. We suggest that this is to misunderstand the existing law. To rely on the defence of fair comment, the defendant must establish that the defamatory statement involves a comment (and not a fact), that it is based on true facts, and that is concerns a matter of public interest. Upon doing so, he or she is entitled to rely on the defence assuming the absence of malice. Fair comment, unsurprisingly, does not protect false imputations of fact. These can be defended only as being true or protected by privilege. Fair comment is intended, quite properly, to protect those who express their opinion on events, even if those opinions are irrational, extreme and prejudiced. Newspaper columnists who dip their pens in gall to excoriate public figures deemed to have committed some moral failure are protected by the defence. The fact that they express themselves intemperately will not usually preclude the defence. It must be right, however, that they should not be free to concoct facts upon which their comment is then based.

31. It is suggested that in applying the defence, courts "should be looking at the context in which a piece is published in order to determine whether it is intended or likely to be read as a statement of fact, or one of comment".[32] Such a suggestion is puzzling as this is exactly what the courts do. Judges have not tended in recent cases to be overly analytical in determining the nature of given statements.[33] Indeed the test applied – how would the statement be interpreted by a reasonable reader – actively discourages over-analysis. Moreover, the requirement that the comment be 'fair' is very easily met. Fairness in this context does not require that a reasonable man would regard the comment as fair. Instead, the statement need only be one that any man however

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seeking in that country to investigate or verify a story or check its accuracy; the constraints to which those opposing the regime in Qatar are subject and the related inhibitions upon disclosure of information relating to the identity and reliability of sources for the published arts" (para 44).

[32] Index / PEN report, above n 2, 9-10 (recommendation 7).

[33] One possible exception in this regard is the recent ruling in the case of *British Chiropractic Association* v *Singh*, QBD, unreported, 7 May 2009. At the time of writing, an appeal from this decision is pending before the Court of Appeal.

prejudiced and obstinate could honestly make. To our minds, the existing defence adequately reflects the interest in freedom of speech.

Exempting internet hosts and service providers, and interactive chat

32. The suggestion that the law of defamation has not responded in an appropriate way to the arrival of the internet is simply wrong.[34] The courts, Parliament and Government have responded in ways that hold an appropriate balance between encouraging freedom of expression and maintaining an appropriate respect for reputation. Specifically, the Index / PEN report appears to suggest – on both following points the report is unclear – either that (i) internet hosts should be liable for defamatory content only in the same way as might offline distributors and that (ii) defamatory interactive chat should be treated as slander and not libel, or that both (a) internet hosts and (b) interactive chat should be entirely free from liability for defamation.

33. If the intention of the authors was to propose the former rules, we agree, and so does the current law. First, section 1 of the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations give wide immunity from liability to internet service providers who merely act as conduits of information provided by others. Where such providers act as hosts of third party material (and therefore have real control over the content), they are immune from liability if they have no knowledge of the defamatory material. Should they be informed of the defamatory content, they remain immune from suit if they act expeditiously to remove the material. Secondly, operators of internet search engines, such as Google, Altavista or AskJeeves, are not treated as 'publishers'. Therefore, they cannot be held liable where in response to an internet search the search engine provides a snippet of information that is defamatory of a claimant. Thirdly, although the issue has not been determined finally, a court has already indicated that online interactive chat should be treated as a slander and therefore only actionable on proof of special damage.

[34] Index / PEN report, above n 2, 10 (recommendation 9)

34. If the intention of the authors was to suggest the latter two propositions (that both internet hosts and interactive chat should be entirely free from liability for defamation), then we demur. We can see no reason in principle to differentiate between defamatory statements by reference to the platform across which they are communicated. We recognise, of course, that irrespective of the legal position problems of extra-territoriality may in practice frustrate any attempt to pursue a legal claim.

Criticism of the Libel Regime: Misjudgments

35. In our view, a number of criticisms made of the English libel regime are based upon misjudgments. These include points regarding the reallocation of the burden of proof as to truth/falsity, and the proposal to cap libel damages.

Reallocating the burden of proof – removing the presumption of falsity

36. In much of the critique of libel law, the issue of the burden of proof is pressed to the fore. It is asserted that it is inappropriate for the falsity of the impugned statement to be presumed, and for the defendant to be required to justify the statement if he or she is to avoid liability.[35] This is said to be an inversion of the normal rule that an individual will be innocent until proven guilty. When this appealing rhetoric is analysed, however, it swiftly collapses into a question of perspective. A presumption of truth can equally be cast as an assumption that the person concerning whom a statement is made is guilty as charged in the trial by media, and that they deserve the lowered reputation. We query whether freedom of expression really demands that the media defendant be entitled to a presumption that a person deserves a bad reputation unless the contrary is established.

[35] See, for example, Index / PEN report, above n 2, 8 (recommendation 1); Leader (2009) A wretched law that threatens our free speech. *The Sunday Times*, 20 December.

37. In our view, the presumption that an impugned statement is false is the preferable starting point. Placing the burden of proving the truth of an imputation on the defendant forces a publisher, when considering whether or not to publish, to focus particular attention on whether the statement can be justified. If a potentially damaging statement cannot be justified, then it becomes difficult to identify the compelling public interest in permitting it to be made. If a potentially damaging statement can be justified in part only or if provable facts warrant only a call for further investigation, then any statement made should not jump to wider conclusions. Without such a legal responsibility, speech would become cheap and the proper restraints placed on the media, or indeed any person, when making serious allegations would be undesirably loosened. Proponents of a reallocation of the burden of proof assert that the claimant will always be better placed to demonstrate falsity than the defendant the converse. This is palpably not true; rather it will depend entirely on the nature of the imputation made.

38. In addition, the defence of truth should not be considered in isolation. A defendant who cannot prove the truth of what has been published is nevertheless entitled to rely on the defence of *Reynolds* privilege, provided that the statement made concerns a matter of public interest and that he or she has met the standards of responsible journalism. Similarly, considerable leeway is allowed to the media where opinions on matters of public interest are published. All that is required is that the comment is one that a reasonable person could honestly hold.

39. Moreover, it is instructive that not only English law that continues to regard the presumption of falsity as necessary feature of the law of defamation. Canada and South Africa, for example, both continue to place the burden of proof of truth on the defendant. Australia, which has recently conducted a major review and modernisation of its law of defamation, has also retained the presumption of falsity. The European Court of Human Rights has stated on several occasions that to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements is not in principle incompatible with Article 10 ECHR. Even in the United

States, the jurisdiction that has gone further than any other country in the world in privileging freedom of expression over the protection of reputation, the majority of states still retain the presumption of falsity where a private claimant sues on a matter of private concern.

Remedies: capping libel damages

40. Damages in the English law of defamation are generally awarded only to compensate the victim for the injury suffered as a consequence of the untrue statement. Unlike torts where a wrong causes loss of earnings or damaged property, however, the quantification of damages in libel and slander cases is by no means straightforward. It is not obvious how one should evaluate the damage to reputation caused by a seriously untrue and defamatory statement, or the hurt and distress caused, or the sum necessary to vindicate a claimant's reputation.

41. On these difficult questions, different views may legitimately be held and it is reasonable here to talk only in terms of general parameters. At the upper limit, we would agree with the Index / PEN report that an award of damages ought not to be a road to untaxed riches. As noted above, the Court of Appeal has in recent years sought to dampen the escalation of awards made by juries so that the effective maximum is now around £200k. In fact, an analysis of the awards made between June 1997 and January 2009 indicates that the mean award was just short of £48k, while the median award was £25k.[36] The mean award since January 2004 was under £38k, and the median award just over £20k.[37]

42. At the same time, awards should be adequate to serve the need for compensation for harms caused. Various proponents of libel reform have proposed that a cap be placed on the quantum of damages available in libel actions. For instance, Denis MacShane

[36] There were 74 decided cases during this period in which, following any appeals, claimants were successful. Awards made to more than one claimant in a given case were treated separately for the purposes of the analysis, with the result that the cited figures are based upon a sample of 91 individual awards.
[37] This smaller sample comprised 44 decided cases and 52 individual awards.

MP has suggested a limit of £10k.[38] The Index / PEN report also suggests a cap of £10k, but with room for additional sums where special damage can be proven and provision for an apology remedy.

43. To our minds, this level of damages cap is seriously flawed. First, there is precious little evidence that any claimants regard their actions as being "more about making money than saving a reputation".[39] In most cases, as any responsible lawyer will inform his or her client, a claimant who wins a contested trial would be fortunate to be in surplus after a detailed assessment of costs. Even successful claimants are usually left with some measure of cost burden. Moreover, damage awards have decreased substantially over the last decade, and have been pegged at the level of general damages in personal injury cases.[40] The courts have emphasised repeatedly the need to avoid excessive awards, and it is only in the most serious of cases that six figure awards are made.

44. We are not averse to a cap on damages in principle. Neither are we committed to the existing effective cap of circa £200k. We note, however, that the only other major common law jurisdiction that limits non-economic damages - Australia - has set its cap at $250k (approximately £120k). We also note that alongside his recommendations on limiting costs in civil actions, Lord Justice Jackson has recently recommended that the standard quantum of damages be increased by 10%.[41] We doubt the wisdom of any suggestion that £10k could reasonably serve as adequate compensation for two social workers wrongly accused of child abuse, driven from their homes, and subjected to a hostile campaign lasting for several years in the local and national press,[42] or for the parents of the abducted child Madeleine McCann,

[38] 485 HCDeb cols 74WH, 17 December 2008.
[39] Index / PEN report, above n 2, 8 (recommendation 2).
[40] The average award has decreased from around £61k between June 1997 and December 2003, to under £38k between January 2004 and January 2009.
[41] Jackson (2010) *Review of Civil Litigation Costs*. London: MoJ, available at: [WWW] http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm (accessed January 2010).
[42] On these facts, the award in *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 was £200,000 each.

repeatedly accused by sections of the national media of complicity in that abduction and possibly in murder.

45. Restricting the compensation available in libel actions to too low a level may also have pathological consequences. We would be concerned that a cap of £10k would leave the repercussions of even the most serious libel almost negligible for an international media company. If, in the absence of both effective alternative regulatory mechanisms and adequate alternative remedial options, one of the functions of the law of libel is to discourage irresponsible journalism, damages need to be set at a level that encourages the taking of due care. The envisaged cap is woefully inadequate to perform this function and may well lead to the excesses of the early 1990s that characterised some sections of the British press.

46. By way of footnote, we note that the authors of the Index / PEN report also suggest that the primary remedy in libel actions should be the correction and/or apology.[43] Insofar as the purpose of libel remedies is to offer vindication, this is an appealing and possibly a sustainable point. We note, however, that corrections or apologies made would necessarily have to be allowed equivalent exposure as the original defamation and that satisfactory performance of this remedy would require to be overseen by some regulatory mechanism. Moreover, the purposes of libel remedies as currently understood extend beyond vindication alone.

Points of Substance for Further Consideration

47. Of the various criticisms of existing libel law and proposals for reform, we consider that only a limited number involve points of substance. In our view, however, these points are deserving at least of further consideration in an appropriate policy forum. We are encouraged that the Government has established a working group to contemplate libel reform, and urge that the following issues form part of their considerations. That said, we do not ourselves necessarily advocate change in any of

[43] Index / PEN report, above n 2, 8 (recommendation 2).

these respects: the introduction of a single publication rule for online publication; the introduction of a specialised libel tribunal or other cost-saving process change; the denial of standing to corporate entities; relieving the costs burden, and introducing legislation to permit defendants to counter-sue abusive libel claimants.

Single publication rule for online publication

48. Under English libel law, 'publication' occurs on each occasion that a statement is accessed as opposed to the occasion on which it is – in lay terms – published. This is the *Duke of Brunswick* / multiple publication rule. In the context of the maintaining of online digital archives by traditional media companies, this rule results in a heightened legal risk that is arguably undesirable given the social benefit delivered by such archives. In the wake of the *Loutchansky* litigation and the subsequent action brought by Times Newspapers before the Strasbourg court,[44] there have been calls for the introduction of a single publication rule for online publication. The Government conducted a consultation on this theme in late 2009.

49. In a response to the Government consultation, we concluded that the case for abolition of the multiple publication rule was not made out. We do not agree that the current rule "defies common sense". Instead, we concluded that an almost equally simple and efficacious alternative solution was available and suggested the introduction of a new defence of 'non-culpable republication' alongside retention of the multiple publication rule. Subject to certain conditions, this defence would extend not only to online archive publishers but also potentially to other authors whose work is replicated by others across the internet.[45]

50. We considered that a single publication rule (even with an extended limitation period) would not always allow for an appropriate balance to be struck between Article 10

[44] Respectively, *Loutchansky* v *Times Newspapers Ltd* [2001] EWCA Civ 1805, and *Times Newspapers Ltd (Nos 1 and 2) v. United Kingdom* (nos. 3002/03 and 23676/03).
[45] The response can be read in full here: [WWW] http://lsemediapal.blogspot.com/2009/12/single-publication-rule-or-defence-of.html (accessed January 2010).

rights to communicative freedom and competing rights to privacy and reputation. A single publication rule would automatically absolve both the author and the host of an impugned archive statement of any responsibility for its making after the requisite limitation period following first publication. We did not consider that this is appropriate. Not every author of a defamatory statement – or every archivist of online content - is deserving of exoneration from liability. In the online environment, the availability of past statements can continue to be horrendously damaging.[46] At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed.

51. Like the authors of the Index / PEN report, we welcomed the Government's consultation initiative and await the outcome of the exercise with interest. We recommend that the Government working party on libel reform attend to this issue.

Introduction of a specialised libel tribunal or other cost-saving process change

52. Proponents of libel reform sometimes suggest that some alternative forum for the resolution of libel disputes should be introduced. To the extent that it may result in lowered process costs, greater access to justice for claimants, and a retained balance between interests in freedom of expression and reputation / privacy in terms of outcomes and remedies, this is an interesting idea that may well be worthy of more full examination.

53. To the extent that the purpose of such a move would be to lower costs, we note that the introduction of a media self- or co-regulatory system that was able to secure fairness between parties and adequate remedies may be equally effective for most cases. We note that the existing regulatory regime for broadcast advertising comprises an effective arrangement of the latter type between Ofcom and the Advertising

[46] For instance, we are aware of a case in which a series of false and malicious allegations were made on a dedicated offshore website by a disaffected former associate regarding the various members of a family. These allegations included false imputations of paedophilia. The ramifications for one family member of the repeated accessing of this content over a prolonged period by means of search engine was that he became effectively unemployable.

Standards Authority. We recognise the shortcoming that any such regime would not be open to non-media libel defendants.

54. Similarly, the rationalisation of the existing libel process may prove as fruitful as the introduction of a specialised tribunal. Such rationalisation might involve procedural and/or substantive legal change aimed at reducing costs. We note for example – and admittedly on the basis of anecdotal evidence – that in most cases the *determination of the meaning* of putatively defamatory statements is an exercise that consumes a very large proportion of lawyers' preparatory and court time. In terms of procedure, for example, if meaning was determined by the judge only then time-consuming and wasteful duplication of argument before the jury could be avoided. We note the point mooted by Lord Justice Jackson on the possible future removal of the jury from libel trials altogether.[47]

55. Revision of the substantive law may have similar effect on the time and cost spent on determination of meaning. For example, it might reasonably be determined that the purpose of damages would henceforth be to compensate only for (a) the claimant's upset and harm to self-esteem caused by the perception that others would consider them less highly as a result of the defamation, and (b) any proven special damage. Were this the case, the question of meaning would become straightforward: on one hand, it would be simply the meaning inferred by the claimant, while on the other it would be the *actual* meaning inferred by those whose responses occasioned the effective financial loss. The question for the court would shift to being only that of whether the meaning inferred by the claimant was a reasonable one or rather a strained product of an overly sensitive mind.[48] The upshot would be a foreshortened, and hence a less costly libel process.

[47] Jackson, above n 41, ch. 32.
[48] We note also that such an approach would amount to the ending of the presumption of damage as recommended by the Index / PEN report.

56. We do not wish ourselves to sponsor any of the foregoing suggestions, but do recommend that the Government working party on libel reform attend to these possibilities.

57. In this regard, by way of aside for the sake of accuracy, we also highlight that the claim made in the Index / PEN report that there are currently few viable alternatives to a full trial is misleading.[49] At present, a number of such alternatives to a full trial do exist. We identify these below. Moreover, it should also be emphasised that the number of cases that do reach a full trial is tiny. Each year, slightly in excess of 200 cases are initiated before the High Court.[50] Others will of course have been threatened, but will have come to nothing or been settled without the need to commence a claim. Of those that are initiated, the vast majority will be settled or disposed of by means other than full trial. According to Mr Justice Eady, there have been only four full trials in each of the last two years.[51] It seems fanciful given these facts to suggest that alternatives to full trial do not exist.

58. Beyond setling a claim informally, there are three key routes to early resolution of libel actions. First, the court is required to further the overriding objective of the Civil Procedure Rules by active case management and this includes encouraging the parties to use an Alternative Dispute Resolution procedure such as mediation or arbitration if that is appropriate. Moreover parties are given the opportunity when filling in the allocation questionnaire to request a stay of the proceedings for one month to try to settle the claim by ADR or other means. A failure to take the use of ADR seriously, particularly if the court has suggested this, is likely to have serious cost consequences for a party that has refused to take part.

59. Secondly, either party may apply to have the case dismissed under the summary disposal procedure established by the Defamation Act 1996. The Act requires that

[49] Index / PEN report, above n 2, 9 (recommendation 5).
[50] According to a study conducted by Reynolds Porter Chamberlain he precise figures for 2008 were 213, and for 2009, 259.
[51] (2009) Libel judge raises 10 issues for reformers to consider. *Media Lawyer*, 3 December.

every defamation action must come before a judge at an early stage so that it can be decided whether the case is suitable for summary disposal even where the parties have not asked for such an assessment. Where the summary disposal procedure is used, the maximum sum recoverable by way of damages is £10,000.

60. Thirdly, a defendant who realises that he has defamed the claimant and wishes to dispose of the claim as quickly as possible can use the 'offer of amends' procedure contained in sections 2-4 of the Defamation Act 1996. Under this procedure, the defendant must make a suitable offer of amends and undertake to pay the claimant's costs and a sum by way of damages. A failure to accept a suitable offer gives the defendant a defence in any subsequent proceedings. Where the parties cannot agree an appropriate sum by way of damages, this will be fixed by the court applying the ordinary principles of assessment save that a discount (usually around 40-50%) will be applied to reflect the fact that the defendant apologised in a timely fashion.

Denying corporations the right to sue

61. The question as to whether corporate entities should be allowed standing to sue for libel is an interesting issue, and one which is certainly worthy of further consideration. The authors of the Index / PEN report suggest that corporations should be free to sue for malicious falsehood only.[52] In contrast to defamation, this tort requires the claimant to prove malice, falsehood and special damage, although there is no need to show that the statement was defamatory. In support of this proposition they draw an analogy between such entities and public bodies (which are not currently allowed standing to sue), and cite the example of Australia that has recently restricted standing to private groupings that employ no more than 10 people. We would add that larger corporations may often have other means available – for example, through advertising or by utilising sophisticated public relations machinery to access the public sphere through the media and other routes – to counteract inaccurate claims.

[52] Index / PEN report, above n 2, 10 (recommendation 10).

62. Nevertheless, we also note that Australia is the only major jurisdiction that has seen fit to prevent claims by trading companies. The European Court of Human Rights has held that allowing a large multinational company to sue in defamation does not constitute a breach of Article 10.[53] Even the United States continues to allow claims to be brought by corporate entities, and in many cases a corporation would be treated as a private figure free from the *New York Times v Sullivan* requirement to prove actual malice against a media defendant.

63. Moreover, there is arguably very good reason to continue to allow corporations to sue. The good name of a company, perhaps even more than that of an individual, is a thing of value. A damaging libel may make a company less attractive for investors to invest in, employees to work for, and customers to deal with. As investor and philanthropist Warren Buffett famously noted, "it takes 20 years to build a reputation and five minutes to ruin it". There is nothing repugnant in the notion that this value is something that the law should protect.

64. It may be that a middle route would be to require corporations to prove special damage – that is, that they have suffered actual or likely financial loss – as a result of the defamatory comment.[54] We note, however, that this may pose a 'catch-22'. A damaging publication about a company will be less likely to result in provable financial loss in cases where the issue of proceedings is prompt and their pursuit diligent. The company would therefore have an incentive to allow the damage to accrue before acting, or by proceeding quickly would extinguish the basis of their claim. Again, we recommend that the Government working party on libel reform attend to this issue.

[53] *Steel and Morris* v *United Kingdom* (2005) 41 EHRR 403.
[54] Precisely this issue provided the second strand of argument in *Jameel v Wall Street Journal Europe* [2006] UKHL 44. There, their Lordships narrowly rejected the argument that proof of special damage should be required of corporations.

Relieving the costs burden

65. Perhaps the single most significant complaint regarding the current libel regime in England and Wales is the cost of embroilment in proceedings. Costs of proceedings here are said to be four times as high as the next most expensive European state (Ireland), and 140 times the average cost in other European jurisdictions.[55] 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. 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.

66. 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) permit the charging of an uplift on costs (the 'success fee') of up to 100% (although in practice this uplift would rarely exceed a figure of half that). 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.

67. The explanation as to why libel actions are so costly is contested. We note that only a tiny proportion of cases commenced ever go to trial thereby incurring the highest levels of costs. The vast majority settle in the early stages, with only very moderate costs being incurred. The attitude manifested by the defendant when faced with a claim is often the most important determinant of the eventual cost of the proceedings. In the scenario where the defendant accepts there has been a mistake, an early apology and offer of appropriate compensation will usually result in costs that are

[55] PCMLP (2008) *Comparative Study of Costs of Defamation Proceedings Across Europe*. Available at: [WWW] http://pcmlp.socleg.ox.ac.uk/ (accessed January 2010). It should be noted that in many European jurisdictions the burden of prosecuting libel actions falls upon the state and not private litigants with the unsurprising upshot that private costs are necessarily significantly lower than in England and Wales.

moderate and proportionate. Should cases be fought, whether unreasonably or because the defendant wishes to stand behind the publication, then costs can mount substantially. Importantly, the UK costs regime raises significant disincentives against claimants pursuing unreasonable damages claims. Where a reasonable offer of compensation (a Part 36 offer) made to a claimant is refused and the court later determines that continuation of the case was unreasonable, there will be a heavy penalty by way of an award of costs. Overall, this position does mean that it will often be the hard cases – those in which both parties believe fully in the persuasiveness of their legal cases - that result in the highest costs.

68. The proponents of libel reform often call for the costs issue to be addressed. For example, in the Index / PEN report it is suggested that success fees should not be chargeable, base costs should be capped, and ATE premiums should not be recoverable.[56] We fully understand and share the desire to reduce the costs of libel actions. We would be concerned, however, that bald reforms of this nature would so disincentivise claimant lawyers as to result in the withdrawal of offers to act on CFAs with attendant repercussions for access to justice for most claimants. We would be concerned that the Government's recent proposal to limit 'success fees' to a maximum 10% uplift on costs may have this effect.[57] Any reform must be designed to accommodate the need to facilitate all prospective claimants in gaining access to justice, and hence to incentivise lawyers to take on their cases. We are loathe to see libel become once again exclusively a rich man's law.

69. The Government has recently initiated a mandatory twelve month costs budgeting pilot for defamation cases,[58] and moreover the Jackson report on civil litigation costs – with its sophisticated array of proposals designed to remedy the costs burden - has just been published.[59] We do not intend in this paper to comment in detail on that report, but note that his reflection of the issues seems markedly more balanced than

[56] Index / PEN report, above n 2, 10 (recommendation 8).
[57] Ministry of Justice (2010) *Controlling costs in defamation proceedings*. CP1/2010. London: MoJ.
[58] Ministry of Justice (2009) *Controlling costs in defamation proceedings: response to consultation.* CP4/09. London: MoJ.
[59] Jackson, above n 41, ch. 32.

those that are sometimes aired in newspaper articles and elsewhere. We hope and expect that these reviews will culminate in reforms that will serve to reduce the costs of libel proceedings while promoting access to justice for all parties. We do not expect, however, that this can be achieved in such a way as to affect by orders of magnitude the costs of the process in the absence of some more fundamental reform of the law and procedures by which reputations are balanced against freedom of expression.

Legislation to permit defendants to countersue abusive libel claimants

70. A primary complaint raised by the proponents of libel reform is that the law can be used to coerce journalists and others to pressure them against bringing to public attention important information regarding the activities of the powerful. This is precisely the claim made by Index on Censorship and English PEN regarding recent actions involving, for example, human rights NGOs, members of the scientific and medical communities and others. Without intending any prejudice to live cases, we acknowledge that such behaviour does from time to time occur although we consider it by no means typical of libel claimants generally.

71. As evident from the above discussion, in our view the substantive law of libel can no longer be said to facilitate such improper designs. We recognise, however, that for some defendants the sheer cost of embroilment in libel proceedings can have that effect. Rather than tinker with the law of libel to avoid this possibility (or perhaps, quite aside from any libel reform deemed necessary), we would prefer that thought be given to tackling such abuse of the legal process directly.

72. The abusive use of the legal process to deter important public interest comment has long been recognised in other jurisdictions. Indeed, in studying the phenomenon two American professors have adopted the inelegant but informative terminology of the

SLAPP, or 'strategic lawsuit against public participation'.[60] US judges have been watchful for instances of such abuse, recognising that it can be a most effective weapon. As one American judge has explained, "short of a gun to the head, a greater threat to [freedom of expression] can scarcely be imagined".[61] A similar deterrent jurisprudence has developed under the Canadian Charter of Rights.

73. British judges also arguably enjoy the right to assess the motivations underlying actions taken by litigants and to strike out SLAPPs. This power is to be found in paragraph 2(b) of Rule 3.4 of the Civil Procedure Rules, which envisages the striking out of a statement of case where it amounts to "an abuse of the court's process".[62] A Practice Direction explains that this criterion is satisfied where a statement of claim is "vexatious, scurrilous or obviously ill-founded", but there is no more precise definition. Lord Bingham has suggested that an abuse occurs where a plaintiff has been "using that process for a purpose, or in a way significantly different from its ordinary and proper use".[63] The action becomes "merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate".[64] Thus, even a claim with an apparent foundation in the law of tort may be struck out should a judge deem such action appropriate. The power has been exercised where a claimant has brought proceedings with no intention of bringing them to a conclusion.[65] It might also be utilised in the face of SLAPPs.

74. Providing defendants with the means to 'win the case', however, is not the crux of the issue. The unusual feature of SLAPPs is that their bite is most often felt prior to the substantive question reaching court. Many potential defendants will seek to escape the courtroom, and will do so by capitulating to the threat. They will self-censor their

[60] Canan and Pring (1988) Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches. *Law and Society Review*, 22(2), 385-395; (1988) Strategic Lawsuits Against Public Participation. *Social Problems*, 35(5), 506-519; (1996) *SLAPPs: Getting Sued For Speaking Out.* Philadelphia: Temple Univ. Press. Academic coverage of the phenomenon in the UK is spartan, although see Donson (2000) *Legal Intimidation*. London: Free Association Books.
[61] *per* Judge J. Nicholas Colabella, *Gordon* v *Marrone* (1992) 590 N.Y.S.2d 649, 656 (Sup. Ct.).
[62] SI 1998/3132, as amended.
[63] *Attorney General* v *Barker*, *The Times*, 7 March 2000, para 19.
[64] *per* Mr Justice Isaacs, *Varawa* v *Howard Smith Co.* (1911) 13 CLR 35, 91.
[65] *Grovit* v *Doctor* [1997] 1 WLR 640.

future contribution to the public sphere. Many claimants will forego the action as hearing dates approach. The courts have recognised that the fact of being sued at all can be a serious interference with the freedom of expression. What becomes vital is the existence of some disincentive to the intimidatory legal suit being brought in the first place.

75. One practical ramification of any signal by the court that it will be watchful for deleterious actions would be to cow prospective SLAPP plaintiffs from that course of action. A more proactive option, however, would be for defendants to be allowed some means to counter-sue the claimant both to recover costs expended and to obtain damages on account of the breach of expression rights. The prospect that the defendant might 'SLAPP-back' would immediately see a prospective plaintiff pause to reconsider the advisability of bringing an intimidatory action.

76. It may be possible for the courts to develop the torts of 'malicious civil proceedings', and 'abuse of process' so as to provide defendants with a cause of action in these circumstances, but legislative intervention would be preferable. By deciding not to transpose Article 13 ECHR into domestic law, Parliament has resiled from providing a general cause of action available in the case of breach of Convention rights. In contrast, a large number of US States have introduced anti-SLAPP legislation. Indeed, the more aggressive forms of the libel tourism legislation mooted currently in the US – those that would allow recovery of costs and counter-damage claims – stand as exemplars in this specific context. Clearly, such legislation would raise Article 6 ECHR access to justice issues, which would need to be balanced against the Article 10 considerations. It may be, however, that legislation to provide for such counter-suits may be considered desirable and necessary in the libel context. Certainly, it has recently been lamented that such deterrent measures are not available to the victims of

'spurious' libel actions brought in the British courts.[66] Again, we recommend that the Government working party on libel reform attend to this option.

[66] Sullivan (2010) *Libel Tourism: Silencing the Press Through Transnational Legal Threats* (Center for International Media Assistance), 18. Available at: [WWW] http://cima.ned.org/wp-content/uploads/2010/01/CIMA-Libel_Tourism-Report.pdf (accessed January 2010).