Defamation, the right to freedom of expression and libel reform in the UK: A comparative analysis of legal regulation and jurisprudence in England and Wales, the United States of America, Germany, and the European Court of Human Rights

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Abstract

Free speech advocates had long argued that the UK's common law on defamation was too claimant friendly and as such either potentially or actually chilled free speech. The phenomenon of libel tourism to the UK, illustrated by several high profile cases and arguably the result of the claimant friendly tilt of the law, served to prompt various actors including the United States Federal Government, the European Parliament and the UK Government itself, to call for reform. This culminated in Parliament's ambitious attempt to fundamentally transform libel law in the UK: the Defamation Act, 2013 ('*the Act'*). More than five years down the line, enough time has elapsed to start analysing the success of this attempt. Specifically, the question may be asked whether the Act succeeds in redressing the balance between the protection of reputation and freedom of speech, one of the stated aims of the legislative reform. To answer this question the Defamation Act 2013 itself, and the case law it has engendered may now be meaningfully examined. Next, a comparative analysis of other jurisdictions are useful. The logical starting point is the United States of America, where freedom of expression is strongly protected. From there the focus shifts to Germany: given its constitutional balancing freedom of speech and 'personal honour', it seems to occupy the middle ground between the perceived extremes exemplified in the USA on the one hand, and on the other the common law of defamation prior to its reform in England and Wales. Finally, for its highly developed balancing approach and its general reflection of European legal thinking, the European Court of Human Rights' jurisprudence is examined.

Although much has been written about the disparate topics covered in this research, i.e. defamation and freedom of speech broadly speaking, a comparative analysis of the abovementioned jurisdictions, chosen for their differing stances, will assist in shedding light on the way in which the Defamation Act 2013 has so far been, and may be developed and interpreted in order to truly redress the balance in favour of freedom of expression in England and Wales.

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List of abbreviations

BGB	German Civil Code (*Bürgerliches Gesetzbuch*)
BGH	German Federal Supreme Court (*Bundesgerichtshof*).
BVerfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HOL	House of Lords
StGB	German Criminal Code(*Strafgesetzbuch*)
SC	Supreme Court of the United Kingdom
UK	United Kingdom of Great Britain and Ireland
US	United States of America

CHAPTER 1: SETTING THE SCENE

1. Introduction

Western philosophy recognised freedom of speech[1] long before its inclusion in the 1948 Human Rights Declaration: John Stuart Mill's classic essay 'Of the Liberty of Thought and Discussion', dating back to 1859, has proven to be an enduring starting point on the topic.[2] Today freedom of speech is one of the most highly valued human rights, with almost universal acceptance as a *sine qua non* for democratic societies. It is included in international conventions such as the Universal Declaration of Human Rights (Article 19), the European Convention of Human Rights (Article 10) and the Charter of Fundamental Rights of the European Union (Article 11),[3] to name but a few.

Freedom of speech is not an absolute right, and it often conflicts with other important rights, such as the right to privacy and the right to preserve a good reputation. It is now recognised that Article 8 of the European Convention on Human Rights (ECHR),[4] which protects the right to privacy, also includes the 'right to reputation'.[5] Reputational rights are accorded protection to varying degrees. For example, in international law the Universal Declaration of Human Rights (Article 12) as well as the International Covenant on Civil and Political Rights (Article 17) recognise the right to legal protection from attacks on individual honour and reputation. On the national level many jurisdictions protect individual reputation through defamation laws specifically. In Germany, both rights are included in the

[1] Throughout this work, the terms 'free speech', 'freedom of speech' and 'freedom of expression' are used interchangeably.
[2] Mill, JS *On Liberty* (London: Longman, Roberts & Green, 1869, originally published 1859).
[3] Article 11 states: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.2. The freedom and pluralism of the media shall be respected.
[4] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) 213 UNTS 221.
[5] Mullis, A and Scott, A 'The Swing of the Pendulum: Reputation, Expression and the Recentering of the English Libel Law' (2012) 63 *Northern Ireland Legal Quarterly* 27-58.

Constitution: The German Constitution (*Grundgesetz*, or GG) in Article 5(1) guarantees the right to freedom of expression, but in Article 5(2) states that the right is subject to limitations including the right to 'personal honour'. In the United Kingdom, reputation has long been vindicated in the courts, with the common law action in defamation stretching back to the 1600s.[6]

A wealth of information exists about both the right to freedom of speech and defamation,[7]and much has also been said about the cross-boundary implications of differential national treatment of (especially) libel and freedom of speech.[8] This has also led to concerns about 'libel tourism' - the practice of forum-shopping for a jurisdiction favourable to libel claimants.[9] This term referred specifically to England and Wales for its relatively generous, jury-driven libel awards.

Furthermore, it had been argued for some time (prior to 2013, when the UK Parliament intervened) that defamation laws in England and Wales[10] were biased in favour of claimants – the European Parliament, for example, in May 2012 termed England and Wales 'the most claimant-friendly in the world'.[11] This thesis proceeds from the premise that these two factors combined had a chilling effect on freedom of expression, in that the mere threat of a libel action could serve as a deterrent to fearless expression.[12] Since such a chilling effect is in reality a form of self-censorship, it is particularly difficult to gauge. Nevertheless, as will

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[6] See McNamara, L *Reputation and Defamation* (OUP, Oxford 2007), chapter 3 'Reputation and the History of Defamation'. Post, RC 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691 provides a good discussion of the foundations of defamation law in both England and the United States.

[7] Barendt, E *Freedom of Speech* (2nd edn OUP, Oxford 2005), chapter 19 'Libel and Invasion of Privacy', 198-230.

[8] Jones, M 'EU Law Relating to Online Infringement of Personality Rights – is EU Law Effective in Preventing Forum Shopping for the Pursuit of Actions Arising from Online Infringement of Personality Rights?' in Weaver, RL, Gilles, W *et al* (eds), *Privacy in a Digital Age: Perspectives from Two Continents* (Carolina Academic Press, Durham, North Carolina, 2017) pp 47-72.

[9] It is commonly accepted that this term was coined by Wheatcroft, G 'The Worst Case Scenario' *Guardian* (London 28 February 2008) <http://www.theguardian.com/commentisfree/2008/feb/28/pressandpublishing.law> accessed 14 November 2013.

[10] This thesis focuses on the law of defamation of England and Wales. Reference to England or English law should be read as including Wales. It should be noted that Northern Ireland declined to adopt the Defamation Act 2013.

[11] European Parliament Resolution of 10 May 2012 (2013/C 261 E/03), paras C-E.

[12] The Chilling Effect in the UK has been proven empirically for as long as twenty years: Barendt, E, Lustgarten, L, Norrie, K and Stephenson, H *Libel Law and the Media: the Chilling Effect* (Clarendon Press 1997) 191.

become clear from the discussion below, there is compelling evidence that the chilling effect is of concern both internationally and locally and of course the very enactment of the Defamation Act 2013 can be viewed as an admission of concern about the chilling of free speech.

The central aim of this thesis is to evaluate whether the Defamation Act 2013 adequately addresses these free speech concerns, thereby providing a mechanism for balancing reputational rights and the right to free speech in England and Wales. Given the existence (and problem) of libel tourism, and the fact that the chilling effect is a concern shared by many jurisdictions, the thesis compares the way in which these are addressed in a choice of key jurisdictions: the United States of America (US), Germany, and the European Court of Human Rights (ECtHR). Globalisation of necessity entails that the UK at least notes and perhaps learns from the way in which common issues of concern are addressed in key jurisdictions.

2. Contribution of the proposed research

As stated above, libel tourism to England and Wales has been identified and acknowledged as a problem by various stakeholders including the US Federal Government,[13] the European Parliament[14]and the UK Government itself.[15] Libel tourism itself could be viewed as a symptom of a bigger issue namely the alleged chilling effect English common law of defamation had on the right to freedom of speech. One can also approach this problem

[13] In order to protect its citizens' constitutional freedom of speech, the US enacted the 'Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act in 2010, following the enactment in New York of 'Rachel's Law', the Libel Terrorism Protection Act 2008. For a discussion of this Act see Feldman, M 'Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction under New York's Libel Terrorism Protection Act', (2010) 31 *Cardozo Law Review* 2457, 2461.

[14] The European Parliament in its Resolution of 10 May 2012 (2013/C 261 E/03) made recommendations to the Commission of the European Union on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), in order to attempt to prevent libel tourism to the UK – despite noting the potentially positive effect of the then proposed Defamation Act 2013.

[15] Paragraph 65 of the Explanatory Notes to the Defamation Act 2013 acknowledges the existence of libel tourism to England and Wales, and explains how the 2013 Act seeks to address this issue. Earlier, the House of Commons Culture Select Committee Report on Press Standards, Privacy & Libel 2010 termed the fact that the US felt the need to protect its citizens against English libel laws (by enacting the SPEECH Act 2010) a 'national humiliation'.

from the other direction by examining the extent to which the right to freedom of expression itself can and does curb the chilling effect of English defamation law. Before outlining how the author proposes to pursue an answer to this question, it should be stated that the notion of freedom of expression as a defence is not foreign to UK jurisprudence: Barendt points out that prior to its recognition as a fundamental right in the Human Rights Act 1998 (HRA), freedom of expression had 'mostly been treated as a *defence* or as an *exception* or *qualification* to other well-established legal rights, such as the right to reputation.'[16] The question is whether the legislative reform in the Defamation Act 2013 sufficiently addresses the inhibitory effect of the common law of defamation on free speech.

Since the coming into effect of the Defamation Act 2013 several important cases have been decided which signal the direction in which the Act's impact is heading. But it is still relatively early in the day, and further developments and interpretations may yet signal a change of course. In a newly reformed and developing area of law, it is useful to compare developments in other key jurisdictions. A good place to start is by examining practice and regulation in a jurisdiction where freedom of expression is strongly protected, such as the United States of America.[17] In addition, given the European Union's concerns about libel tourism in England and Wales, it would be useful also to examine a continental jurisdiction – such as Germany, being the most powerful of the EU states. Germany also makes a natural choice as it is a jurisdiction in which freedom of speech and the right to a reputation are constitutionally balanced[18] and therefore Germany seems to occupy the middle ground between the perceived primacy of freedom of speech in the USA versus the perceived primacy of defamation in England and Wales (at least, prior to the reforms in 2013).[19] Relevant jurisprudence from the European Court of Human Rights (ECtHR) also deserve

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[16] Barendt, *Freedom of Speech* note 7, 41.

[17] For example, the First Amendment accords protection against pre-publication censorship or 'prior restraint' – see the landmark cases of *Near v Minnesota*, 283 U.S. 697 (1931) and *New York Times Co. v United States*, 403 U.S. 713 (1971).

[18] German Constitution, Article 5.

[19] See par 5.4 below in the literature review for the argument as to why jurisprudence from the European Court of Human Rights cannot form the sole basis for comparison in this regard.

scrutiny due to its continuing gravitas in the development of UK law in general and personality rights in particular. Much has been written about the disparate topics covered in this research (defamation, freedom of speech, libel tourism and so on), and a brief synopsis follows in the literature review below.

This thesis proceeds from the fact that the UK recognised that freedom of speech was being limited in England and Wales through its defamation laws, and acted on that recognition by promulgating the Defamation Act 2013.[20] The question is whether this goes far enough to adequately redress the balance with freedom of expression. Put another way, the question is whether the enactment of the 2013 Act rings the death knell for defamation's chilling effect on free speech in England and Wales. Academic reaction is mixed,[21] but if the number of suits pursued is any indication, the answer may be positive. There has been a pronounced drop in the number of libel suits pursued,[22] to such an extent that England and Wales can no longer be termed the 'libel capital of the world'.[23] But does that necessarily translate to a positive effect on free speech in England and Wales?

Enough time has now lapsed since its enactment for an in-depth and systematic look at the courts' interpretation of the Defamation Act 2013 in this regard. This, in turn, would benefit from an examination of the jurisdictions chosen for the focus of this study. There are several excellent comparative analyses of defamation in a number of jurisdictions, but most of these predate the 2013 legislative reform. An up to date comparative analysis of key

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[20] The Defamation Act 2013 applies to England and Wales only, except that sections 6 and 7(9) and 15 and 17 and, in so far as it relates to sections 6 and 7(9), section 16(5), also extend to Scotland. Therefore, wherever reference is made to England or the law of England, this extends to Wales as well.

[21] Mullis, A and Scott, A 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) Modern Law Review 87-109; Krishnan, S 'Lord Lester's Defamation Bill: Striking a Balance?' (2012) *Entertainment Law Review* 25; Sanchez, T 'London, Libel Capital No Longer?: The Draft Defamation Act 2011 and the Future of Libel Tourism' (2010-2011) 9 *University of New Hampshire Law Review* 469.

[22] For example, in 2016 there were only 37 decisions in defamation proceedings, down from 56 in 2015, and only eight of these cases went to trial; see the Inforrm blog of 5 September 2017 at <https://inforrm.org/2017/09/05/using-data-protection-law-to-defend-your-reputation-what-about-the-new-data-protection-bill-michael-patrick-and-alicia-mendonca/> accessed 22 November 2017. There were 49 reported defamation cases in the UK over the year to the end of June 2017 that made it to a court hearing, down from 86 three years ago, according to research by Thomson Reuters; see Mayhew, F 'Higher Threshold of Harm Has Seen Number of UK Defamation Cases Drop as Celebs Look to Privacy Actions to Fight Libel' *Press Gazette* (London 23 April 2018) <https://www.pressgazette.co.uk/higher-defamation-threshold-has-seen-number-of-uk-cases-drop-as-celebs-look-to-privacy-actions-to-fight-libel/> accessed 25 February 2020.

[23] This prompted Barendt to remark that this dubious distinction 'probably now belongs to Sydney' (in his review of Rolph, D's *Defamation Law* (Thomson Reuters, Sydney 2016) in (2017) 2 *Journal of Media Law* 291).

jurisdictions is necessary to gauge the direction that UK defamation law is taking vis-à-vis the promotion of free speech in England and Wales.

3. Research methodology

Given the large volume of material available on both defamation and freedom of speech, the methodology employed for this research comprises mainly textual analysis of legislation and sources from the four jurisdictions that form the focus of the thesis. Case law, compared across the jurisdictions, will form a major part of the analysis. As the law touching on all parts of the research is almost fully codified in the four jurisdictions, similarly extensive study of the relevant pieces of legislation is required, especially in the case of Germany which, as a civil law jurisdiction, places more emphasis on statutory codes and commentary than is done in a common law jurisdiction. As four distinct legal jurisdictions are investigated, law comparative methodology is used.[24]

4. Structure

The study consists of seven chapters: This, the first chapter, provides a synopsis of the research topic and questions, the limits of the study, a brief discussion of the proposed research methodology, and a brief literature review, setting the scene for the more detailed discussions in the chapters to follow.

Chapter 2 examines the common law of defamation in England and Wales prior to the enactment of the Defamation Act 2013, and the reasons why a wholesale reform of the law was deemed necessary. It also revisits the reasons for the protection of freedom of expression and of reputation. Chapter three examines the recent reforms incorporated in the Defamation Act 2013, its interpretation in significant cases, and its impact on the way libel actions specifically are pursued in England and Wales. It evaluates the efficacy of its reforms against its stated aims, focusing on whether the overarching goals of addressing the problems of libel tourism and the chilling of free speech have been achieved.

[24] On comparative law and its benefits to legal understanding, see Zweigert, K and Kötz, H (translated by Tony Weir), *Introduction to Comparative Law* (3rd edn, Clarendon Press, Oxford 1998).

Throughout chapters 2 and 3 focus remains on the role of freedom of speech in libel actions past, present and future. The interaction of the right to protection of one's reputation with the right to freedom of speech in England and Wales is examined, followed by an attempt to answer the question whether these rights are now equally balanced. The tentative answer, given parallel developments in privacy and data protection laws in the UK, is that the reforms do not go far enough in redressing the balance in favour of free speech. This in turn will set the scene for the next chapter's discussion of the jurisdiction where the opposite seems to hold: the United States of America and its constitutional reverence for freedom of speech.

Chapter 4 thus turns the attention to the US, and the way in which defamation actions are conducted according to US Federal Supreme Court guidelines in order to give effect to the constitutional entrenchment of the First Amendment right to free speech. Having examined the English law in the preceding two chapters, comparative analysis is now possible between these two seemingly disparate jurisdictional positions.

Chapter 5 likewise examines the position in Germany and chapter 6 analyses relevant decisions handed down by the European Court of Human Rights.

Chapter 7 summarises key conclusions from the preceding chapters and offer some ideas about the likely and/or desirable directions further interpretation of the Defamation Act 2013 may take. Best practices identified in the comparator jurisdictions are revisited as well as pitfalls to avoid. The chapter therefore ends with conclusions about where the law is, where it is headed and whether it has properly dealt with the problems identified with the English common law of defamation. As such, a contextual approach is taken, with rapidly evolving public policy issues forming a benchmark against which the changed law is tested.

5. Literature review

A wealth of information exists on the core issues addressed in this thesis and will be analysed throughout the discussion. Therefore, this brief review focuses only on key studies that have been widely cited and works by established researchers in the field, arranged thematically.

5.1 Freedom of speech

The starting point for any discussion touching on free speech remains John Stuart Mill's classic essay, 'Of the Liberty of Thought and Discussion'.[25] His central argument is that open discussion forms the basis for the discovery of truth, and this has proven to be the most durable argument for the free speech principle. It has continued to form the basis of scholarship in this regard, including that of Barendt, whose book *Freedom of Speech*[26] remains the most comprehensive and lucid modern work on the topic. Barendt discusses four arguments for the free speech principle namely (i) arguments concerned with the importance of discovering truth; (ii) free speech as an aspect of self-fulfilment; (iii) the argument from citizen participation in a democracy, and (iv) suspicion of government. Barendt's breadth of coverage in terms of topics crucial to as well as jurisdictions included in the legal debates around free speech reflect the continuing practical importance of comparative free speech law. In particular, the book provides a comparative discourse on free speech in liberal legal systems in chapter 2.[27] The second edition was published in 2005, twenty years after the first, but the legal landscapes in the UK and elsewhere have now changed enough to necessitate examining this area again.

Pech's *La Liberté d'Expression et sa Limitation* ('Freedom of Expression and its Limitation')[28] examines the US experience with regard to that of Europe, particularly that of France, Germany and the European Convention on Human Rights. Published in 2003, this work, although informative, is now dated and unfortunately remains un-translated.

A more recent, and perhaps a more sceptical analysis can be found in Koltay's 2013 work on freedom of speech.[29] His central thesis is that history teaches us that ideals such as freedom of speech never have been, and never can be, realised in full. As such, he argues, freedom

[25] Mill, note 2.
[26] Barendt, note 7.
[27] Barendt, note 7, 39-73. See also by the same author, on the status of freedom of speech in the context of libel law: Barendt, E 'Libel and Freedom of Speech in English Law', (1993) *Public Law* 449.
[28] Pech, L *La Liberté d'Expression et sa Limitation* (Les Presses Universitaires de la Faculté de Droit de Clermont-Ferrand, Auvergne 2003).
[29] Koltay, A *Freedom of Speech: The Unreachable Mirage* (CompLex Kiadó, Budapest, 2013).

of speech as an ideal remains an unattainable mirage and certainly not the touchstone of liberalism, and especially not the only fundamental criterion of a good society. At the same time, it remains an indispensable and essential basic value in liberal democracies.

5.2 Reputation and the aims of defamation law

It is axiomatic that defamation law protects reputation. However, there used to be a paucity of detailed analysis on the meaning of reputation and the reasons why the law deemed it a protectable interest.[30] This lacuna was filled in detail by McNamara's *Reputation and Defamation*, published in 2007 and comprising the first study of what reputation is, how it functions, and how it is and should be protected under the law. [31] Many students of defamation would be surprised to learn from this historical and contemporary analysis that defamation law did not aim and function to protect reputation until the early 19th century.[32] McNamara in fact argues for a re-evaluation of reputation as the interest protected by defamation law. This has found some support, notably in the argument Descheemaeker raises in suggesting that reputation could (and may eventually) also be protected under the law of negligence.[33] The blurring of lines regarding what defamation law does (and should) protect finds its clearest expression in the conflation of privacy and reputation emanating from the European Court of Human Rights' jurisprudence, and is a theme that is explored further in chapters 6 and 7 of this thesis. McNamara's work therefore serves as an interesting philosophical explanation for the shifting focus of this area of law.

5.3 General discussion of defamation in England and Wales

Collins on Defamation[34] was perfectly timed to coincide with the coming into force of the Defamation Act 2013, and provides a scholarly yet practical and comprehensive work on the English law of defamation. It contains extensive (but at the time necessarily still partly

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[30] Barendt, E 'What is the point of libel law?' (1999) 52 *Current Legal Problems* 111.
[31] McNamara, L *Reputation and Defamation* (OUP, Oxford 2007).
[32] See in particular chapter 3, 'Reputation and the History of Defamation' pp 61-80.
[33] Descheemaeker, E 'Protecting Reputation: Defamation and Negligence' (2009) 29(4) *Oxford Journal of Legal Studies* 603-641.
[34] Collins, M *Collins on Defamation* (OUP, Oxford 2014).

speculative) treatment of the 2013 Act's impact. Its prefatory statement '(g)enerally speaking, although not uniformly, the reforms tilt the balance towards greater protection for freedom of expression', founds what is being tested against practice abroad in this thesis.[35]

The twelfth edition of *Gatley on Libel and Slander*[36] again provides an authoritative and comprehensive guide to the law of defamation. The twelfth edition was published in 2013, with a 1st Supplement published in December 2015 and a Second Supplement in 2017. It covers recent case law (domestic, commonwealth and Strasbourg) and important legislation including the Defamation Act 2013, and also references cases from other jurisdictions with commentary on their relevance to English law and procedure. As such it overlaps to a certain extent with the project in this thesis, but missing from the book is a detailed focus on the United States (instead Canada, as a commonwealth country, is included) and Germany.

There was a steady build-up of critique against the common law of defamation which was perhaps best summarised in the special libel reform edition of the *Northern Ireland Legal Quarterly* in 2012,[37] with Mullis and Scott's article forming the core.[38] Critique of the Bill and the subsequent legislation itself was soon to follow. Again Mullis and Scott offered succinct insights.[39] Academic discussion now largely seems to have moved on to privacy and data protection laws, the reasons for which are touched upon briefly in, but largely fall outside the scope of, this thesis.

5.4 Comparative analyses in the areas of free speech and defamation

There are a number of works comparing these themes across jurisdictions. Barendt's *Freedom of Speech*[40] devotes its second chapter to comparing free speech in liberal

[35] *Ibid*, ix.
[36] Mullis, A, Parkes, R and Busuttil, G (eds), *Gatley on Libel and Slander* (Sweet & Maxwell 2015).
[37] Capper, D and Anthony, G (guest eds), Special Issue: Reforming Libel Law (2012) 63(1) Northern Ireland Legal Quarterly.
[38] Mullis and Scott note 5.
[39] Mullis and Scott note 21.
[40] Barendt note 7.

democracies, and chapter 6 deals with libel and invasion of privacy in select jurisdictions. Shortly afterward, Milo published a comprehensive comparative analysis of defamation and freedom of speech, paying particular attention to, and approving the constitutionalisation of the right to free speech.[41] His central argument was that defamatory speech on matters of public interest should receive greater protection than private defamatory speech. This treatise examined and evaluated the following jurisdictions in detail: England, South Africa, Australia, the US, and the European Court of Human Rights. The author also gave some attention to the laws of India, New Zealand, Canada, Namibia and Zimbabwe. Since Milo's ideas reflect much of the premises underlying this thesis, this is a work that is referenced often. It will be seen that the 2013 reforms, judged against the suggestions already formulated by Milo, can be seen as a missed opportunity for real change. Since the date of Milo's book, 2007, more than a decade has passed and much has changed. (Collins' work builds upon and further extends Milo's analyses.) Milo's book also lacks a Continental focus, unless one counts ECtHR jurisprudence in this regard. It is submitted that the discussion of German law in this thesis will redress this gap. In fact the continued focus in our courts on common law (as opposed to European decisions) was raised by Gilliker's work on the *lack of* Europeanisation of UK Tort law, which explores the difficult reception of civil law in the UK courts [my italics].[42] When research commenced for this thesis, Brexit was not even on the horizon. Now it is an ongoing reality. It could be argued that the rapidly changing relationships make a comparative analysis with a key civil law jurisdiction more, not less important.

A Continental take on the issues under discussion is provided in Georg Nolte's German book on defamation law in liberal democracies.[43] His analysis of how the constitution underpins jurisprudence on libel in Germany still forms the basis of decisions handed down in that jurisdiction today, and reflects the call for a more constitutional approach subsequently formulated by Milo (above). It is a pity that this 1992 work has not been updated since.

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[41] Milo, D *Defamation and Freedom* of Speech (OUP, Oxford 2008).
[42] Gilliker, P *The Europeanisation of English Tort Law* (Hart Publishing, Oxford and Portland, Oregon 2014).
[43] Nolte, G *Beleidigungsschutz in der Freiheitlichen Demokratie* (Springer, Heidelberg 1992).

And of course it suffers from not having been translated into English, thus remaining largely inaccessible to many UK scholars.

Luckily (for English lawyers) the jurisprudence of the ECtHR is mostly available in English, and a fair summary of recent cases relevant to this study can be found in the 2016 Council of Europe publication entitled *Freedom of Expression and Defamation – A study of the case law of the European Court of Human Rights*.[44] Although comprehensive, the booklet is mainly descriptive and lacks a theoretical framework.

American scholars have also been interested in the contrast between the English and US laws on defamation. From a variety of articles written on this topic, special mention could be made of the following two. Weaver succinctly summarised the US position on (and general exasperation with) the English common law of defamation pre-2013,[45] whereas the most succinct recent analysis addressing the 2013 reforms comes from Johnson in his 2016 article comparing defamation law in England and the US.[46]

So while there are numerous works on defamation, many are dated. There are also several comparative analyses in this field, but they tend to focus on common law jurisdictions, perhaps because of language issues. The jurisprudence of the ECtHR is included in several of these, but what is missing is the voice of a civil law jurisdiction and lessons that may be learnt from there during what remains the infancy of reformed English defamation law.

The rest of this introductory chapter sets out, in broad strokes, the background to what follows in further chapters and how the thesis aims to provide a novel comparative analysis in this field.

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[44] McGonagle, T with McGonagle, M and Ó Fathaigh, R *Freedom of Expression and Defamation – A study of the Case Law of the European Court of Human Rights* (Council of Europe, Strasbourg 2016).
[45] Weaver, RL 'British Defamation reform: an American perspective' (2012) 63(1) *Northern Ireland Legal Quarterly*, 97-117.
[46] Johnson, VR 'Comparative Defamation Law: England and the United States' (2016) 24 *University of Miami International and Comparative Law Review* 1.

6. Competing rights: Free speech and reputation

6.1 Reasons to protect freedom of speech

Free speech is protected in some form in every modern liberal democracy. It could even be argued that a state does not merit being called either liberal or a democracy, if it does not protect freedom of speech. Indeed, so well entrenched is this right that nowadays debate is usually constrained to its limitation, rather than its substantive nature. Because of its wide acceptance, Barendt remarks that free speech is prized by liberals for reasons that they may not understand.[47] But, in deciding how to weigh up competing interests the normative value of the interests should determine their relative weight, which in turn should dictate where the balance should lie should these interests in fact come into conflict. It therefore makes sense to first pause and revisit the reasons why free speech and reputation are deemed worthy of protection, before examining the balancing act attempted by the Defamation Act 2013.[48]

It is submitted that both freedom of speech and defamation could fruitfully be viewed by focusing on societal interests. Several of the most important theoretical bases underlying the value of free speech allocate the benefit of free speech in this manner.[49] A good place to start is John Stuart Mill's classic essay 'Of the Liberty of Thought and Discussion', in his work on democratic freedom, *On Liberty*.[50] Mill's stated goal in *On Liberty* is to identify the nature and limits of the power which can be legitimately exercised by society over the individual. His famous argument from truth emphasises the interests of society in discovering the truth. For this, he argues, society should not merely tolerate, but embrace speech that is considered objectionable. The reasons for this are fourfold: Nobody is infallible, and therefore we must be open to the possibility that an opinion that deviates from the mainstream might be true. Next, even where an argument is substantially wrong, it may still contain a portion of truth that is missing from the accepted opinion. If the prevailing

[47] Barendt, note 7, 1.
[48] For an explanation of these theories, see Barendt, note 7, chapter 1 ('Why Protect Free Speech?').
[49] *Ibid*.
[50] Mill, note 2.

opinion is completely true, it still needs to be open to challenge for it is only through frequent challenge and vigorous defence that those who hold the opinion can fully understand the rational grounds for the opinion. Finally, related to the last point and of particular importance to our current analysis, Mills argues that in the absence of vigorous debate, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on character and conduct.[51] In short, an argument may persuade the audience members to change their minds, or it may cause them to defend their stance on the matter.[52] Either way, the focus is on the argument, the message, the speech, rather than the speaker. The speaker has the right to free speech only as a function of delivering the message.

This is also the case in the next theory, the argument from citizen participation in a democracy. Meiklejohn, a leading exponent of political speech, emphasised the importance of the electorate being able to access a variety of opinions on political and social matters. This at the least equals, and probably outweighs, the individual speaker's interest in participating in the discourse.[53] A further theory, best framed by Scanlon, explores free speech as an aspect of individual self-fulfilment or autonomy and holds that the justification for freedom of speech proceeds from the right of an individual to consider all the arguments and views that may determine their course of action.[54] Of course the liberal notion of individual autonomy also includes the speaker's right to determine the content of their speech.[55] But, given the fact that the arguments from truth, citizen participation in democracy and from autonomy have been influential in shaping the development of constitutional free speech rights, it is fair to say that recipients, rather than speakers, are the primary object of free speech interests.[56] The categorisation of the right as being a societal good is clear.

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[51] *Ibid*.
[52] For a critical view of the relevance of Mill's argument from truth to modern jurisprudence, see Wragg, P 'Mill's Dead Dogma: The Value of Truth to Free Speech Jurisprudence' (2013) *Public Law* 363-385.
[53] Meiklejohn, A *Political Freedom* (New York, Harper Collins, 1960) 64
[54] Scanlon, T 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204.
[55] Dworkin, R *Philosophy of Law* (OUP, Oxford 1977) Introduction.
[56] Barendt, E *Anonymous Speech: Literature, Law and Politics* (Oxford, Hart Publishing, 2016) 62.

Against this background, the *raison d'être* for defamation law, i.e. reputational interest, is now examined.

6.2 Values underlying the legal protection of reputation

Post argues that the protection of reputation is informed by the core values of property, honour and dignity.[57] In other words, reputation could be regarded as personal property, or as part of a person's honour, or as a function of the inherent dignity of all human beings, and thus worthy of protection for one or all or a combination of these reasons. It is submitted that it is often overlooked that there is also a clear societal interest underlying these values.

The image of the market society underlies and informs the view of reputation as property.[58] This view resonates strongly with the pervasive neoliberal world view, and also explains why non-human entities such as companies are able to sue in defamation. Honour and dignity are after all not aspects that can be ascribed to the corporate form. Lord Hoffman pointed out that a commercial company has no soul and therefore its reputation is more correctly seen as a valuable commercial asset, something attached to its trading name which brings in customers.[59] In short, this view of reputation sees it as a form of intangible property that may be damaged and as such result in monetary loss which can be compensated. However, the 'property' argument alone cannot explain why reputation is deemed worthy of protection, as it cannot, for example, explain fundamental aspects of defamation law such as the rule that an action for defamation dies with the claimant, or the legal presumption of damage.[60]

When looking at the next view of reputation, that of 'honour', it is interesting to remember that the civil law of defamation in England in large part developed because the Star Chamber outlawed duelling, the traditional means of restoring honour.[61] The modern conception of 'honour' arguably relates more to the inherent dignity of man, and may be

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[57] Post, RC 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691. See also McNamara, note 6.
[58] Milo, note 41.
[59] *Jameel v Wall Street Journal Europe SPRL* (No.3) [2006] UKHL 44 at 91.
[60] Milo, note 41, 30.
[61] Holdsworth, WS *A History of English Law* (Methuen, London 1948) Vol VIII, 336.

reflected in the grand and ongoing project of the current and previous century, namely the idea and practice of human rights. However, all the elements of a cause of action in defamation confirm that what is protected is an *external* conception of image, rather than an internal conception of self. Everything that the claimant needs to prove focus on the attitudes of the community – that the statement identified the claimant, directly or indirectly, that it was defamatory, and that it was made public through publication to a third party. As such it is the projection of the self to society that the law protects.[62]

The common denominator in reputation as property and as honour is the involvement of society, of other people. The value of the company's reputation is determined by society's view, as is the *de facto* reputation of the individual. This chimes with the definition of reputation as 'the respect or esteem which a person enjoys in society'.[63] This clearly differentiates reputation from self-esteem, which is the esteem a person has for themselves. It is therefore submitted that reputation as the focus of defamation law is a societal construct that seeks to mediate the relationship between individuals and the society in which they exist. Lord Nicholls in *Reynolds v Times Newspapers Ltd* [1999] explained how reputation is important both to the individual concerned and to society more generally:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many important 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 vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, 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.[64]

To this must be added that allowing someone to safeguard a false or misleading reputation surely damages the public good severely. Jimmy Savile is a case in point.

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[62] Milo, note 41, 30. See also Brown, RE *The Law of Defamation in Canada* (Carswell 1994) vol 1, 17.
[63] Weir, T *An Introduction to Tort Law* (2nd edn Clarendon Press, Oxford 2006) 175.
[64] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 para 201D with Lord Cooke of Thorndon and Lord Hobhouse of Woodborough concurring.

Societal interests in free speech and reputation can therefore be brought squarely into Mill's argument from truth, and this thesis evaluates the Defamation Act 2013 from this perspective.

6.3 The balancing exercise

Before describing in broad terms what the chosen jurisdictions do about defamation and freedom of speech, it is necessary to first explain a juridical concept that will form the basis of much of the discussion in this thesis, namely the balancing exercise. Most jurisdictions subject to a constitution containing a bill of rights have a balancing mechanism to assist the judiciary in instances where rights conflict with each other. For example, the Canadian constitution states in section 1:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[65]

How the decision is reached as to what exactly is justified in a free and democratic society is left up to the courts. In a more recent constitution, the drafters attempted to assist the courts in this function: Section 36 of the Constitution of the Republic of South Africa[66] entrenches a balancing mechanism with more explicit instructions as to what considerations should be taken into account in a free and democratic society. Section 36(1) states the following:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

The European Convention on Human Rights also relies on the idea of balancing rights with each other, and several of the Articles specifically spell out what they need to be balanced

[65] Canada Act 1982 c. 11.
[66] Act 108 of 1996.

against. The right to freedom of expression is a good example. Article 10 of the ECHR[67] reads as follows:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

This freedom is not absolute and should be balanced against competing rights in the relevant context. Article 10 also contains its own constraints in paragraph 2 including a specific mention of the protection of reputation (which is not otherwise specifically mentioned in the Convention):

> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (Own emphasis)

In the other three national jurisdictions under discussion, the balancing exercise is neither prescribed nor described in such detail.[68] Nonetheless, a balancing exercise still happens in each. As will be seen in the brief introductory discussions below, exactly *what* gets to be 'put on the scales of the balance,' as it were, *how* these factors are weighted and to which extent the courts have freedom to decide for themselves on this, and to which extent they have to follow prescribed methodologies, will form much of the comparative element of this study.

7. England and Wales

It is necessary to examine defamation law and its recent changes in England and Wales in a bit more detail at this stage (than defamation laws in the US and Germany), as an analysis of the English and Welsh reforms is the focus of this study. First, however, it needs to be stated that whereas the balancing exercise mentioned above is no stranger to English jurisprudence, it would be over-simplifying it tremendously to state that where the right to

[67] This Article is now incorporated into English law through the Human Rights Act 1998, S 12.
[68] Although paragraph 5(2) of the German Constitution lists possible limits.

reputation clashes with the right to freedom of expression, a straight-forward balancing mechanism exists in English law: it does not. For this reason one needs to keep in mind the common law 'wrongs-based' approach to the tort of defamation and the fact that this does not always comfortably fit in with the rights-based approach developing since the incorporation of ECHR rights in the HRA.[69] Still, examples of the courts balancing competing rights are not difficult to find. The right to freedom of expression incorporated in section 12 of the HRA is a good starting point.[70] For present purposes, section 12(4) is the most relevant:

> (4)The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a)the extent to which—
>
> (i)the material has, or is about to, become available to the public; or
>
> (ii)it is, or would be, in the public interest for the material to be published;
>
> (b)any relevant privacy code

Section 12 was designed to allay fears by the press about privacy rights trumping freedom of expression, and at first glance it appears to prioritise freedom of expression over competing rights such as the right to privacy. However, the courts soon stated that the correct interpretation is that freedom of expression must be balanced against competing Convention rights and interests: Sedley LJ in *Douglas v Hello!* [2001][71] interpreted the right as including the restrictions that form part of Article 10 ECHR, i.e. with regard to for example the right to reputation. This view was confirmed by the House of Lords in *Campbell v MGN* [2004].[72] Logically, it follows that this balancing exercise would apply to all the Convention Rights in the HRA.

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[69] The 'culture clash' between these two approaches are explored in detail by Gilliker, note 42 in her work on the (lack of) Europeanization of English tort law.

[70] Section 12(1) incorporates Article 10 of the ECHR in the following manner: '(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.' Section 12(3) contains a prohibition of prior constraint: '(3)No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'

[71] *Douglas v Hello!* [2001] QB 967 paras 133-5.

[72] *Campbell v MGN* [2004] 2 AC 457, paras 55 (Hoffmann), 111 (Hope) and 138-41 (Hale).

Having said that, there was, and remains, a perception that the right to reputational protection was unfairly prioritised through the way in which UK defamation laws operated. This merits an in-depth discussion of English defamation law, its recent reform in the 2013 Act, and the likely impact of such reform, the topics explored in chapters 2 and 3. For now, a brief introduction to the problem suffices.

Based on Lord Atkin's test for the word 'defamatory' in *Sim v Stretch* [1936],[73] defamation can be defined as '…the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him'. [74] The tort aims to protect a person's reputation, which is still seen as distinct from privacy protection in English law: the latter is protected to a large extent by the rapidly developing tort of misuse of private information.[75] Given the recognised importance placed on the right to privacy, which includes the right to one's reputation, it is necessary to explore the reasons for the reform of England and Wales's common law of defamation. These, the reasons for the legislative reform culminating in the Defamation Act 2013, are explored in detail in chapter 2. As already mentioned, one of, if not the main, reason for enacting the Defamation Act 2013 was the concern that the English common law of defamation was chilling free speech.[76] It is submitted that the main reason for this chilling effect was the inequality under the common law between defamation claimants and defendants. The structure of defamation law and litigation itself handed an advantage to the claimant for which, it is argued, there exists no justification.

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[73] *Sim v Stretch* [1936] 2 All ER 1237.
[74] Rogers, WVH *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010), para 12.3.
[75] This tort developed from the tort of breach of confidence, and protects against the disclosure of confidential information (and is therefore largely equivalent to privacy protection). A few examples of successful use of this tort includes Catherine Zeta Jones's suit (note 71) and Naomi Campbell's (note 72).
[76] For discussion of the background leading to the reforms, see: House of Lords and House of Commons *Joint Committee on the Draft Defamation Bill Report* Session 2010-2012, HL 203, HC 930-I and the government's response to the consultation, Ministry of Justice, 'The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill', February 2012, Cm 8295; Krishnan, S 'Lord Lester's Defamation Bill: Striking a Balance?' (2012) *Entertainment Law Review* 25; Mullis, A and Scott, A 'Reframing Libel: Taking (all) Rights Seriously and Where It Leads' (2010) 63(1) *Northern Ireland Legal Quarterly* 5; Weaver, note 45.

Several characteristics of the common law combined to give an unfair advantage to libel claimants. The costs associated with bringing or defending a defamation claim were prohibitive. In the absence of a tribunal or other alternative dispute resolution forum for defamation, court remained the only option for such disputes, with the result that it seemed that only the rich and powerful had unfettered access to legal protection of their reputations. Impecunious defendants, faced with potentially being bankrupted by defending their words in a libel claim, could be bullied into silence by the mere threat of being sued.[77] So while in theory the courts were open to all to vindicate either their reputation or their right to free speech, the costs associated with this meant in reality this was akin to stating that the Ritz Carlton hotel is open to everyone. The matter ended up as an access to justice issue that went to the European Court of Human Rights via the famous McLibel litigation.[78]

Furthermore, three principles peculiar to the common law fundamentally favoured defamation claimants: A legal presumption that the allegedly defamatory statement was false combined with an irrebuttable presumption of damages, and finally the strict liability nature of libel and some slander claims. Milo referred to these as the 'potent trilogy of defamation law'[79] which combined to place a *de facto* reverse burden of proof on the defamation defendant.

If one accepts that there is no inherent reason to accord such advantage to the defamation claimant, and that such advantage unfairly tilts the balance in favour of reputation and away from speech, the logical conclusion is that in order to address free speech concerns the advantage given to defamation claimants need to be removed. A level playing field needs to be ensured in the defamation trial. This is a useful benchmark against which the Defamation Act 2013 is scrutinised in chapter 3. Despite several positive developments, the chapter concludes by submitting that the Defamation Act 2013, unless interpreted by UK courts in a more significantly pro-free speech fashion, will be an opportunity missed to redress the balance between the protection of reputation and speech. Having reached that

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[77] See Singh, H 'The Libel Survivor' (2011) 13(32) *Legal Week* 20-21.
[78] *McDonalds Corp. v Steel* [1995] 3 All ER 615; *Steel and Morris v UK* [2005] 18 BHRC 545. The latter case led to the legal aid regime to be reformed so that defendants sued by large multinational corporations are now entitled to legal aid. However, for all other parties to defamation claims, legal aid remains unavailable.
[79] Milo, note 41, 11.

conclusion, the focus shifts in chapter 4 to the jurisdiction in which freedom of speech is protected more than anywhere else.

8. The United States of America

The constitution of the United States of America guarantees and protects freedom of speech. This could be explained as a result of American history, a detailed analysis of which goes beyond the scope of this thesis. Suffice it to say that Thomas Jefferson's sentiment that freedom of expression 'cannot be limited without being lost'[80] found expression in the First Amendment to the Constitution which states that (*inter alia*): 'Congress shall make no law…abridging the freedom of speech, or of the press…' At this stage it is important to note that the First Amendment and the free speech protection it offers are binding only on the *state:* In its literal sense it only refers to laws of Congress, but the Due Process Clause of the Fourteenth Amendment makes clear that it also applies to the individual states.[81] Freedom of speech, then, is protected from infringement by government at federal and state level.

A prohibition on any laws prohibiting freedom of speech seems absolute, but this does not mean that the right to freedom of expression trumps all other fundamental rights in the US. From a practical point of view alone this absolutist position is impossible to sustain, and an examination of case law shows that the US courts, including the Federal Supreme Court, do indeed depart from a literal or absolute interpretation of the First Amendment. Many cases can be quoted as examples where free speech was restricted,[82] but perhaps Holmes J put it best when he stated with true common law common sense, in the landmark decision on the First Amendment in *Schenk v US* (1919),[83] that the 'most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic'. To start with, freedom of speech sometimes need to be restricted in order to enable others to exercise their own right to freedom of speech.

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[80] Letter to James Currie, 28 January 1786, Library of Congress.
[81] As was clear since the decision in *Gitlow v New York* 268 US 652 (1925).
[82] A select sample would include the 'prior restraint' cases, of which the prime example is the famous *Pentagon Papers* case: *New York Times v US* 403 US 713(1971).
[83] *Schenk v US* 249 US 47, 52 (1919).

Barendt points out that in the US, freedom of speech is not regarded as an undifferentiated monolith; as such various forms of speech are given differing levels of protection with particularly strong protection being accorded to political speech as opposed to, for example, commercial speech or advertising.[84] Whilst the courts perform a balancing exercise when free speech conflicts with other rights, as courts do in other jurisdictions, in the US there is a strong presumption in favour of free speech. The US Supreme Court has specifically formulated principles intended to guard against the danger of according the First Amendment right to freedom of speech less protection than it should enjoy, i.e. to guard against it being ranked as just another factor to consider in combination with other factors in a constitutional democracy.

Examining these guiding principles, it is clear that the threshold to infringe free speech is set very high. Foremost there is the 'clear and present danger' test: Free speech is allowed unless it can be shown that allowing it presents a clear and present danger intended to, and likely to, produce imminent lawless behaviour.[85] Indeed, if one compares the use of this test to the practice in other common law jurisdictions, including England and Wales, insulting and inflammatory speech that would almost certainly fall foul of contempt of court proceedings in these jurisdictions would be protected under the First Amendment in the US.[86] The same is true *mutatis mutandis* for defamation proceedings.

Further, US courts recognise the strong prohibition against prior constraint: following the famous *Pentagon Papers* case (1971),[87] courts can only grant a prior restraint if the state concerned showed that it would otherwise suffer direct, immediate and irreparable damage. The utility of recognising this will be important in the discussion of the chilling effect evidenced by UK defamation law. Finally, and most importantly, a state cannot restrict freedom of speech (based on the content of the offending speech) unless it can prove a compelling reason to do so. If there is any other less draconian way of protecting

[84] Barendt, note 7, 48.
[85] *Brandenburg v Ohio* 395 US 444 (1969).
[86] Barendt, note 7, 50.
[87] *New York Times v US* 403 US 713 (1971).

the interest concerned, that state will not be able to do so by restricting freedom of speech.[88]

Turning to defamation specifically, the almost visceral distrust of governmental restriction of free speech is particularly evident here, to such an extent that the Supreme Court has formulated guiding principles and rules for lower courts when faced with libel actions. Principled guidelines are given here for the balancing exercise (as opposed to leaving it up to the courts to decide on an ad hoc basis which factors to take into account when balancing competing interests in this regard).[89] Where the claimants are public officials, a libel claim cannot succeed unless the claimant can prove clearly that the aggrieving statement was not only false but that the author demonstrably knew that the statement was false. The rule was stated in *New York Times v Sullivan* (1964)[90] by Brennan J and imposed as a constitutional safeguard against the possible chilling effect of libel law, as follows:

> [A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[91]

The discussion of *New York Times v Sullivan* in chapter 4 examines the importance of setting this threshold so high in more detail. The short summary in this introductory chapter suggests that the First Amendment to the US Constitution accords, on the face of it, absolute protection to freedom of speech: nevertheless, the courts do recognise that in certain cases this right needs to be restricted. However, the right to freedom of expression is regarded as superior to other rights and this is evidenced in setting the threshold for its legitimate infringement very high indeed, especially in defamation suits.

9. Germany

Paradoxically, it can be said that freedom of expression in Germany is accorded both more and at the same time less protection than in the US: The former because in Germany the

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[88] Barendt, note 7, 51.
[89] For a discussion of this approach, see Schauer, F 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 *Vanderbilt Law Review* 265, 296-307.
[90] *New York Times v Sullivan* 376 US 254 (1964).
[91] At 279-80.

state is under a positive duty to promote freedom of expression in ways which the US judiciary, with its constitutionally imposed distrust of government would find almost unimaginable. As to the latter, in Germany the right to freedom of expression is not constitutionally ranked as superior to other rights - that distinction belongs to the right contained in Article 1 of the GG which guarantees the inviolable right to dignity of man ('*Ehre*') and which cannot be amended.

Article 5 of the GG deals with freedom of expression and is noticeably more detailed than the First Amendment. In the same manner as Article 10 of the ECHR (and section 12 of the HRA) do, it includes recognition of the idea that freedom of expression relates to both the freedom to express an opinion and the right to receive information. The relevant part reads as follows:

> (1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
> (2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.[92]

Given the not too distant history of Germany, it is unsurprising that a strong commitment to human dignity pervades its Constitution, and is accorded supreme protection in paragraph 1 GG. All other rights are to be interpreted in a manner consistent with paragraph 1. Barendt points out that this partly explains why the German Constitutional Court had upheld statutory provisions proscribing Holocaust denial (a clear restriction of freedom of speech);[93] it also explains in part the decision reached in *Mephisto* (1971).[94] This case concerned a novel satirising the claimant's father courting Nazi leadership – when the court had to balance the publisher's right to freedom of expression enshrined in Article 5 with the claimant's right to human dignity in Article 1, the latter triumphed. Although the case was not couched in defamation terms, it is interesting to note that had it been, and had it been pursued in England and Wales, there would have been no prospects of success as only living

[92] Markesinis, B, Bell, J and Janssen, A *Markesinis's German Law of Torts: a Comparative Treatise* (5th edn, Hart Publishing, Chicago 2019), 218. Unless otherwise stated, all translations of German statutes and case law are from this source.
[93] Barendt, note 7, 61, commenting on the '*Auschwitz Lies*' case, 90 BverfGE 241 (1994).
[94] *Mephisto* 30 BVerfGE 173 (1971).

persons are accorded the protection of defamation laws in English law. By contrast in Germany, deceased persons' reputations are potentially protected. This is an indication of how seriously 'personal honour' or the inviolable dignity of man is taken in that jurisdiction.

Returning to the 'balancing exercise' – in the seminal case of *Lüth* (1958)[95] (another case dealing with allegations of Nazi links and which is discussed in detail in chapter 5) the German Constitutional Court established a balancing formula stating that the right to freedom of expression as enshrined in paragraph 5(2) is limited by not only paragraph 1, but also by provisions in general laws including provisions concerning defamation both in the criminal law and in tort.[96]

On the face of it then it seems as if the net of reputation protection is cast further in Germany, but that presumption is wrong, at least as far as political and other public discourse is concerned. In this case there is a presumption in favour of freedom of expression.[97] In the same way opinion is accorded more protection than statements of fact. From a reading of relevant case law it is clear that the balancing exercise is more nuanced and competing rights may be treated differently in differing cases, depending on the circumstances surrounding the facts. In this way, German jurisprudence in this area of law proceeds in a more ad hoc manner than in the US, where there are strict guidelines from the US Supreme Court on to the way in which rights should be balanced. It must be noted that there are indeed guidelines from the German Constitutional Court,[98] particularly emphasising that due weight should be given to the character of the statement, but that these guidelines are not as rigid as those in the USA and allow for far more contextual flexibility in the lower courts.

10. The European Court of Human Rights

The penultimate chapter of this thesis examines the way in which the European Court of Human Rights (ECtHR) seeks to balance the rights to free speech and reputation. The first

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[95] *Lüth* BVerfGE 198 (1958).
[96] The German Penal Code, paragraphs 185-94 and the German Civil Code paragraphs 823 and 826. Nolte note 43 provides a thorough exposition of defamation law in Germany (as well as under the ECHR and in the USA).
[97] For a comparative analysis, see Nieuwenhuis, A 'Freedom of Speech: USA vs. Germany and Europe' (2000) 18 *Netherlands Quarterly of Human Rights*, 195.
[98] See the '*Soldiers are murderers*' case, 93 BVerfGE 266 (1995) discussed in chapter 5.

and key observation that must be made here is the ECtHR's conflation of reputational rights with the right to privacy. Much of the jurisprudence therefore proceeds from the balancing of the rights in Article 10 and Article 8 ECHR. For now it should be noted that the ECtHR had long raised concerns about the chilling of free speech: McGonagle *et al* remark that it 'is a central concern of the Court to ensure that any measures taken by national authorities do not have a "chilling effect" on debates on matters of legitimate public interest'.[99] The ECtHR recognises that chilling free speech could also be seen as self-censorship,[100]and that free speech may be chilled in various ways and for a variety of reasons. For example, people may self-censor due to fear of disproportionate sanctions.[101]

Another example relates to the nature of possible consequences of speaking up: the possibility of incurring criminal sanctions for defamation may inevitably have, by their very nature, an inhibiting effect on free speech. In *Altuğ Taner Akçam v Turkey* (2011), the ECtHR held:

> Furthermore, it is also open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct because of it or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation. The Court further notes the chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future.[102]

Unpredictably large damages are also capable of chilling free speech. In *Independent News and Media v Ireland* (2006) the issue of large damages was addressed:[103]

> …it is not necessary to rule on whether the present damages award had, as a matter of fact, a chilling effect on the press: as matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny. Accordingly, and even if, as the Government argued, the assessment of damages in libel cases is inherently complex and uncertain, any such uncertainty must to be kept to a minimum.

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[99] McGonagle *et al* note 44, 24.
[100] *Vajnai v. Hungary* no. 33629/06, ECHR 2008 para 54.
[101] *Cumpãnã and Mazãre v. Romania* [GC], no. 33348/96, ECHR 2004-XI para. 114.
[102] *Altuğ Taner Akçam v. Turkey,* no.27520/07, 25 October 2011, (2016) 62 EHRR 12 para 68.
[103] *Independent News and Media and Independent News Ireland Limited v Ireland,* No. 55120/00, ECHR 2005-V, (2006) 42 EHRR 46 para 114.

Finally the ECtHR recognises that chilling free speech is detrimental to the whole of society.[104] In *Bladet Tromsø and Stensaas v Norway* it reiterated that, when measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern, it is the duty of the court to accord the issue the most careful scrutiny.[105]

Over the past decade or so, two major channels of development in the field of defamation and freedom of expression are of interest. On the one hand there has been a move in England and Wales to right the balance between a tilt in favour of defamation claimants at the expense of the principle of freedom of expression in general. Almost during the same time frame, it can be safely said that European Court of Human Rights jurisprudence has been moving away from the notion of giving precedence to freedom of expression (when competing with reputation rights) to regarding these as two equal rights to be balanced in the context of their own specific circumstances. These decisions followed from and built upon the recognition given by the ECtHR of reputation forming part of the Article 8 ECHR right to respect for private life.

To fully understand the jurisprudence from the ECtHR on defamation, one therefore needs to also examine the relevant development in its treatment of the right to privacy, and this is explored in chapter 6. Given the continued importance of Strasbourg jurisprudence in this area of law, this chapter's comparative analysis could arguably provide a barometer of shifting perspectives on the continent.

11. Conclusion

From a preliminary analysis of the positions in England and Wales, compared to the other three jurisdictions examined in this thesis, the following tentative statements can be made: Of the three national jurisdictions freedom of speech is protected most vigorously in the US, with a concomitant lower likelihood of defamation actions being pursued successfully in cases where freedom of speech may arise as a defence, or as a balancing factor.

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[104] *Cumpãnã* note 101 para 114.
[105] *Bladet Tromsø and Stensaas v Norway,* no. 21980/93 ECHR 20 May 1999, (2000) 29 EHRR 125 para 64. See also *Jersild v Denmark*, No. 15890/89 (A/298), (1995) 19 EHRR 1 paras 31 and 35.

In Germany, (as in the other jurisdictions) freedom of speech is differentiated according to the kind of speech concerned: political speech and opinion, for example, are accorded higher protection than other forms of speech. But all of them are subject to a balancing exercise with relevant competing constitutional rights where these come in conflict. Therefore, a defamation suit may well be trumped by judicial consideration of the right to freedom of speech. The relative weights given to competing rights depend on the context of each case and therefore the balancing exercise tends to be rather ad hoc. One also needs to keep in mind that under the right circumstances, the personality right protected by a defamation claim in Germany may overlap with the paragraph 1 GG right to human dignity which is sacrosanct in German constitutional law: in such a case this will then trump the freedom of speech consideration.

In England and Wales, it was recognised that defamation law operated in such a manner that there were legitimate concerns that it was stifling freedom of expression. To that end, a major legislative reform process culminated in the Defamation Act 2013. This Act attempts to redress the balance by, *inter alia*, addressing concerns that defamation laws were particularly claimant friendly, setting the threshold for instituting claims higher, discouraging libel tourism and abolishing the right to trial by jury for defamation claims. The extent to which these concerns are addressed and the way in which they are handled in case law can be fruitfully analysed from a free speech perspective.

Against the broad brush-strokes of this initial introduction, the next chapters will focus in more detail on each of the selected jurisdictions, starting with the English common law of defamation in chapter 2.

CHAPTER 2 COMMON LAW OF DEFAMATION IN ENGLAND AND WALES PRIOR TO THE DEFAMATION ACT 2013

1. Introduction

This chapter explores the relevant characteristics of the common law of defamation[1] which led to the 2013 legislative reform of the law of England and Wales. Particular attention goes to what Milo characterises as the 'potent trilogy of fundamental principles' of the common law of defamation, namely the presumption of falsity, the nature of defamation as a no-fault/strict liability tort and the presumption of damages.[2] The tort was (and remains) actionable *per se*, which means that the claimant need not prove that they suffered any damages. The defamation claimant was further assisted in this regard by the irrebuttable presumption of harm which was triggered upon proof of a defamatory statement identifying the claimant. The result was a series of high profile incidents of 'libel tourism' where claimants domiciled abroad chose to sue in England.[3] This forum shopping led to the abuse of process doctrine being applied vigorously in defamation cases in order to discourage the pursuit of a number of frivolous cases. A threshold of seriousness was set, but the legal presumptions of harm and of falsity were firmly retained, as well as the nature of the tort as being actionable *per se*.

Under the common law, defamation was also the only civil action in England and Wales that was routinely tried by jury. A pattern developed where disproportionately large awards were given by juries, which then later had to be reduced on appeal. This both led to the ECtHR signalling its disapproval,[4] as well as legislative reform which effectively placed a cap on the awards that could be given with libel damages now subject to a notional ceiling which rises with inflation.[5] The legal costs associated with pursuing or defending a

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[1] For a more extensive discussion of the common law of defamation see Milmo, P and Rogers, WVH (eds) *Gatley on Libel and Slander* (10th edn, 2004) and Collins, M *Collins on Defamation* (OUP, Oxford 2014).
[2] Milo, D *Defamation and Freedom of Speech* (OUP, Oxford 2008) 11.
[3] As stated in chapter 1, reference to England includes Wales, and 'English law' means English and Welsh law.
[4] *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152.
[5] A significant change in the civil costs regime was initiated by Sir Rupert Jackson's reforms (*Final Report on Civil Litigation Costs* (December 2009)) and enacted by the legislature in Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

defamation trial was also very high, and no state legal aid was available to either party to a defamation suit. These considerations meant that many people or institutions, including academics and consumer groups could be silenced with the mere threat of a libel suit. This of course was inhibiting, or 'chilling' free speech and the main reason for the eventual reforms that passed in 2013. Before examining these issues in more detail, the main elements of the common law tort are briefly summarised.

2. Fundamental principles of the law of defamation

2.1 What is defamation?

Based on Lord Atkin's test for the word 'defamatory' in *Sim v Stretch* [1936][6] defamation can be defined as 'the publication of a statement which reflects on a person's reputation, and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him'.[7] In order to succeed with a common law claim in defamation, the claimant had to prove the publication of a defamatory statement referring to them. The Defamation Act 2013 adds the requirement that the statement causes or is likely to cause serious harm to their reputation,[8] but under the common law harm to reputation is presumed upon proof of the defamatory meaning of the statement. In addition, the common law then presumes that the statement is false, placing the burden to prove otherwise on the defendant. This presumption, one of Milo's 'potent trilogy' mentioned above, indicates the gravity with which the law regarded reputation.[9]

It is useful at this point to take a step back here and recall once more the *raison d'être* of defamation. It is trite that the tort protects an individual's reputation. But what makes reputation a right worthy of protection in the first place? In the introductory chapter, the reasons for protecting free speech as well as reputation are discussed.[10] Post[11] explains that

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[6] *Sim v Stretch* [1936] 2 All ER 1237.
[7] Rogers, WVH *Winfield and Jolowicz on Tort* (18th edn, London: Sweet & Maxwell 2010) para 12.3.
[8] Section 1.
[9] See the discussion of this and the other two issues in the 'potent trilogy' in para 3 below.
[10] Chapter 1, paras 6.1 and 6.2.
[11] Post, RC 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691.

the protection of reputation stems from three core values: property, honour and dignity.[12] In chapter 1 it was argued that an analysis of all three of these values indicates that protecting reputation serves an overarching societal interest. As such, it accords with the classic view of Mills' espousal of free speech as inherently being a societal rather than just an individual good.

2.2. Elements of common law defamation

To succeed in a common law defamation suit in England and Wales, the claimant had to prove the publication of a defamatory statement identifying the claimant. There was no need to prove damages to the claimant or fault on the part of the defendant. Once these elements were proven, the burden then shifted to the defendant who had a plethora of disparate defences at their disposal.

Publication

Since the clear formulation in *Webb v Bloch* (1928)[13]it is generally accepted that publication occurs when a person intentionally or negligently communicates, or takes part in communicating, material. To establish publication for defamation, a third party needs to have heard or seen the statement – A statement made solely to the claimant, without anybody else hearing it, can therefore not be defamatory, regardless of how insulting it is.[14] The reason once again is that defamation is concerned with protecting an individual's reputation, and a reputation whilst belonging to an individual, depends for its existence on the observations of other/s.

It is worth noting that at common law not only those who composed the statement could be held responsible for publication. Such responsibility was extended to those who

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[12] For a more in depth discussion of these values, see Milo, note 2, 27-41, Barendt E *Freedom of Speech* (2nd edn OUP, Oxford 2005), Chapter 1; Post note 11 and McNamara, L *Reputation and Defamation* (OUP, Oxford 2007).
[13] *Webb v Bloch* (1928) 41 CLR 331 (HCA), 363-6.
[14] *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA), 527, 529, 530; *Powell v Gelston* [1916] 2 KB 615, 619. See however, instances where publication only to the defamed person may be sufficient, such as where further communication should have been anticipated, *Theaker v Richardson* [1962] 1 WLR 151 (CA); or, for example, where the recipient is a trade union official under an obligation to further disseminate to union members the material defaming himself, see Collins note 1, 70.

participated in the preparation of the statement, in its communication, including for example typists, editors, media proprietors, online content moderators, television affiliates.[15] What is more, at common law even secondary distributors of defamatory statements were treated as publishers. These include, for example, libraries,[16] retailers and wholesalers.[17]

Defamatory meaning

Claimants in defamation actions must prove that the publication conveyed a defamatory meaning. How difficult a task they face depends on the statement itself. The law recognises several levels of defamatory meaning. In *Chase v News Group Newspapers Ltd* [2002] [18] it was held by the Court of Appeal that a defamatory statement may involve three levels: level 1 comprising a clear imputation of guilt on the part of the claimant, level 2 which entails that there are reasonable grounds to suspect that the claimant is involved and level 3, in terms of which there are grounds to investigate what the claimant has done.

When exactly a statement is defamatory is a vexing question, and one which it is submitted the current state of play in England and Wales does not comprehensively or clearly address. Lord Justice Neill famously said in *Berkoff v Burchill* [1996] [19] that he was not aware of any entirely satisfactory definition of the word 'defamatory'. However, it seems to be broadly agreed that a statement is defamatory if it has some (negative) bearing on the reputation of the claimant, and again Neil LJ in *Berkoff* gave what may be the most important modern consideration of the relationship between defamatory meaning and reputation, with reputation 'to be interpreted in a broad sense as comprehending all aspects of a person's

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[15] *R v Paine* (1696) 5 Mod 163 (KB), 167; ER 584, 586-7: 'if one dictate, and another write, both are guilty of making it…If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; for all persons who concur, and shew their assent or approbation to do an unlawful act, are guilty: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.' (sic).

[16] *Martin v Trustees of the British Museum* (1894) 10 TLR 338 (QB).

[17] *Emmens v Pottle* (1885) 16 QBD 354.

[18] *Chase v News Group Newspapers Ltd*[2002] EWCA Civ 1772.

[19] *Berkoff v Burchill* [1996] 4 All ER 1008, 1011, CA.

standing in the community'.[20] McNamara points out that to understand what is defamatory, one needs therefore to understand properly what is meant by 'reputation', and that it is here that the law is lacking.[21] It is worth pausing to consider whether this question has been (or indeed can ever be) satisfactorily answered. It certainly forms the basis of an enquiry of its own,[22] but for present purposes the discussion of reputation in chapter 1 and the ways in which the courts and other legal thinkers have attempted to define 'defamatory meaning' must suffice, with the caveat to the reader that a final answer has not been formulated yet, and perhaps never could be.

In general, Parke B's statement in 1840 in *Parmiter v Coupland* (1840) is seen as the starting point: A statement that, '…is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule' is defamatory.[23] Since then the law changed significantly, and McNamara describes three tests for defamatory meaning that can be identified as having crystallised over the last seven decades.[24]

The principal test is the'lowering the estimation' test quoted above from *Sim v Stretch*.[25] In this case the *Parmiter v Coupland* position was watered down – instead of having to prove that the statement inspired feelings as strong as hatred, ridicule, or contempt, Lord Atkin held that it was enough that the plaintiff was lowered '…in the estimation of right-thinking members of society generally…'.[26] A more recent iteration of this test is found in the Faulks

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[20] *Ibid* 151.
[21] This question informs the entirely of the work in McNamara, L *Reputation and Defamation* (OUP, Oxford 2007).
[22] See on the relationship between defamation and reputation also: Post note 11 and Rolph, D *Reputation, Celebrity and Defamation Law* (Routledge, Abingdon 2008).
[23] *Parmiter v Coupland* (1840) 6 M&W 105, 108, Exch.
[24] McNamara note 21, 2-3.
[25] *Sim v Stretch* note 6.
[26] *Ibid* 1240. It is interesting to note that a diverse society brings its own problems in this regard. Suffice it to note here that the orthodox view as expressed by Warby J in *Monroe v Hopkins* [2017] EMLR 16 paras 50-51. states**: '**The demands of pluralism in a democratic society make it important to allow room for differing views to be expressed, without fear of paying damages for defamation. Hence, a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society.' Some argue for a sectional test (i.e. whether a specific section of the population would find the statement defamatory). Cf. Speker, A 'Paradise and Prostitutes: Time for a Sectional Standards Test?' <https://inforrm.org/2017/11/16/paradise-and-prostitutes-time-for-a-sectional-standards-test-adam-speker/#more-38727> accessed 19 November 2017.

Committee on Defamation's 1975 formulation of a statement as defamatory if it would be likely to affect a person adversely in the estimation of reasonable people generally.[27]

Two other tests are also generally recognised. The second test is as follows: Even if there is no 'moral discredit', a statement is defamatory if it will lead to the claimant being 'shunned and avoided'.[28] The third and final test is whether or not the statement subjects or exposes a person to ridicule.[29] McNamara points out that the second test is almost never applied by the courts but is nevertheless regularly cited as part of the law, and that the third test appears in case reports more often but is still only applied occasionally.[30] Although the first test remains primary, and the others tend to be used only when the first test cannot yield an answer, the three together can be regarded as a synopsis of the law.

It is submitted that this is not satisfactory. It might even be seen as contradictory that a single statement can qualify as defamatory in order to found a claim on the basis of one set of criteria when it does not make the grade based on another, without any clear reason why this should be so. Of course, until 2013 it was for the jury to decide whether the aggrieved statement was defamatory and because this decision was not reasoned, it largely came down to something best defined as 'we know it when we see it'. Now that jury trials for libel actions have for all practical purposes been abolished, it is to be expected that reasoned decisions by judges may explain better why a statement is deemed defamatory. The extent to which this is happening is explored in more detail in chapter 3 where relevant post-2013 case law is discussed.

Single meaning rule

What about statements that are ambiguous, or that could be interpreted differently by different persons? The common law 'single meaning rule' in defamation cases state that, as in the construction of contracts or statutes, a given set of words is to be treated as having

[27] Report of the Committee on Defamation CMND 5909, 1975, para 65.
[28] *Youssoupoff v Metro-Goldwyn Mayer* (1934) 50 TLR 581, CA.
[29] *Berkoff v Burchill* note 19.
[30] McNamara note 21, 3.

only one meaning.[31] Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] summarised the legal principles by which such single meaning is to be identified:

> (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced or utterly unreasonable interpretation …' (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'. [32]

Finally, it bears repetition that reputation is very much dependent on the opinions or judgements of the beholder and is not solely a function of personality such as informs the basis for privacy rights. The complications of conflating these concepts are explored in subsequent chapters and in more detail in the jurisprudence of the ECtHR examined in chapter 6.

Reference to claimant

If the claimant cannot be identified from the statement, there is no defamation. This does not mean that the claimant has to be specifically named: they may be identified by implication. The test is whether the hypothetical reasonable reader/viewer, with knowledge of any special circumstances would believe that the claimant is being referred to. The requirement that the claimant has to be identified/identifiable, reinforces the principle that defamation is concerned with reputation as a construct that exists primarily in the opinion of members of a community.

3. Peculiar characteristics of the tort of defamation which may have led to the imbalance *vis-à-vis* free speech

In England and Wales, the tort of defamation differed substantially from other torts in several significant ways. It is the only tort of strict liability that was also actionable *per se.*

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[31] *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 , 71–72.
[32] *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 para 14.

By putting the defendant to the proof as to the truth of the allegedly defamatory statement (which in itself was subject to an irrebuttable presumption of harm), the burden of proof shifted to the defendant in a way that clearly departs from the rule of civil procedure that 'he who avers has to prove'. For this discussion it is therefore useful to examine this 'potent trilogy of fundamental principles' of the common law of defamation in England and Wales, namely the presumption of falsity, strict liability and the presumption of damages.[33]

3.1 Strict liability

Initially defamation was a tort based on fault in the form of malice, but it metamorphosed - in a transition that was 'neither smooth nor unanimous'[34] to a tort of strict liability.[35] The general position therefore was, and remains that under the common law, the defamation claimant does not need to prove fault on the part of the defendant, be it malice, intention or negligence, and neither can the absence of fault be raised as a defence.[36]

Innocent defamation means that a defendant could be held liable for the purely unintended consequences of a statement.[37] One of the classic formulations of the rule concerns a case where the author of a statement believed it to be fictitious, whereas the 'fictitious' name used turned out to belong to a real person, who successfully vindicated it in a libel action: In the House of Lords' decision in *E Hulton & Co v Jones* [1910], the applicable principle was formulated as follows:

> Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. [38]

The principle of strict liability was held in *O'Shea v MGN Ltd* [2001][39] to be in violation of the right to freedom of expression guaranteed in Article 10 of the ECHR. However, this did not

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[33] Milo, note 2.
[34] Mitchell, P *The Making of the Modern Law of Defamation* (Oxford: Hart Publishing 2005) 101-13, 112-13.
[35] *Jones v E Hulton & Co* [1910] AC 20 HL.
[36] Milo, note 2, 185; Milmo *et al* note 1, 186.
[37] As will be seen in chapter 3, this characteristic of the common law survived the 2013 reforms.
[38] *E Hulton & Co v Jones* [1910] AC 20 (HL).
[39] *O'Shea v MGN Ltd* [2001] EMLR 40 (QB).

put paid to the principle of strict liability for libel in the UK common law. Subsequent cases held otherwise, clarifying that the decision in *O'Shea v MGN Ltd* merely meant an extension of the common law *Reynolds* defence, which protected *prima facie* defamatory statements published on matters of public interest.[40] In *Baturina v Times Newspapers Ltd* [2011],[41] for instance, Lord Neuberger MR stated that Article 10 of the ECHR did not require any modification of the strict liability principle for instances of 'reference innuendos'[42]as the *Reynolds* defence would usually apply.

This means that strict liability is indeed capable of being successfully challenged as being incompatible with Article 10 ECHR, but it seems that it is possible only on an *ad hoc* basis, depending on each case's facts, rather than on a systemic and principled basis. In *O'Shea*, for instance, the court held that the particular facts of the case placed an impossible burden on the defendant and served no pressing social need: clearly here a factual weighing up / balancing exercise was undertaken by the court. In this case, a pornographic website used in its advertisement a photograph of a woman bearing a striking resemblance to the claimant, who alleged that she was identified by the photograph. In the judgment of the court, Article 10 ECHR here outweighed the claimant's dependence on the strict liability characteristic of English libel law.

3.2 Presumption of harm: Actionable *per se*

In the English common law libel (and some instances of slander[43]) were actionable *per se,* meaning the claimant did not have to prove damages. For the majority of defamation claims, all the claimant had to prove therefore was that there was a defamatory statement

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[40] This defence was formulated in the case of *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, and was the closest the UK common law came to a 'responsible journalism' defence. For a discussion of the *Reynolds* defence, see Barendt, E 'Reynolds revived and replaced', (2017) 9(1) *Journal of Media Law* 1-13.

[41] *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308, [2011] 1 WLR 1526, para 27.

[42] These are statements that are prima facie defamatory, but where external knowledge is then further necessary to link the statement to a specific person.

[43] In cases of slander the claimant had to prove special damages: cf. *Chamberlain v Boyd* (1883) 11 QBD 407 (CA). There were four exceptions where slander too was actionable *per se*, namely if the aggrieved statement alleged that the claimant was an unchaste woman, suffered from a communicable disease, had committed a serious crime, or that the claimant was incompetent, unfit or dishonest in her business, profession or trade: cf. Slander of Women Act 1891, s 1; *Taylor v Perkins* (1606) CroJac 144 (KB), 79 ER 126; *Webb v Beavan* (1883) 11 QBD 609; *Jones v Jones* [1916] 2 AC 481 (HL).

impugning their reputation. Not only was there no need to prove damages, the claimant also did not need to prove that their reputation was in fact harmed. The presumption survived the introduction of the Human Rights Act 1998.

Nor was the presumption displaced by considerations relating to Article 10 ECHR: In *Jameel v Dow Jones* [2005] it was held that the presumption of damage that forms part of the English law of libel is not incompatible with Article 10 of the Convention.[44] The claimant, a Saudi national, issued defamation proceedings in England against the publisher of the Wall Street Journal based on an article it posted on its website in the US, which was available to subscribers in England. The claimant alleged that the article and its hyperlinks identified him as a donor to Al Qaeda. The defendant pointed out to the court that very few (as few as five) people in England had accessed the article, and that the claimant had therefore in fact suffered no or minimal damage to his reputation. This brought them to the issue of presumption of harm. The defendant argued that this presumption was in conflict with the right to freedom of speech. The Court of Appeal held that the presumption of harm in the tort of defamation was irrebuttable. However, the Court then held that in cases where actual damage to the claimant's reputation was minimal, the claim could be struck out as an abuse of process. In what subsequently came to be known as the 'Jameel exception', the courts, although stopping short of removing the presumption of harm, thereafter required as a minimum threshold for defamation actions that the claimant must have, in fact, suffered harm to their reputation.

Threshold of seriousness

The next significant development in this area of the law occurred in the first instance decision of Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2011].[45] It is clear that Tugendhat J was concerned, particularly in the context of Article 10 ECHR and proportionality considerations, about the need to exclude trivial claims. He concluded that

[44] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, para 41. See also *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359.
[45] *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985.

there was a requirement for a 'threshold of seriousness',[46] and that the correct formulation was as follows: '…the publication of which he complains may be defamatory of him because it *substantially* affects in an adverse manner the attitude of other people towards him, or *has a tendency so to do*'(emphasis in original).[47]

A threshold of seriousness, phrased in terms of substantiality, was thereby introduced. In fact, Tugendhat J reasoned that such a threshold is the logical *sine qua non* for the very existence of the presumption when he explained his understanding of the reason why the law presumes damage in libel as follows:

> If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant.[48]

It must be reiterated that the presumption of harm itself remained intact.

3.3 Presumption of falsity

In common law, upon proof by the claimant that a defamatory statement of fact[49] identifying the claimant had been published, a presumption arises that the statement is false. The legal burden of proof then shifts to the defendant to prove that the statement is substantially true, or failing that, is covered by one of a number of defamation-specific defences.[50] This reverse burden of proof has been criticised consistently over the years. Lord Lester, who long campaigned for libel reform, arguably voiced the frustration of many critics when he stated that '[v]illains can (and frequently do) recover substantial damages in

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[46] *Ibid* paras 90 and 92.
[47] *Ibid* para 96.
[48] *Ibid* para 94.
[49] as opposed to opinion, in which case the defendant could possibly rely on the defence of honest comment – but would still bear the burden of proving the veracity of the underlying facts upon which the opinion is based.
[50] Parkes, R, *et al*, *Gatley on Libel and Slander* (12th edn, incorporating Second Supplement, Sweet & Maxwell 2017) para 11.4.

libel without having to show that what has been published about them is false.'[51] Nevertheless, jurists have been remarkably resistant to the idea of abolishing this presumption, and it remains firmly entrenched. Both the Faulks Committee[52] and the Neil Committee[53] rejected changing it. The ECtHR has also stated that placing the burden to prove substantial truth on the defendant in the way that the common law does, is not in principle incompatible with Article 10.[54]

When given the opportunity to address the issue, albeit of necessity *obiter*, the Court of Appeal declined to consider the point in *Jameel (Mohammed) v Wall Street Journal Europe SPRL (No.3)* [2005].[55] It did however take the time to remark that suggesting a reversal of this reverse burden of proof was going too far, and that it would require a major change in the law of defamation.[56] Arguments in favour of retaining the presumption can be summarised as comprising a reluctance to break with longstanding precedent,[57] the notion that reputation deserves to be protected robustly in this way by the courts, that the existence of defences such as honest opinion and justification mitigates the harshness of the presumption, and the argument that burdening the claimant with proving falsity requires of them to prove a negative.

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[51] *Hansard* HL Deb col 240 (2 April 1996), where Lord Lester unsuccessfully moved an amendment to the Defamation Bill 1996 that would have placed the burden to prove falsity of the defamatory statement on the claimant.

[52] Report of the Faulks Committee on Defamation (Cmnd 5909) (1975). The Committee on Defamation was appointed by the Lord Chancellor and the Lord Advocate in June 1971 under the chairmanship of The Honourable Mr. Justice Faulks, M.B.E., T.D. Its terms of reference, which applied to Scotland as well as to England and Wales, were:- 'To consider whether, in the light of the working of the Defamation Act 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation.' The Committee's report was published in 1975 (Cmnd. 5909).

[53] UK Supreme Court Procedure Committee *Working Group on Practice and Procedure in Defamation* (1991). This Committee, chaired by Sir Brian Neill reviewed some aspects of defamation law by the Faulks Committee and updated a previous statute dating from 1952. The findings were instrumental to the enactment of the Defamation Act 1996.

[54] *EuropaPress Holding DOO v Croatia* (2011) 53 EHRR 27 para 63. See also *McVicar v UK* (2002) 35 EHRR 22; *Steel and Morris v UK* (2005) 41 EHRR 22 para 93.

[55] *Jameel (Mohammed) v Wall Street Journal Europe SPRL (No.3)* [2005] EWCA Civ 74 para 57. (For the appeal to the HL on other issues, see [2006] UKHL 44; [2007] 1 AC 359).

[56] *Ibid* para 55.

[57] *Ibid*.

As to the contention that reputation needs to be favoured in this way, the reasons for this argument seem unclear, especially given that the English law of defamation remains committed to the proposition that a claimant is not entitled to recover damages for injury to a reputation which he does not in fact have.[58] For this purpose the reputation a person has is determined as a matter of objective fact.[59] But there is still no logically valid reason why this evidentiary burden is place on the defamation defendant, rather than on the defamation claimant, as is usual in other civil actions. After all, there are other related areas of law in which the claimant is required to prove falsity, such as malicious falsehood and negligent misrepresentation. What is more, this argument conflates evidentiary difficulties with evidentiary burden and therefore rests on a less than firm basis.[60] Finally, claimants remain in the best position to say precisely what is true and what is false about defamatory statements.[61]

One of the arguments for this reverse burden of proof is the notion that being required to think about whether one could prove the truth of what gets to be said or published, acts as a necessary restraint on publishers. So the argument goes that, together with the defence of truth, this injects a much needed element of caution into decisions about publication.[62] However, that does not take into account the fact that proving truth is often very difficult, especially in the publication of more contentious issues – journalists may wish to protect their sources, some sources may be anonymous or have died or moved abroad. [63] The argument that this presumption helps to ensure that only deserving statements are published can be countered by the argument that requiring the claimant to prove falsity will go some way towards ensuring that 'only claimants with deserved reputations succeed'.[64]

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[58] *McPherson v Daniels* (1829) 10 B & C 263 at 272. *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772; [2003] EMLR 218 para 33.
[59] Gatley, note 1 para 11.1.
[60] Hagans, WG 'Who does the First Amendment Protect? Why the Plaintiff should Bear the Burden of Proof in any Defamation Action' (2007) 26 *Review of Litigation* 613, 635-6.
[61] Butterworth, S 'Lord Lester's Defamation Bill should be more radical' *The Guardian* (London 23 June 2010).
[62] Mullis, A and Scott, A 'Lord Lester's Defamation Bill 2010: A distorted view of public interest?' (2011) 16(1) *Communications Law* 6-18.
[63] Butterworth, note 61.
[64] Milo note 2, 163

In the final analysis, it seems that the common law places, in this presumption, a premium on reputation compared to other considerations such as free speech. Why this is so remains unclear and, '[a]t bedrock, the allocation of the burden of proof depends upon *public policy*'(my italics).[65]

4. Rationale for demanding statutory reform of English common law on defamation: redressing the balance in favour of freedom of expression

In the preface to his book on defamation law, Milo stated that it is '…trite that the law of defamation contemplates the clash of two fundamental rights, the right to freedom of expression…and the right to reputation'.[66] The fact that the right to reputation may be and often is in conflict with the right to freedom of expression continues to exercise the courts: In *Re S,* the House of Lords held that balancing these rights would have to consist of a two-way exercise involving an intense scrutiny of all the circumstances of the case.[67] Rebalancing the law in favour of promoting free expression was therefore, not surprisingly, one of the stated aims of the reforms that culminated in the Defamation Act 2013. In fact, this was identified in the report of the Joint Committee on the draft Defamation Bill[68] as one of four key areas of concern.[69]

Based on what evidence, however, was it alleged that the common law on defamation tilted in favour of reputation, at the cost of free speech? In addition to the 'triumvirate of presumptions' in favour of defamation claimants discussed above, the following issues were paramount: The chilling effect of the threat of defamation suits, the perceived phenomenon of libel tourism to England and characteristics of the common law that fuelled these phenomena, such as the inequality of arms inherent in equating corporate claimants with natural persons, the multiple publication rule, and the growth of the internet outpacing the common law rules on publication.

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[65] *Ibid* 182.
[66] *Ibid* ix.
[67] *Re S (A Child)(Identification: Restrictions on Publication)* [2004] UKHL 47 para 17.
[68] Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011).
[69] Milo note 2, 3.

4.1 'Chilling effect' of defamation actions on freedom of expression

It has often been said that libel laws in England and Wales are skewed in favour of the rich and powerful. As such free speech was being inhibited or 'chilled' as in many cases the mere threat of a defamation claim could silence an impecunious critic. Conversely, impecunious victims of libel or slander found their access to justice barred by the costs of litigation. The main reason for the chilling effect of the Common law of defamation therefore relates mainly to costs – of the suit itself, as well as potential damage awards that were inflated by defamation juries. These two drivers of the chilling effect are now examined more closely.

4.1.1 Costs

It is argued that the costs involved in defending a defamation claim had at least the potential to chill free speech. Such restraint on the free and frank exchange or expression of views in turn has dire consequences for scientific or academic discourse, consumer awareness, legitimate criticism, political discourse and the practical exercise of democratic functions, to name but a few. As mentioned before, vindicating one's reputation is an expensive affair in the common law. In the absence of a tribunal or other alternative dispute resolution forum for defamation, court remains the only option for such disputes. Conditional fee arrangements, which are discussed in detail in chapter 3, only addressed this partially. The result was that it seemed that although any individual referred to in a defamatory statement could sue, and despite robust free speech precedent, only the rich and powerful had unfettered access to legal protection of their reputations. In that sense, stating that the courts were open to anybody to enforce their reputation rights was analogous to saying that the Ritz Carlton hotel is open to everybody. Since either pursuing or defending a defamation claim required deep pockets this meant that the playing field was not level – the impecunious, or those simply without the time and resources to devote to defending a costly defamation suit, definitely needed to think twice about what they said publicly about the rich and powerful. This was aggravated by the fact that not only natural persons but also legal persons such as corporations have legal standing to sue. In a globalised world with multinational corporations wielding enormous power, this is highly

significant to free speech advocates – the McLibel case[70] discussed immediately below being the prime example of how this can all go wrong.[71]

Also, as already stated, under the common law there was no legal aid for defamation. Although legal aid in general is being cut and this has an impact on society, campaigners have pointed out that the fact that there is no legal aid for defamation actions impact disproportionately on ordinary or impecunious parties. A prime example is the lengthy and expensive court battle waged by McDonalds, a multinational corporation with teams of lawyers, against two indigent individuals dependent on the good will of pro bono lawyers in what came to be known as the 'McLibel' case.[72] McDonalds sued two environmental campaigners for allegedly defamatory statements about the company. The case is famous for being the longest civil action in English history, and for the large amount of damages (£60,000) awarded to McDonalds, which paled in significance compared to the costs of pursuing the claim: It was rumoured that McDonalds' legal costs ran into millions of pounds.

The defendants in the McLibel case took the matter to the ECtHR, where it was held that the fact that they had not been given legal aid when they were defending themselves in the UK courts was an infringement of the right to a fair trial.[73] As a consequence of this decision by the Strasbourg court, legal aid is now available to the defendant in a libel action, but only if they are sued by a multi-national corporation.

4.1.2 Trial by jury

Defamation claims constitute the only civil actions in English law that can potentially be heard by a jury. As stated earlier, it fell to the jury to decide whether or not the statement complained of in a defamation trial carried a defamatory meaning. This finding on the facts, being made by a jury, was not accompanied by reasons and arguably this meant that a

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[70] *McDonalds Corp. v Steel* [1995] 3 All ER 615; *Steel and Morris v UK* [2005] 18 BHRC 545.
[71] See the discussion of reputation as property in chapter one: The idea of a corporate reputation is based on the marketplace ideology informing one of several understandings of reputation.
[72] *McDonalds v Steel* note 70.
[73] *Steel and Morris v UK* note 70.

full theory of what comprises defamatory meaning was lacking. There was also a tendency for juries to award disproportionately high damages, which often required the Appeal Court to later on reduce the damages. For example, in *John v Mirror Group Newspapers* [1996][74] the jury awarded Elton John a total of £350,000 in defamation damages. The Court of Appeal later reduced this to £75,000 and directed that in future judges should give clear guidance to juries on damages.[75] It could be argued that these high awards, coupled with the extra layer of complexity added by jury trials, further tended to have a chilling effect on free speech. The ECtHR seemed to agree: In *Tolstoy Miloslavsky v United Kingdom* [1996][76] it held that an award of £1.5 million made by a jury against the defendant was an infringement of Article 10 of the ECHR.

4.2 Libel tourism and forum shopping

As has already been pointed out 'libel tourism' was widely recognised as a concern for UK defamation law, with England and Wales being seen as a prime destination for libel claimants.[77] The Government Explanatory Notes to the Defamation Act accepted that concern about libel tourism was valid.[78] Libel tourism means that cases with only a tenuous link to England and Wales are instituted here because the jurisdiction is seen as very favourable to defamation claimants. The fact that libel claims are actionable *per se* made this jurisdiction particularly attractive. Two well-known examples will suffice to illustrate the point. In *Bin Mahfouz v Ehrenfeld* [2005][79] a wealthy Arab businessman sued an American academic, Dr Rachel Ehrenfeld, in London for defamatory statements about him in her book entitled *Funding Evil.* Only 23 copies of her book had been sold in the UK, and it was pointed out that the claimant chose England rather than the US to sue, as the latter's

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[74] *John v Mirror Group Newspapers* [1996]2 All ER 35.
[75] *John v Mirror Group Newspapers* [1997] QB 586.
[76] *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152.
[77] For a discussion of the problem of libel tourism as it manifests across jurisdictions, see Garnett, R and Richardson, M 'Libel Tourism or Just Redress? Reconciling the (English) Right to Free Speech in Cross-border Libel Cases' (2009) 5(3) *Journal of Private International Law* 471; Hartley, TC 'Libel Tourism and Conflict of Laws' (2010) 59(1) *International & Comparative Law Quarterly* 25 and Stavely-O'Carroll, S 'Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?' (2009) *New York University Journal of Law & Liberty* 252.
[78] Para 65 of the Explanatory Notes to the Defamation Act 2013.
[79] *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156.

constitutional protection of freedom of expression[80] effectively cancelled his suit's prospect of success. When he won his case in England, the US reacted by passing the 'Securing the Protection of our Enduring and Established Constitutional Heritage' (SPEECH) Act 2010. This Act makes foreign libel judgments unenforceable in US courts, unless those judgments are compliant with the US constitutional protection of freedom of speech. The fact that a traditional ally such as the US deemed it necessary to protect its citizens' right to freedom of speech against English laws by enacting legislation to that effect was seen as hugely embarrassing: The House of Commons Culture Select Committee Report on Press Standards, Privacy & Libel 2010 termed it a 'national humiliation'.

Similar factors also made suing (or silencing critics by threatening to sue) in London attractive to multinational corporations with only the most tenuous links to the UK. For example, the fact that defamation actions could be pursued without having to prove damages made this jurisdiction inviting to multinational corporate litigants. This was illustrated in *Jameel v Wall Street Journal Europe SPRL (No.3)*[81]where the House of Lords held that a company which had a trading reputation in England and Wales was entitled to pursue a remedy in a defamation action without being required to allege or prove that the publication complained of had caused it actual damage on the basis that companies as legal persons were being treated in the same way as human beings (natural persons).

4.3 An overly large pool of defendants

The common law worked in such a way that the net for possible defendants could be cast to such a wide extent that it had the potential to silence entire sections of society. There may be several possible defendants and several possible actions. The originator of the statement would be held liable for their own *prima facie* defamatory publication. Under the common law, every repeat publication of a defamatory statement constituted a cause of action *de novo*, with a new prescription period running from the date of the repeat publication. In this way, defamation actions could be pursued many years after the original publication would have prescribed.

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[80] The US constitutional protection of free speech and its effect on US defamation law are discussed in detail in chapter 4.

[81] Discussed above in paragraph 3.3.

The common law position that each publication of the same defamatory statement gave rise to a separate cause of action is known as the 'multiple publication rule'. At common law, a statement is published at the time when and the place where it is received, i.e. read, heard, or seen.[82] Each repetition was therefore seen as a fresh defamation and actionable in its own right.[83] This meant the original publisher could potentially be held liable at common law for the additional damage caused by all further publications of the statement. The reason for this was because the limitation period was calculated from various times including when the original and the repetitions occurred. Therefore, given various repetitions, an originally prescribed defamation action may revive as a new prescription period started afresh after each repetition. There were common law defences to this, but they were not satisfactory. For instance, the original publisher could argue that they should not be liable for the consequences of a republication because these were too remote, or that the republication was a *novus actus interveniens* that broke the chain of causation between the original publication and the damage suffered by reason of the republication.[84]

The rule also had the effect that publications of the same statement could occur (and give rise to separate actions) in multiple jurisdictions. The classic case illustrating the problem with this rule is *Duke of Brunswick v Harmer* (1849).[85] In 1830, the duke was defamed by a newspaper article. Eighteen years later, the duke sent his agent to find a copy of the newspaper, upon which procurement it was held that such acquisition sufficed to found a cause of action in defamation against the proprietor of the newspaper. Although the court

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[82] For written material see: *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA); *Hebditch v MacIlwaine* [1894] 2 QB 54 (CA); *Shevill v Presse Alliance SA* [1995] 2 AC 18 (ECJ) para 41; and *Shevill v Presse Alliance SA* [1996] AC 959 (HL) 983.

[83] *Pullman v Walter Hill & Co Ltd* note 82, 527; *Berezovsky v Michaels* [2000] UKHL 25; *Godfrey v Demon Internet Ltd* [2001] QB 201, 208-9; *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2001] EWCA Civ 1805, [2002] QB 783, para 57. In *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom no 3002/03* (ECHR, 10 March 2009), [2009] EMLR 14, the ECtHR held that the common law multiple publication rule did not violate the ECHR Article 10 right to free expression.

[84] In *McManus v Beckham* [2002] EWCA Civ 939, [2002] 1 WLR 2982, para 43, Laws LJ held that the test is one of foreseeability: the defendant would be held liable for the consequences of further publication if they foresaw, or reasonably ought to have foreseen, that the further publication would take place. See also *Shendish Manor Ltd v Coleman* [2001] EWCA Civ 913, paras 47-50 and *Campbell v News Group Newspapers Ltd* [2002] EWCA Civ 1143, [2002] EMLR 43, 977.

[85] *Duke of Brunswick v Harmer* (1849) 14 QB 185, 199-9.

in *Jameel* remarked that this would probably now be struck out as an abuse of process, the consequences of the multiple publication rule for, for instance, internet publications, remained very grave.[86]

5. Conclusion

This chapter explored the relevant characteristics of the common law of defamation which led to calls for reform in the law of England and Wales. After briefly examining the structure and purpose of the common law of defamation, certain peculiarities of the law were scrutinised. These included the fact that defamation was by and large a tort of strict liability, meaning that the claimant did not need to prove any fault on the part of the defendant, be that intention or negligence. A person could therefore be held liable for completely unintentional or innocent defamation. There are of course other torts where the liability imposed by law is strict. For instance, the modern statutory tort of product liability imposes strict liability on the manufacturers of products that cause damages to consumers.

There are also torts in the law of England and Wales where a defendant could be held liable without having to prove damages. These torts are termed actionable *per se* and include trespass to land, assault, battery and false imprisonment. However, defamation remained the rare exceptional tort that was both one of strict liability as well as actionable *per se.* Not only did the burden of proof placed on the defamation claimant not require of them to prove fault on the part of the defendant, they also did not need to prove that they suffered any damages. This is unusual in itself. But the defamation claimant was further aided by two legal presumptions: Upon production of a statement which had a defamatory meaning identifying the claimant, the court had to infer that the claimant's reputation was harmed, and further that the statement itself was false. These powerful presumptions meant that the evidentiary burden on the claimant was very light, and that the burden of proof in fact shifted for the bulk of the suit to the defendant. The Court of Appeal in *Jameel* held that

[86] *Jameel* note 44, discussed in para 3.2 above. See also *Godfrey v Demon Internet* note 83, 208-209 re bulletin board postings; ; *Loutchansky v Times Newspapers Ltd* note 83 re online archives; *Harrods Ltd v Down Jones & Co Inc* [2003] EWHC 1162 (QB), para 36 re web pages; *King v Lewis* [2004] EWCA Civ 1329, [2005] EMLR 4, para 2 re postings being published when downloaded.

the presumption of damage in UK defamation is not incompatible with Article 10 of the ECHR and therefore stopped short of removing the presumption. However, in what subsequently became known as the 'Jameel exception', the courts thereafter required as a minimum threshold for defamation actions that the claimant must have, in fact, suffered harm to their reputation. If they did not, their claim would be struck out as an abuse of process. [87]

The Jameel exception was further strengthened when Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2011][88] signalled that in order to exclude trivial claims, and particularly in the context of Article 10 ECHR and proportionality considerations, a 'threshold of seriousness' must be applied in defamation claims. These cases could be interpreted as a move in the right direction, i.e. to rebalance free speech and defamation law. However, they could also be interpreted as the need for reform being acknowledged at the highest level, for the law was not changed in substance. Existing law such as the abuse of process norm was used to interpret the defamation law more strictly. The law itself and its presumptions remained firmly in place.

The costs of defending a defamation trial remained an issue. Coupled with unpredictable and often excessive jury-driven awards, financial concerns meant that often the mere threat of a claim could silence critics. The claimant-friendly nature of the UK common law of defamation acted as a driver for libel tourism. It was therefore clear that the English law of defamation was ripe for reform by 2013.

To conclude this chapter, the words of Lord Lester, introducing his Defamation Bill, are perhaps the most apt:

> Our law suffers from the twin vices of uncertainty and overbreadth. The litigation that it engenders is costly and often protracted. It has a severe chilling effect on the freedom of expression not only of powerful newspapers and broadcasters, but also of regional newspapers, NGOs and citizen critics, as well as of scientific discourse. That chilling effect leads to self censorship. It impairs the communication of public information about matters of legitimate public interest and concern.[89]

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[87] *Jameel* note 44 discussed in para 3.2.
[88] *Thornton* note 45, para 3.2.
[89] Lord Lester of Herne Hill, 'These Disgraceful Libel Laws Must be Torn Up', *The Times* (London 15 March 2011).

In the next chapter the reforms of the common law by the Defamation Act 2013 together with subsequent case law are examined at the hand of the problems identified in this chapter. The central question of this thesis is also kept in mind throughout, namely whether or not the balance between free speech and the protection of reputation is restored in England and Wales.

CHAPTER 3 DEFAMATION LAW IN ENGLAND AND WALES AFTER THE 2013 REFORMS

1 Introduction

The preceding chapters highlighted the major problems encountered in the English common law of defamation which led to the reforms in the Defamation Act 2013.[1] The Act has now been in force for more than five years, meaning an attempt to gauge its efficacy can now be undertaken. In order to do this, a simple Burkean analysis[2] of new legislation is useful. Within this broad framework any proposed change in laws needs to start by showing, first, that there is a need for change; second, that the proposed change will solve the problem it claims to solve; and finally, that the benefits of the change will outweigh its costs.[3] The first part of this analytic framework was addressed in chapter 2, namely whether there was a need for reform of English defamation law. This chapter attempts to address the second and to an extent also the third parts – that is, whether the Defamation Act 2013 ('the Act') delivers on solving the problems identified in chapter 2 and whether benefits of the change are apparent. A final answer is attempted in chapter 7 after the comparative analyses with the ways in which the US, Germany and the ECtHR deal with the issues in this thesis in chapters 4 through 6.

To briefly recap: In chapter 2 the case is made that the then common law of defamation in England and Wales was indeed problematic and needed to be addressed. It was argued that the overarching problem was that the law as it stood favoured claimants in an unfair manner. This was caused by several factors, of which the following are the most significant: Costs associated with bringing or defending a claim; the scope of potential liability being so severe as to constitute an access to justice concern;[4]and furthermore, Milo's 'potent trilogy' of fundamental principles peculiar to defamation actions namely the presumption of falsity,

[1] As stated already, reference to the England and English law in this thesis includes Wales and Welsh law.
[2] (following the methodology of the thinker Edmund Burke).
[3] Burke, E *Reflections on the revolution in France*, *Works of Edmund Burke*, (Kindle Edn, 2016) volume 3 of 12. It is submitted that the pragmatism with which Burke sets about grounding abstract notions to reality is very useful, especially in the common law.
[4] See the discussion in paragraph 4.1.1 in chapter 2.

the irrebuttable presumption of damage, and the strict liability nature of libel and some slander claims. The overarching problem of imbalance between claimants and defendants in turn caused a number of others, such as acting as a driver of libel tourism and forum shopping, and raising concerns that free speech was being chilled.

From this, clear benchmarks against which the Act could be judged can be formulated. The main question is whether the playing field has been levelled between the defamation claimant and defendant. In order to attempt an answer this chapter focuses on the costs implications of the Act, as well as to what extent it addresses Milo's trilogy of procedural issues affecting defamation defendants.

In many, but not all instances, the 'level playing field' issue would mirror the question whether protection of reputation and the right to free speech is now balanced. To this end the effect of the Act on libel tourism is addressed, showing that research in this area remains opaque, and even more so in relation to the question whether free speech continues to be chilled. It is recognised that the growing importance and width of privacy and data protection legislation and jurisprudence should also be taken into account in this area. However, this merits a substantive discussion on its own and thus falls beyond the scope of this work. As this thesis is concerned mainly with the effect of libel reform on freedom of expression, not every aspect of the Act will be considered. Instead, the focus is placed on those sections of the Act directly impacting the overarching themes of the thesis.

Weir called the common law of defamation a 'blot on the lawscape'[5] because it accorded protection to reputation similar in strength to protection of liberty, which must surely outrank reputation as the more important right. Would he still be able to say this after the 2013 reforms? This chapter tries to provide an answer through examining how successful the 2013 Act is in addressing the concerns raised in the previous chapter, prior to moving on in following chapters to examine lessons that may be learnt from other jurisdictions.

[5] Weir, T *An Introduction to the Law of Tort* (2nd edn, OUP, Oxford 2006) 190.

2 Overview of the Defamation Act 2013

Before starting thematic analysis as set out above, a brief overview of the Defamation Act 2013 may be useful to contextualise the discussion.[6] The Act is relatively short, consisting of only seventeen sections that in turn codify, revise and alter the common law. At first glance it becomes obvious that the Act does not fundamentally alter the overarching structure of defamation law in England and Wales, as the focus remains on defences rather than on a reconceptualisation of the tort as such. A substantial part of the Act deals with defences: Sections 2 to 7 mostly abolish, but also replace the common law defences, in the main with similar or at least analogous defences.

Arguably the most significant alteration of the law is contained in section 1, which introduces a 'serious harm' threshold for a defamation claim. Section 8 replaces the multiple publication rule with a single publication rule, while section 9 attempts to address libel tourism by putting in place jurisdictional constraints on the adjudication of defamation suits pursued by non-domiciled claimants in England and Wales. Section 10 attempts to further restrict access to the libel court by limiting possible defendants to authors, editors or publishers of defamatory statements – so limiting actions against, for example, internet server providers, search engines or other non-editorial 'secondary publishers'. For all intents and purposes section 11 abolishes jury trials in defamation actions. Sections 12 and 13, dealing with remedies, are also important as the expanded basket of remedies available to courts have the potential to limit costs. The remaining general provisions deal with administrative issues[7]and a confirmation that the common law meaning of 'publish' and 'statement' remain unaltered.[8]

Against this broad outline the act can now be more closely examined.

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[6] For a brief snapshot of the act, see Farrer & Co 'A Quick Guide to the Defamation Act 2013(United Kingdom)' (2014) 25 *Entertainment Law Review* 55.

[7] Section 16 concerns consequential amendments and savings, etc., and section 17 provides the short title and extent and commencement of the Act.

[8] Section 15.

3 Critique of the Defamation Act 2013

In the preceding chapters some of the most prominent concerns about the common law of defamation were examined. As already stated, these included inequality of arms between the defamation claimant and defendant, due mostly to the potent trilogy of ,[9] which in turn was believed to have led to the chilling of free speech and the phenomenon of libel tourism; and the cost and complexity of defamation actions. The rest of this chapter examines whether and to what extent the Defamation Act 2013 addresses these issues.[10]

3.1 The Mischief the act was intended to address

It is trite that the key aim of statutory interpretation is to consider the mischief which the Act in question is intended to remedy, first by reading the Act and if necessary, looking 'at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it'.[11] Should the legislation itself prove ambiguous, it has been permitted since the decision in *Pepper v Hart* [1993][12] that the court may have regard to any report which informed the framing of the statute, provided that the report clearly discloses the mischief aimed at, or the legislative intention underlying the obscure or ambiguous words of the statute. Only very rarely, and as a last resort,[13] would it be permissible to have regard to statements made in the course of parliamentary debates by the promoters of the Bill.

Three key reports are instrumental in this respect: The Ministry of Justice's consultation paper on the draft Defamation Bill,[14] the report of the Joint Committee on the draft

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[9] As discussed in chapter 2, paragraph 2.3 and further, these are the presumption of harm, the presumption of falsity and the strict liability nature of the common law of defamation. To this can be added the de facto reversal of the burden of proof in defamation actions. See Milo, D *Defamation and Freedom of Speech* (OUP, Oxford 2008), chapters V and VI.

[10] Few authors have examined the Defamation Act 2013 in general, with most seeming to focus on particular or discrete aspects of the Act. For more general critique see Rolph, D 'A Critique of the Defamation Act 2013: Lessons for and from Australian Defamation Law reform.(United Kingdom)' (2016) 21 *Communications Law* 116 and Johnson, H 'The Defamation Act 2013 - Reform or Tinkering? (Editorial)' (2014) 19 *Communications Law* 1.

[11] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 614.

[12] *Pepper v Hart* [1993] AC 593 , 634 (Lord Browne-Wilkinson).

[13] *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633, para 126.

[14] Ministry of Justice, Draft Defamation Bill: Consultation (2011).

Defamation Bill,[15] and the government's response to the Joint Committee's Report.[16] The Joint Committee's report identified four key areas of concern:[17] Balancing freedom of expression with the protection of reputation; reducing costs, as it is recognised that the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen;[18]accessibility in the sense of demystifying defamation law for the ordinary citizen; and cultural change in order to reflect the realities of modern life, in particular modern communication culture.

The government's response strongly stressed redressing concerns about free speech:

> [W]e are firmly committed to reform of the law on defamation and the protection of free speech. The right to speak freely and debate issues without fear of censure is a vital cornerstone of a democratic society. We believe that it is important that our defamation laws strike a fair balance so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech and freedom of expression are not unjustiably (sic) impeded by actual or threatened defamation proceedings.[19]

The government also explicitly stated as a goal improving accessibility and clarity of the law of defamation[20] and reducing costs.[21] The concerns highlighted in chapter 2 clearly mirror these stated aims.

3.2 Levelling the playing field between claimant and defendant

One of the main points of critique against the common law of defamation was the unequal playing field faced by defamation defendants *vis-à-vis* claimants. A good place to start examining the impact of the Act on this issue, is with the already mentioned 'potent trilogy

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[15] Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011).
[16] Ministry of Justice, The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill (2012).
[17] Joint Committee Report Note 15, 3.
[18] *Ibid*. The Joint Committee further noted in this respect that 'early resolution of disputes is not only key to achieving this, but is desirable in its own right—in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort.'
[19] Ministry of Justice Response note 16, 4.
[20] *Ibid*.
[21] Ministry of Justice Response note 16. The government specifically stated that costs should be reduced by reducing jury trials (17) and procedural changes to encourage early dispute resolution (18-20).

of fundamental principles' of the common law of defamation in England, namely the presumption of falsity, strict liability and the presumption of damages.[22]

3.2.1 Strict liability and the reverse burden of proof

When the Defamation Act 1996 was being debated, it was suggested that the burden of proof be altered along the lines of this proposed amendment: 'In an action for defamation, the burden shall be upon the plaintiff to prove that the defamatory words of which he complains are false.' This amendment was not passed,[23] nor did the idea of abolishing no-fault liability for defamation find any traction in the 2013 reforms. The Ministry of Justice refused to make this change in the Defamation Bill because 'proving a negative is always difficult'.[24] But commentators have taken issue with this assumption, pointing out that all that would be required of the claimant is to go into the witness box and aver that the story is false and to submit to cross-examination. If the claimant survives this, they prove their case on the balance of probabilities, like any other civil litigation claimant.[25] Placing the burden of proof on the claimant means that the press, and others, would be free to raise questions about the conduct of people such as Jimmy Savile, for whom cross-examination may well have been too much of a risk.

3.2.2 Actionable per se: The serious harm requirement in section 1

Section 1 of the Defamation Act 2013 states that a statement is not defamatory unless it causes or is likely to cause serious harm to the reputation of the claimant. As Warby J said in *Doyle v Smith* [2018][26] – 'This is a beguilingly simple sentence.' It could be said equally that it proved to be a misleadingly simple sentence, as the debate as to its meaning and

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[22] Milo, note 9 p 11. See the discussion of these issues above in chapter 2, paragraph 3.
[23] *Hansard* HL Deb 2 Apr 1996: Col 242.
[24] Ministry of Justice, *Draft Defamation Bill* Consultation Paper CP3/11, March 2011, para 144: 'It may not be fair to place the burden entirely on a corporate claimant and absolve the defendant of the need to show that the defamatory publication was justified (or to substantiate another defence if appropriate). Proving a negative is always difficult, and it may be unduly onerous on a corporate claimant to require them to prove the falsehood of the allegations. We therefore do not consider that any formal reversal of the burden of proof is appropriate. However, a number of the actions which we propose in other areas should help to minimise any difficulties that may be experienced by defendants.'
[25] Robertson, G, QC 'Put burden of libel proof on claimants', *The Guardian*, 25 February 2013, <https://www.theguardian.com/law/2013/feb/25/libel-laws-speech-uk-expensive> accessed 02/04/2019.
[26] *Doyle v Smith* [2018] EWHC 2935 (QB).

effect started before and continued long after the Act came into force on 1 January 2014. Specifically, the question as to what constitutes serious harm proved to be difficult to resolve, and gave rise to debate about whether or not this section abolished the common law presumption of harm. Put another way: Does section 1 abolish the presumption of harm, meaning that libel is no longer actionable *per se*, or does it merely raise the threshold of harm, meaning that the presumption of harm is retained and with it the nature of libel as being actionable *per se*?[27] This was the question put to the courts in *Lachaux* [2015],[28]a case which concerned serious allegations made in British newspapers against the claimant by his ex-wife. The claimant, Bruno Lachaux, a French citizen, sued both Independent Print Ltd and AOL (UK) Ltd over a number of news articles which appeared in the Independent, the I, the Evening Standard and The Huffington Post (operated by AOL). The articles contained allegations which had arisen subsequent to the acrimonious divorce of the claimant and his ex-wife Afsana (a British citizen). The couple met and lived in Dubai for some time. A son was born to the couple in Dubai. At some stage during the divorce proceedings, Afsana disappeared with the child, and the claimant lost all contact with him for a considerable period of time. Sometime later the claimant learned of what he was to consider to be a campaign to defame him in the English press and media and which he attributed to Afsana and her eldest son (by a previous marriage). The defamatory meanings of the words complained of in the various publications included allegations of domestic abuse, false allegations of kidnapping against Afsana which, if upheld, could have resulted in her unfairly and unjustifiably facing a lengthy incarceration in Dubai, and concomitant abuse of Emirati law to deprive Afsana of custody and access to their son.[29] The 'meaning hearing' was relatively straightforward, with the statements relied on by Mr Lachaux found to be defamatory.

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[27] The Act is clear on this only in section 14(2) where it confirms the common law position that certain instances of slander are not actionable *per se*. In particular it states: 'The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage'.

[28] *Lachaux v Independent Print Ltd, Lachaux v Evening Standard Ltd, Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), [2016] 2 WLR 437.

[29] *Ibid* paras 5 to 21.

At first instance section 1(1) was interpreted as impliedly abolishing the presumption of harm. Warby J held that a proper construction of section 1(1) meant that 'libel is no longer actionable without proof of damage, and…the legal presumption of damage will cease to play any significant role.' He went so far as to say that '[t]hese…are necessary consequences of what I regard as the natural and ordinary, indeed the obvious meaning of section 1(1)'.[30]

However, the Court of Appeal reversed this decision, instead finding that the common law presumption of damage in fact survived the enactment of section 1(1).[31]The Court of Appeal agreed with the reasoning of Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2011],[32] and affirmed that the existence of the presumption of damage is compatible with a raised threshold of harm. The Court found that section 1(1) had merely raised the threshold from one of 'substantiality' to one of 'seriousness', with the latter conveying something 'rather more weighty' than the former.[33] Following this judgment, some disappointed commentators rightly observed: '…it seems fair to say that reports of the death of the libel writ have been greatly exaggerated'.[34]

But the Supreme Court disagreed with the Appeal Court's interpretation of section 1 of the Defamation Act 2013.[35] Lord Sumption gave a brief overview of the history preceding and culminating in the Defamation Act 2013 and set out the Court's ruling on how section 1 should be interpreted and applied in defamation cases. The Supreme Court unanimously held if 'serious harm' within the meaning of section 1(1) can be demonstrated only by reference to the inherent tendency of the words themselves, then no change in the law

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[30] *Ibid* para 60. On the facts, i.e. given the repute and scale of the publications, the judge held that serious harm was made out. He rejected the suggestion that an absence of tangible adverse reactions by publishees undermined his conclusions.

[31]*Lachaux v Independent Print Ltd, Lachaux v AOL (UK) Ltd* [2017] EWCA Civ 1334, [2018] Q.B. 594.

[32] *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, para. 94.

[33] *Lachaux* Appeal note 31 para 44.

[34]Wilson, I and Double, T 'Business as Usual? The Court of Appeal Considers the Threshold for Bringing a Libel Claim in Lachaux v Independent Print Ltd' *Inforrm's Blog*, 16 September 2017, <https://inforrm.org/2017/09/16/business-as-usual-the-court-of-appeal-considers-the-threshold-for-bringing-a-libel-claim-in-lachaux-v-independent-print-ltd-iain-wilson-and-tom-double/> accessed 3 April 2019. For further discussion of the Appeal Court's decision see Bennett, TDC 'Why so Serious? Lachaux and the Threshold of "Serious Harm" in Section 1 Defamation Act 2013' (2018) 10(1) *Journal of Media Law* 1-16 and case comment, 'Proof of Serious Harm' (2015) 20(3) *Communications Law* 100-102.

[35]*Lachaux v Independent Print Ltd and another* [2019] UKSC 27.

would have been achieved – and the Defamation Act 2013 is clear that it intended in section 1 to make a significant amendment to the common law.[36] This means that not only is the threshold of seriousness raised, but proof is also now required, on the facts, that the impact of the words was to harm the claimant's reputation.[37] The focus therefore is not only on the meaning of the words but on their actual or likely impact.[38] Further proof of this is the fact that section 1(2) requires an actual impact assessment – and the two sections need to be read together.[39] The reference to 'has caused' in section 1(1) relates to the consequences of publication and thus points to harm which has actually occurred/'historic harm'. The term 'likely to cause' in turn points to possible future harm. The Supreme Court held that both may be established as a fact.[40] Regarding the facts of the case, the Court held that factors such as the scale of publications (including print runs and estimated readership) and the gravity of the statements themselves (according to the meaning attributed to them) must be taken into account.

As to what kind of evidence would suffice to prove serious harm, the best kind of evidence would be from a person who had read/heard the publication and who formed a negative view of the claimant as a result. But the Supreme Court recognised that this would sometimes be almost impossible to obtain: the third parties to whom the communication took place may be anonymous, or if known to the claimant, may be reluctant to give evidence, or may not have formed a negative opinion of the claimant as they knew the claimant and therefore knew the allegations not to be true.[41] Because of these evidentiary difficulties, the Court was careful to reserve for itself the right to make inferences from the factual matrix laid before it in evidence: 'There is no reason why inferences of fact as to the seriousness of the harm done to…reputation should not be drawn from considerations of this kind,' and '[a] Claimant's case 'must not necessarily fail for want of such evidence'. [42]

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[36] *Ibid* para 13.
[37] *Ibid* para 12.
[38] *Ibid* para 14.
[39] *Ibid* para 15.
[40] *Ibid* para 14.
[41] *Lachaux* QB note 28 paras 138-140, 145.
[42] *Lachaux* SC note 35 para 21.

The significance of this decision by the Supreme Court was recognised by the defendants' barrister when she triumphantly stated: 'In a boost to free speech & the Fourth Estate the Supreme Court has come off the bench on defamation.'[43] In the Court's concise judgment, the meaning of the 'beguilingly simple' 23 words comprising section 1(1) Defamation Act 2013 which gave rise to so much debate is now clarified once and for all.

A useful summary of the state of the law relating to the evidentiary burden regarding serious harm can be found in *Sobrinho v Impress Publishing SA* [2016].[44] The uncontroversial aspects of section 1 are set out as including the following: In order to prove 'serious harm to reputation' it is open to the claimant to call evidence in support of their case – and likewise it is open to the defendant to call evidence to demonstrate that no serious harm has occurred or is likely to occur. It would be up to the court to draw inferences based on the admitted evidence, on the understanding that mass media publications of very serious defamatory allegations are likely to render the need for evidence of serious harm unnecessary, whilst at the same time it should be stressed that the issue of serious harm is not a 'numbers game', as it is acknowledged that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person. [45] The court also pointed out that there are evidential difficulties in proving serious harm, such as an 'understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence.'[46] The claimant may also find it difficult to get witnesses to say that they read the words and thought badly of the claimant.[47]

A number of cases were decided on the serious harm requirement following the clarification provided in *Lachaux*, including instances where the claim failed and instances where the

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[43] Canneti, R 'Rewriting the Defamation Act?' 169 *New Law Journal* 7845, 7. For another comment on the case see Dobson, N. 'Defamation & 'Serious Harm' Post Lachaux' 169 *New Law Journal* 7848, 13.
[44] *Sobrinho v Impress Publishing SA* [2016] EWHC 66, per Dingemans J, paras 46 to 50.
[45] *Ibid* para 47.
[46] *Ibid* para 48.
[47] Cf. the difficulties faced in in *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at para 55.

claimant succeeded in proving serious harm. In *Yavuz v Tesco Stores* [2019] the claimant sued in slander after the defendant accused him of theft. [48] The Court accepted that such an allegation has an inherent tendency to cause serious harm.[49] However, on the facts of the case it was clear that only a handful of people unknown to the claimant were likely to have heard the defamatory words. Nor did the claimant provided any evidence of the 'grapevine effect'. Therefore, although the imputation was grave, there was no factual basis for drawing an inference of serious harm. Nor was there any likelihood of the imputation to spread and to potentially thereby cause serious harm.[50] Likewise in *ZC v Royal Free London NHS Foundation Trust* [2019] a patient's libel claim against a hospital failed where, although the hospital had sent an email to four people imputing that the patient had behaved dishonestly and fraudulently, she was unable to prove as a fact that the email had caused or was likely to cause her serious harm.[51] Knowles J concluded that the claimant had failed to show the email in question had caused her serious harm in fact or that it was likely to do so. The evidence showed that the number of publishees was very limited and there was no grapevine effect. Furthermore, two of the four recipients of the email already knew about the contents of the email beforehand, and there was no evidence that anyone thought any less of the claimant because of the email.[52]

The following case illustrates facts that did indeed support a claim of serious harm to reputation. In *Al Sadik v Sadik* [2019] the defendant subsequent to a property dispute sent a WhatsApp message to 34 family members and friends alleging that her brother in law, the claimant, had (*inter alia*) arranged to rob his brother's house, had lied, even after having sworn on the Quran to tell the truth, and had committed perjury in order to dishonestly promote his interest at the expense of his own brother.[53] Among the factors that informed the decision by the Court that the section 1(1) threshold had been met were the fact that the allegations were very serious, had a religious component and were specifically targeted

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[48] *Yavuz v Tesco Stores Ltd & Anor* [2019] EWHC 1971 (QB),
[49] *Ibid* para 59.
[50] *Ibid*.
[51] *ZC v Royal Free London NHS Foundation Trust* [2019] EWHC 2040 (QB).
[52] *Ibid* para 131.
[53] *Al Sadik v Sadik* [2019] EWHC 2717 (QB).

to the claimant's family members. The Court found that the number of publishees were not trivial and that there was evidence of further dissemination via the grapevine, even though this could not be fully quantified.[54]There was no direct evidence of adverse impact. However, given the nature of the statement, the standing of the claimant in London and abroad, the sender of the messages and the targeted nature of the publication, Knowles J held:

> I regard it as an arguable inference that there will be some among the population, who do not know the Claimant, and in whose eyes he has suffered serious reputational harm. The inherent probabilities in this case, certainly at this stage, are that there will have been some people who have become aware of the Messages and concluded that the Defendant would not have made such widespread and serious accusations against her sister's husband [the Claimant] unless there was some substance to them.[55]

Fentiman v Marsh [2019] concerned allegations against a company of which the claimant was a director and posted on various social media sites and blog entries.[56] The publications included allegations of fraudulent and criminal activity. The Court held that the subject matter of the publications were all grave and had an inherent tendency to cause serious harm. The number of publishees were also substantial, comprising 100 to 230 views for each post.[57] Furthermore, the Court stated that even though the claimant led evidence of substantial further dissemination via the grapevine, the Court would have been prepared to draw such inference as such percolation typically results from allegations such as those under contention on social media. What is more, the claimant submitted evidence from staff members who had read the post that they were troubled that the allegations against Mr Fentiman might be true, even though these publishees were persons close to the claimant and trusted and admired him.[58]

These cases clearly illustrate the two-pronged approach to serious harm under section 1(1) of the Defamation Act 2013 as described by Lord Sumption in *Lachaux*: The courts will consider the 'inherent tendency' of the statement/s to cause harm, and secondly their

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[54] *Ibid* paras 95, 99-100.
[55] *Ibid* para 101.
[56] *Fentiman v Marsh* [2019] EWHC 2099 (QB).
[57] *Ibid* para 55.
[58] *Ibid*.

'actual impact.' [59] It is clear that although the inherent tendency of the statement to cause harm, i.e. the gravity of the statement, is important, it would be unwise for the claimant to rely solely on this. Evidence on the facts about the actual impact on the claimant's reputation needs to be led. These include for instance the number and nature of publishees, whether the publication was targeted and whether the defendant intended to harm the claimant's reputation. Publication to family, friends, colleagues and the like would be viewed seriously.[60] Data analytics in the case of internet and/or social media dissemination could be submitted to prove the extent of publication.[61] The location of the likely publishees are taken into account, and the Court is not averse to noting the probability of the grapevine effect, especially as an inference in social media cases.[62] Evidence should be brought that publishees thought worse of the claimant, i.e. evidence of the adverse impact of the publication, although the absence of such evidence is not fatal to the case.[63]

Serious Harm to Corporate Reputations

It was argued, and debated in Parliament, whether to restrict the rights of corporate claimants in defamation actions, bearing in mind that this had been done in some other jurisdictions.[64] The main contention in favour of such restriction relates to the chilling effect that the common law defamation law had on free speech. As discussed in chapter 2, the 'McLibel' litigation is a reminder of the kind of power wielded by large corporations to silence critique. The counter-argument is that not all companies are well resourced and powerful, and there will be cases where a company ought legitimately to be able to seek judicial redress for potentially irreparable harm caused to it by a defamatory publication. In

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[59] *Lachaux* SC note 35 para 17. For a discussion of key cases on the section 1(1) requirement decided after the Supreme Court decision in *Lachaux* see Aamodt, A 'What Next for Defamation?' (2019) 169 *New Law Journal* 21-22.
[60] *Al Sadik* note 53 paras 96-98.
[61] In the case of *Monroe v Hopkins* [2017] EWHC 433 (QB) data was submitted about the reach of tweets sent out by the journalist Katie Hopkins about left wing food blogger Jack Monroe, see para 84 of the judgment.
[62] *Fentiman* note 56 para 55.
[63] *Lachaux* SC note 35 para 21.
[64] Ministry of Justice, *Draft Defamation Bill: Consultation* (2011) paras 136-45; Ministry of Justice, *Draft Defamation Bill: Summary of Responses to Consultation* (2011) 7, 70-2; Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011) paras 108-18.

the end a compromise was enacted, with the insertion of a provision that for the serious harm threshold in section 1(2), in case of bodies trading for profit, harm is not serious unless it has caused or is likely to cause serious financial loss to the body.[65]

As was the case for section 1(1) of the Defamation Act 2013, section 1(2) also gave rise to interpretational difficulties. Following the lead of the Appeal Court's decision in *Lachaux* upholding the common law legal inference of damage, it was not surprising that the Court in *Burki v Seventy Thirty Ltd* [2018] held that the claimant company did not need to provide evidence of serious financial loss, nor of a likelihood of such loss occurring, in order to satisfy section 1(2). [66] In the Court's view doing so would wrongly confuse 'serious financial loss' with special damage. The Court then went on to infer a tendency to cause serious financial loss from broader circumstantial facts. Interpreting section 1(2) in the same way as section 1(1) in this way means that very few corporations would be barred from being able to sue. Put another way:

> The problem [with interpreting these concurrent subsections in the same way] is that it builds a claim for a commercial claimant by stacking inferences on top of one another, creating an inferential house of cards.[67]

The Supreme Court's decision in *Lachaux* has now surely toppled this 'inferential house of cards.' If the presumption of damage did not survive for section 1(1), surely it cannot survive for section 1(2), as the latter is meant to be a narrower construct than the former.

Given the Supreme Court decision in *Lachaux*, it is therefore reasonable to expect more cases on the issue of serious harm as a substantive and not a threshold issue to emerge.

From presumption of harm to causation

If the claimant succeeds in proving to the satisfaction of the court that his reputation was or is likely to be harmed, the next crucial step would then be to prove causation. This could be particularly problematic where there are publications about the same subject matter which

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[65] Section 1(2).
[66] *Burki v Seventy Thirty Ltd* [2018] EWHC 2151 (QB).
[67] Bennett, TDC 'An Inferential House of Cards – Serious Financial Loss under Section 1(2) Defamation Act 2013: Burki v Seventy Thirty Ltd & Ors' (2019) 24(1) *Communications Law* 34-37.

are not the subject of complaint.[68] The House of Lords' decision in *Associated Newspapers v Dingle* [1964][69] assists to an extent. In this case it was held that a defendant cannot rely in mitigation of damages for libel on the fact that the same or similar defamatory material has been published in other newspapers about the same claimant. However, this does not assist in resolving the issue of causation, as it does not address the issue of whether a publication has caused serious harm. Related to causation is the characteristic peculiar to defamation of the so-called 'grapevine effect': as Bingham LJ pointed out in *Slipper v BBC* [1991], damage caused by defamation more often than not do not begin and end with publication to the original publishee, as defamatory statements have a propensity 'to percolate through underground channels and contaminate hidden springs'.[70]

Apart from the above, section 1 does not otherwise alter the common law tests for determining whether a statement is defamatory.

3.2.3 The presumption of falsity

Unfortunately the Act does not alter the common law presumption that a defamatory statement is false. In fact, the presumption was reaffirmed by the Court of Appeal in *Serafin v Malkiewicz* [2019] when the following was pointed out:

> It was a fundamental tenet of libel at common law that a defamatory imputation was presumed to be false, and that the burden was therefore on the defendant to prove that it was substantially true. That principle had since been enshrined in s.2 of the Defamation Act 2013.[71]

The remarks in Chapter 2 concerning the lack of judicial and legislative will to reform this presumption can therefore be repeated here.[72]

It is therefore clear that two of the three main structural issues that Milo identified as being problematic in the common law of defamation remain fundamentally unaltered by the Act. This may well be a golden opportunity missed, given that alternatives are available, as will be seen from the discussion of the other jurisdictions in this thesis.

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[68] *Tesla Motors v BBC* [2013] EWCA (Civ) 152 and *Karpov v Browder and others* [2013] EMLR 3071 (QB).
[69] *Associated Newspapers v Dingle* [1964] AC 371.
[70] *Slipper v BBC* [1991] QB 283, 300.
[71] *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852 H16 (9).
[72] See chapter 2, para. 3.3.

This brings us back to the question whether the changes wrought by the Act are far reaching enough to address the issues that led to its enactment. Certain societal/qualitative effects may be very difficult to gauge, such as the impact on freedom of speech. Others may be easier as empiric data may become available, such as analysis of the number of foreign claimants pursuing claims in England and Wales, to gauge the effect of the Act's reforms on the occurrence of libel tourism. For now, staying with the topic of the balance of power between claimant and defendant, two related issues deserve attention. Both stem from the fact that for all practical purposes, jury trials for defamation cases have been abolished by section 11 of the Act, which directs that defamation trials are to be without a jury unless the court orders otherwise.

3.2.4 Jury trials 'abolished'

Defamatory meaning

It used to fall to the jury to decide whether or not the statement complained of in a defamation trial carried a defamatory meaning. Section 11 now places this task in the hands of the trial judge, and the hope is that this would engender more reasoned decisions by judges on why a statement is deemed defamatory. Indeed the post-2014 case law mostly include very thoughtful and careful findings on meaning. The best and most recent example is to be found in the Supreme Court's judgment overruling both the first instance and appeal court findings in *Stocker v Stocker* [2019].[73]

In this case, the respondent to the appeal, Ronald Stocker, was the former husband of the appellant, Nicola Stocker. After their marriage ended acrimoniously, Mrs Stocker said this to her ex-husband's new partner in a Facebook post: 'He tried to strangle me.' The issue before the court was purely that of meaning. The judges had to decide what those words would convey to the 'ordinary reasonable reader' of a Facebook post. At first instance, and on appeal, the words were given their dictionary definitions, which accorded to the respondent's claim that it conveyed the meaning 'he tried to kill me'.[74] The Supreme Court

[73] *Stocker v Stocker* [2019] UKSC 17.
[74] *Ibid* para 16.

held that by taking this as their starting point, the judges erred in law, and that they also failed to take into account the context of a Facebook post. The words had to be taken together so as to determine what the ordinary reasonable reader would understand them to mean.[75] Affirming the single meaning rule, the Court emphasised that the primary role of the court was to focus on how the ordinary reasonable reader would construe the words complained of, in the event of several possible meanings. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made.[76] The fact that the statement under scrutiny was made in a Facebook post was very pertinent: It was unwise to search a Facebook post for its theoretical or logically deducible meaning. It should be recognised that Facebook was a casual medium; it was in the nature of a conversation rather than carefully chosen expression. People scrolled through Facebook quickly and their reaction to posts was impressionistic and fleeting.[77] The Court held that the ordinary reader of the Facebook post would unquestionably have interpreted the post as meaning that the respondent had grasped the appellant by the throat and applied force to her neck, rather than he had tried deliberately to kill her. Because this is in fact what happened, the Court held that the Appellant's defence of justification should succeed.[78]

The procedural stage at which the court examines meaning is also significant, but here the implications for the libel defendant are less clear. On the one hand, the procedure which is now accepted practice for the determination of meaning could entail significant costs savings, as meaning can be determined as a preliminary issue by the judge. A number of cases decided by Nicklin J indicate that in accordance with the overriding objective of the Civil Procedure Rules, a hearing to determine meaning should be held at an early stage and before service of the Defence.[79]

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[75] *Ibid* paras 23-26.
[76] *Ibid* paras 34-38.
[77] *Ibid* paras 39-44.
[78] *Ibid* paras 61-62.
[79] *Morgan v Associated Newspapers Ltd* [2018] EWHC 1850 (QB), *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB).

But, on the other hand, since the preliminary hearing on meaning should be conducted before service of the Defence, it is unclear whether the procedure would also allow the defendant to dispute the issue of meaning. As it stands, there is no obligation on a defendant to plead the meaning they said the words bore at such a preliminary hearing, and there may even have been a rule preventing such a pleading.[80] Nicklin J seems to indicate that this is not the case anymore and that indeed it now falls to both parties to address meaning at an early stage. What is more, failure to do so could entail costs penalties: In *Poroshenko v BBC* [2019] the judge awarded costs against the claimant for unduly obstructing an early resolution of meaning.[81]

Costs down

Not using a jury in itself is a cost saving measure.[82] Furthermore, one of the issues that drove libel reform was the occurrence of several high awards by juries that subsequently had to be reduced on appeal.[83]At this point, it is important to note that although the remedies in defamation include, possibly, an injunction, a published correction, an apology or statement in open court under para.6 of CPR PD 53, the main remedy in a defamation trial remains an award of damages.[84]There are three heads of damages: general (compensatory) damages, aggravated damages and exemplary damages. Lord Donaldson MR and Nourse LJ in their respective judgments in *Sutcliffe v Pressdram* [1990][85]provide an excellent analysis as to why the *quantum* of libel damages has historically been on a vastly different scale to awards made in personal injury cases: 'juries do not give reasons for their awards and it is the common experience of judges that having to give reasons is something which puts a substantial premium on ensuring that the head rules the heart'. Libel damages

[80] *Bokova* .note 79 para. 7.
[81] *Poroshenko v BBC* [2019] EWHC 213 (QB) para. 51.
[82] Joint Committee on the Draft Defamation Bill, note 68, p. 3. See also Ministry of Justice, *Draft Defamation Bill: Consultation* (2011) para 95.
[83] See the discussion of *John v Mirror Group Newspapers* [1996] 2 All ER 35 and *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152 in chapter 2 above.
[84] This was confirmed in *Cairns v Modi* [2012] EWCA Civ 1382.
[85] *Sutcliffe v Pressdram* [1990] 1 All E.R. 269, per Lord Donaldson MR at 281.

are now subject to a notional ceiling which rises with inflation.[86] The current ceiling is in the order of £275,000.

Having cut costs associated with jury trials; does the Act address costs in other ways?

3.2.5 Cost and complexity

Mullis and Scott argued that the core problem with the common law of libel was that it juridified and over-complicated disputes that properly belong in the public sphere, with the result of making the cost of legal proceedings excessive.[87] Since the reforms did not change the nature and classification of defamation as falling under private law, it comes as no surprise that cost and complexity remain issues vexing this area of law. The excessive cost aspect, of course, also fed into the skewed balance of power between claimants with deep pockets and impecunious defendants which in turn added to the claimant friendly view of English libel law. The 2013 Act does not address this problem sufficiently, in fact it barely touches this problem, and this surely is, to again quote Mullis and Scott, '…to the benefit of no-one bar tyrants and lawyers.'[88]

In order to understand the problem with costs in defamation actions, it is necessary to examine the role of conditional fee agreements (CFA) and 'after-the-event' insurance (ATE).[89]CFAs provide for success fees as percentage uplift (up to 100%) on base costs, payable to a litigant's lawyers in the event that he is successful. ATE insurance premiums are sums paid by a litigant to insure him against, amongst others, potential costs liability. In the context of defamation, both are problematic. The following case is illustrative.

Disproportionate costs orders – conditional fee agreements

In the 2017 Supreme Court case *Times Newspapers Ltd v Flood*[90]the central question was whether the claimants were entitled to recover their entire costs which far outstripped their damages awards, and in two instances, were awarded even though the defendants had

[86]Civil Procedure Rules 1998/3132, Practice Direction 53, para. 6.1.
[87] Mullis, A and Scott, A 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) *Modern Law Review* 87.
[88] *Ibid* 88.
[89] CFA's are recoverable by the provisions of Part II of the Access to Justice Act 1999. The 1999 Act regime, *inter alia*, inserted section 58A(6) into the Courts and Legal Services Act 1990 allowing for the recovery of CFA success fees and, by section 29 of the 1999 Act, allowed for after the event (ATE) insurance premiums also to be treated as a recoverable cost.
[90] *Times Newspapers Ltd v Flood* [2017] UKSC 33.

largely succeeded with their respective defences. Lord Neuberger summarized the issues as follows: The appeals involve a challenge to an order for costs made by a High Court judge against a newspaper publisher after a trial. In two of the appeals, the trial involved an allegation that the newspaper had libeled the claimant; the third appeal involved allegations that the newspaper had unlawfully gathered private information about the claimants by hacking into their phone messages. In each case, the newspaper publisher lost and was ordered to pay the claimants' costs, and in each case the newspaper publisher contends that the costs order infringes its rights under Article 10 of the ECHR.[91]

The claimant was awarded £60,000 damages and his entire costs of the action, with the result that his base costs and the additional liabilities by way of success fee and ATE premium totalled some £1.6million.[92]Here we should note that in September 2013 the government released for public consultation proposals for costs protection in defamation and privacy claims. The proposed changes were '…designed to help people and organisations of modest means to be able to bring and defend defamation and privacy claims without the fear of having to pay unaffordable legal costs to the other side if they lose.'[93] The consultation proposed that those of substantial means (whether individuals or organisations) would be excluded from the costs protection regime, while those of less modest means might have to pay something towards the legal costs of the other side if they lose.[94] These proposals were to give effect to Lord Justice Jackson's recommendations on civil litigation funding and costs,[95] and to try and achieve at least some measure of parity with the implementation of qualified one way costs shifting (QOCS) which were introduced for personal injury claims from 1 April 2013 following the coming into force of the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO).

However, by the time that *Flood* reached the Supreme Court, these proposals had not reached any concrete resolution. The case therefore had to be decided on the law as it stood. While Part 2 of LASPO ended the recovery of CFA and ATE insurance sums from

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[91]*Ibid* p 1421, para. 1.
[92] *Ibid* p 1415.
[93] Ministry of Justice, Costs protection in defamation and privacy claims: the Government's proposals (2013) 4.
[94] *Ibid* 7 para 42 'Summary of proposals'.
[95] Jackson, Sir R Review of Civil Litigation Costs: Final report (December 2009).

opponents, a transitional order preserved the pre-LASPO position in specific categories of litigation, including publication cases such as privacy and defamation cases. As stated above, this was pending the introduction of a new costs regime for publication cases.

Lord Neuberger delivered the judgement in *Flood* on behalf of all members of the Court. The Strasbourg Court's decision in *MGN v UK* (2011)[96] was given careful consideration. This case followed from the House of Lords' decision in *Campbell (No 2)* [2005] [97]and the Court decided that MGN's Article 10 rights were infringed by having to reimburse the claimant the very large success fee and the ATE premium which Ms Campbell had incurred.[98]This decision was reached on the basis of the 1999 Act regime and took into account the wide margin of appreciation granted to the UK. Lord Neuberger interpreted the *MGN* case as in effect meaning that, although 'Article 10 is [not] automatically infringed in every case,'[99] 'where a claim involves restricting a defendant's freedom of expression, it would normally be a breach of its Article 10 rights to require it to reimburse the claimant any success fee or ATE premium which he would be liable to pay'.[100]

Lord Neuberger then proceeded on the basis that it would *normally* breach a publisher's Article 10 rights to require it to reimburse any success fee or ATE premium, and therefore the starting point was that, in the absence of a good reason to the contrary, the appellant would be entitled to have the costs orders amended to remove the additional liabilities.[101] However, the Court found that on the facts it would undermine the rule of law if the additional liabilities could not be claimed – parliament had decided that post-LASPO, the 1999 Act would not be dis-applied retrospectively, in cases where additional liabilities were no longer recoverable.[102] It also found that amending the costs order would infringe

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[96] *MGN v UK* (2011) 53 EHRR 5. See the discussion of this case in chapter 6.
[97]*Campbell v. MGN Limited (no. 2)*[2005] UKHL 61.
[98] *Ibid*. Ms Campbell had funded her own litigation in the lower courts, but in the House of Lords hearing she retained solicitors and counsel pursuant to a CFA which provided for her solicitors and counsel to be entitled to success fees of 95 per cent and 100 per cent respectively. The success fee MGN was liable to pay amounted to £279,981.35, which brought total liability for legal costs to £1,086,295.47.
[99] *Flood* note 90 par 34.
[100] *Ibid* para 42.
[101] *Ibid* paras 42 and 45.
[102] *Ibid* paras 46-48.

another Convention right, namely the right to property under Article 1 of the First Protocol to the Convention. Lord Neuberger accepted that it was therefore inevitable that one side's Convention rights would be infringed. He reasoned that allowing the appeal would involve a graver infringement of the rights of the respondents than the infringement of the appellant publishers' Article 10 rights that would result from permitting the cost orders to stand.[103] This decision did not provide the clarity on the recoverability of additional liabilities which might have been hoped for. In fact it reflected the uneasy situation with the continuing application of the 1999 Act regime,[104] permitting the recovery of additional liabilities in publication cases.[105]

In the meantime, what happened to the government proposals regarding costs? In the end, following the consultation, the government decided not to proceed with the costs protection proposals as set out in the consultation. Instead they decided to keep the existing arrangements in place when the success fee reforms come into force on 6 April 2019.[106] Part 2 of the LASPO contains CFA reforms relevant to defamation and privacy cases. These 'success fees' are from 6 April 2019, non-recoverable for new cases. This will certainly have an impact on the costs of these cases and will also give effect to the UK's legal obligations under *MGN v UK.*

However, the government has decided to keep in place, at least for the time being, the existing costs protection regime, which means that ATE insurance premiums will remain recoverable. The rationale is that this will enable parties with a good case to litigate and discharge their Article 10 rights without the fear of having to pay potentially ruinous legal costs if their case fails. The government hopes that this approach will control costs but

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[103] *Ibid* paras 54 and 56.
[104] by operation of the LASPO (Commencement No. 5 and Saving Provision) Order 2013.
[105] See the discussion of this case on the INFORRM blog: Wills, A 'Flood v Times Newspapers, CFA Appeals Dismissed, Future of the Scheme Left Open'20 April 2017, < https://inforrm.org/2017/04/20/case-law-flood-v-times-newspapers-cfa-appeals-dismissed-future-of-the-scheme-left-open-aidan-wills/> accessed 4 April 2019.
[106] Ministry of Justice, *Costs protection in defamation and privacy claims: the Government's proposals, The Government Response* (29 November 2018), <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/> accessed 4 April 2019.

protect access to justice, since parties with good cases can still benefit from recoverable ATE insurance in respect of adverse costs.

Overall, the procedure in defamation cases (as in all civil litigation) has been streamlined and clarified, and with the abolition of jury trials, simplified to a large extent. However, the procedure is still complicated and it is a pity that the alternative dispute proposals mooted prior to the 2013 Act never got any serious consideration. [107] As to costs, the effect of the demise of CFA's will be interesting to follow. This coupled with the encouragement in the 2013 Act to use alternative remedies to damages awards may well have a significant impact on the costs associated with defamation suits. For example, section 11 provides as a remedy, where the court gave judgment for the claimant, that it could order the defendant to publish a summary of the judgment. There is also, of course, the order to remove the offending statement or cease its distribution, etc., contained in section 12.

3.2.6 Libel Tourism

The matter of libel tourism is addressed in section 9 of the Defamation Act 2013, in terms of which courts in England and Wales no longer have jurisdiction against defendants domiciled outside the United Kingdom, other European Union member states, Iceland, Norway or Switzerland, unless, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring the action. [108] Some commentators have pointed out that the issue of libel tourism may have been overstated to start with, citing decisions not allowing claims brought by non-domiciled claimants shortly before the Act came into effect.[109]

However, it is questionable whether section 9 has had the intended deterrent effect. The courts of England and Wales remain a popular choice, and there have been a number of

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[107] Webb, S 'Double Trouble? How ADR Can Help Resolve Libel Disputes' (2010) 160 *New Law Journal* 989.
[108] For instance, in *Craig Wright v Roger Ver* [2019] EWHC 2094 (QB) the High Court found it did not have jurisdiction to hear a libel claim brought against an individual who was not domiciled in the UK or a Member State, as England and Wales was not the most appropriate forum. The majority of the offending publications had been in the US.
[109]These include *Subotic v Knezevic* [2013] EWHC 3011 (QB) (QBD) and *Karpov v Browder* [2013] EWHC 3071 (QB). See Rudkin, T and Pearce, C 'Forum Shopping in the 21st Century' (2014) 25 *Entertainment Law Review* 73.

high-profile claims where neither claimant nor defendant resided in this jurisdiction – although in these instances the courts did not hesitate to apply section 9 restrictively.[110]

3.2.7 Claims against persons who are not the primary publisher of the defamatory statement

Section 10 changes the common law significantly by removing the jurisdiction of courts in England and Wales to hear defamation actions against secondary publishers of defamatory statements (in most cases, at least). The section states:

> (1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of *unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.* (Own emphasis)
> (2) In this section 'author', 'editor' and 'publisher' have the same meaning as in section 1 of the Defamation Act 1996.

By section 1(3)(a) of the Defamation Act 1996, persons who are involved only in printing, producing, distributing, or selling printed material containing a defamatory statement are not to be treated as authors, editors or publishers of the statement. This means that, read with the 2013 Act, courts in England and Wales no longer have jurisdiction to determine a defamation action brought against such person, for causes of action accruing after the Act's commencement, unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher of the statement. [111]

The significance of this change is that it protects secondary publishers such as wholesale and retail newspaper and magazine vendors and distributors, commercial printers, libraries and book distributors, who at common law, were deemed to be publishers and as such

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[110] To name a few: *Ahuja v Politika Novine I Magazini Doo* [2015] EWHC 3380 (QB); *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA*[2018] EWHC 1081 (QB); *Sobrinho v Impresa Publishing SA*[2016] EWHC 66 (QB) and *Sloutsker v Romanova*[2015] EWHC 545 (QB). For recent discussions of forum choice see Baker, PB 'Legal Update: Media: Libel Actions – Here or the United States?' (2018) 39 *Law Society Gazette* 28; Hooper, D 'How the Court Will Interpret Whether England is the Most Appropriate Place to Bring a Libel Action' (2016) *Entertainment Law Review* 102; and Rudkin and Pearce note 109.

[111] For an application of this section, see *Richardson v Facebook* [2015] EWHC 3154 (QB) However see *Monir v Wood*[2018] EWHC 3525 (QB); [2018] 12 WLUK 367 and the reasoning as to why the chairman of a local branch of a political party was held liable for a libelous tweet sent by a branch member through the branch's Twitter account.

potentially liable.[112] The question is, when will it be deemed to be 'not reasonably practicable' to sue the author, editor, or publisher? Within the meaning of section 10(1) of the 2013 Act this answer will be fact sensitive. Some instances could include, for example, where the claimant, despite making reasonable attempts, has not been able to identify or locate the author, editor or publisher, or where the latter could not be made to submit to the jurisdiction of the court, or could not be sued for some other reason such as death or bankruptcy.[113]

Should the court allow a secondary publisher to be sued, the following defences are the most likely (depending on their nature and the role they played in publication): the defence for operators of websites in section 5 of the 2013 Act; the defences for internet intermediaries in regulations 17-19 of the Electronic Commerce Regulations, and the statutory[114] or common law defences of innocent dissemination.[115]

The changes made by the 2013 Act as they impact defamation defendants can be summarized as shrinking the potential pool of defendants (sections 9 and 10), and reducing costs both in terms of potential damages awards and legal costs. The absence of legal aid (save for humans defending a suit brought by a multinational corporation) remains problematic in terms of access to justice. Moreover, the procedure faced by parties to a claim of defamation, although streamlined and slimmed down, still remain a daunting

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[112] Although section 1(3)(a) of the Defamation Act 1996 refers to printed material only, similar protection would in effect be extended to online publications by the working of section 1(3)(c), to the processors, copiers, distributors and exhibitors of films through section 1(3)(b), and the broadcasters of live programmes through section 1(3)(d).

[113] For a comparative analysis of legal developments in the UK, India, the US and South Africa on the liabilities of internet service providers (ISPs) for the publication of defamatory statements on their services, and the ways in which ISPs might be involved in the dissemination of defamatory statements, see Araromi, MA 'Determining the Liabilities of Internet Service Providers in Cyber Defamation: A Comparative Study' (2016) *Computer and Telecommunications Law Review* 123.

[114] Defamation Act 1996, section 1.

[115] The common law defence of innocent dissemination operates as an alternative to its statutory counterpart in section 1, Defamation Act 1996, *Metropolitan International Schools Ltd v Designtechnica Corp* [2009] EWHC 1765 (QB), para 70. It relieves defendants who are secondary publishers/distributors of defamatory publications upon proof that they did not know that the publication contained a libel or was likely to contain a libel, and the absence of knowledge was not due to any negligence on their part. See *Emmens v Pottle* (1885) 16 QBD 354 (CA); *Vizetelly v Mudie's Select Library Ltd* (1900) 2 QB 170 (CA) and more recently, *Goldsmith v Sperring* [1977] 1 WLR 478 (CA).

prospect. Most significantly, however, the core characteristics of the common law which made it problematic for defendants remain unchanged. Defamation is still a strict liability tort, subject to a presumption of falsity, and with the burden of proof still largely on the defendant. The conclusion therefore can only be that the playing field has not been levelled in favour of defamation defendants.

3.3 Less chilling of free speech?

One of the main *raisons d'être* for the Defamation Act 2013 was the need to reduce the chilling effect on free speech that the common law rules on defamation had.[116] Of course, the issues analysed above in paragraph 3.2 relating to the inequality of arms between defamation claimants and defendants, have a direct bearing on free speech being chilled. It is precisely because those accused of defamation dread costly court procedures combined with legal presumptions favouring their accusers that persons think twice about stating some things. Therefore the conclusions reached at the end of the preceding discussion are also applicable here. A few further comments need to be made on this topic.

Unintended consequences

Instead of promoting free speech, some of the 'protections' created by the Act may actually work in such a way as to inhibit it. Take for an example the section 5 defence given to operators of websites, which reduces the potential for defamation actions to be brought against internet intermediaries for defamatory statements posted by others. Should such an internet intermediary be sued in defamation, it can raise the defence of stating that the statement was not posted by itself but by another.[117] However, the defence is defeated if the claimant shows that he could not identify the person who posted the statement,[118] he gave a notice of complaint regarding the statement to the website operator,[119] and the

[116] See in particular the explanatory notes to the Defamation Act 2013.
[117] Section 5(2).
[118] Section 5(3)(a).
[119] Section 5(3)(b).

operator then failed to respond to such notice in accordance with the Defamation (Operators of Websites) Regulations 2013.[120]

The website operator now has three options in terms of the mechanism provided for in the Regulations: It can obtain the poster's consent to reveal their identity to the claimant, and if granted, must then give the poster's name and address to the claimant; if such permission is refused, it must inform the claimant of such refusal and also that the poster has refused to consent to the removal of the offending statement;[121] or, finally, it could simply remove the statement complained of. Failure to do this would deprive the operator of the section 5 defence. It is no stretch of the imagination to assume than rather than assuming the potentially considerable burden of contacting posters, website operators may simply remove postings upon receipt of a notice of complaint, irrespective of whether they are in fact defamatory or not. To this should be added concerns about the effects on free speech by data protection regulations including the newly operative EU General Data Protection Direction and the rapidly developing law on privacy protection.[122]

Companies and trading corporations

As noted in the discussion of the serious harm requirement above in paragraph 3.2.2, it was argued, and debated in Parliament whether to restrict the rights of corporate claimants in defamation actions, bearing in mind that this had been done in some other jurisdictions.[123] The main contention in favour of such restriction relate to the chilling effect that the common law libel laws had on free speech: powerful corporations regularly intimidated publishers with defamation proceedings. The 'McLibel' case,[124] discussed in chapter 2

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[120] SI 2013/3028, s 5(3)(c).

[121] In such an instance, the claimant has to use alternative means to try and identify the poster: for example, using the application outlined in *Norwich Pharmacal Co v Commissioner of Customs and Excise* [1974] AC 133 (HL), which is usually used to force journalists to reveal their sources, but which is granted at the court's discretion.

[122] Jones, M 'Privilege, Power and the Perversion of Privacy Protection' in Weaver, RL, Reichel, J, and Friedland, SI (eds), *Comparative Perspectives on Privacy in an Internet Era, The Global Papers Series, Volume VII* (2019, Carolina Academic Press, Durham, North Carolina) 141-164.

[123] Ministry of Justice Consultation note 14 paras 136-45; Ministry of Justice Responses to Consultation note 16, 70-2; Joint Committee on the Draft Defamation Bill note 68 paras 108-18.

[124] *McDonalds Corp. v Steel* [1995] 3 ALL ER 615, *Steel and Morris v UK* [2005] 18 BHRC 545.

above, will forever remain a stark reminder of the kind of power wielded by large corporations to silence critique. Against the arguments raised in favour of limiting or excluding corporate claimants, it was countered that of course not all companies are well resourced and powerful, and there will be cases where a company ought legitimately to be able to seek judicial redress for potentially irreparable harm caused to it by a defamatory publication. In the end a compromise was enacted, with the insertion of a provision that for the serious harm threshold in section 1 of the 2013 Act, where bodies trading for profit are concerned, harm is not 'serious' unless it has caused or is likely to cause serious financial loss to the body.[125]

3.4 Conclusions and other issues

Overall, conclusions on how far the 2013 reforms go towards levelling the playing field and redressing the balance in favour of free speech are tentative. It seems as if there is a concerted effort to address these concerns, but the overall impression, if the preceding discussion points are viewed holistically, is that the reforms simply do not go far enough.

Related to the matter of complexity, it is not clear that the Act is sufficiently holistic: It does not seem to be joining the dots with other areas of the law. For example, pre-legislative questions as to why the tort is not run more along the lines of personal injury matters as in the law of negligence remain. The contention is that in enlarging protection for free speech, the standard for liability has more closely approximated that of negligence.[126] It is also argued that, as far as the chilling of free speech is concerned, the drafters of the legislation should have taken into account the impact of privacy law and data protection law[127] as well as areas such as the law on public interest disclosures, or 'whistleblowing'.[128] Concerns are also raised that the Defamation Act 2013 lags behind developments in information

[125] Defamation Act 2013, s 1(2).
[126] For example, Descheemaeker, E 'Protecting Reputation: Defamation and Negligence' (2009) 29 *Oxford Journal of Legal Studies* 603-641: '…the fact of the matter is that it is less and less true that defamation is not negligence-based.'
[127] Jones note 122.
[128] Lewis, D 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?' (2018) *Industrial Law Journal* 339.

technology and the concomitant speech implications of, for example, user-generated platforms.[129]

Against this background, i.e. the fact that the law does not change the key issue of the reverse burden of proof, this burden on the defendant now needs attention.

4 Defences

From the preceding discussion it is clear that the Act fails to make major structural changes to the law of defamation. The burden of proof still lies mostly with the defendant, and in fact the larger part of the Act deals with defences, reflecting the common law position. Indeed there are those who would argue that this is the correct position. One prominent commentator, for example, sees the law of defamation as inherently having a dual function, namely not only protection of reputation but also providing a robustly defined legal spectrum in which to exercise the right to free speech:

> This dual function may be best represented in the defences to a defamation action: speech may be found to be defamatory and still not be the subject of legal sanction because robust defences have been put in place so that speech is protected. The defences are a testament to the importance placed on free speech.[130]

Given the conclusions from the previous sections namely that the structure of libel law as well as the structure of defamation litigation was changed, but not fundamentally, and the continued importance of the defences, it is therefore necessary to closely examine the changes wrought to the common law defences. This section analyses whether and to what extent the changes to defences relevant to this discussion wrought by the Defamation Act 2013 succeed in levelling the playing field between defamation claimants and defendants, and to what extent, if any, they redress the balance in favour of the robust exercise of free speech.

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[129] Only section 5 of the Act touches on this issue, and for the rest the common law is trusted to develop this highly contemporary area. This is in contrast to other legal disciplines which deal with these issues more robustly: re. employment law see Mangan, D. 'Social Media in the Workplace' in Mangan, D and Gillies, LE (eds), *The Legal Challenges of Social Media* (Edward Elgar 2017), Ch. 10.

[130] Mangan, D 'Reconsidering Defamation as a 21st Century Tort' winner of the best paper prize, Society of Legal Studies Annual Conference 2017.

Although the Act states that it 'abolished' the three main common law defences (justification, fair comment and privilege), in reality it did no more than repackaging each of them with a statutory variant that amended the defences to varying degrees.

4.1 Truth

The common law name for this defence was 'justification', and its successor remains the most powerful and complete defence against a claim in defamation. At common law, justification was made out when the defendant could show on a balance of probabilities that the imputation conveyed by a defamatory statement was substantially true. Added to this was a statutory defence of contextual justification: a defendant could still succeed where a defamatory statement contained two or more distinct imputations, not all of which were substantially true.[131] Section 2 of the Act abolished these defences but for the most part their replacement, the defence of truth, is a faithful codification of the prior position. Again, the defence succeeds should the defendant be able to show that the imputation conveyed by the statement complained of is substantially true, and if the imputation consists of two or more statements, of which some are true and some untrue, the Act directs the court in section 2(3) to allow the defence provided the untrue imputations do not seriously harm the claimant's reputation.

The same critique levelled against the common law defence of justification can be raised against this defence, namely why the burden should be on the defendant to prove this matter? Why not require that the defamation claimant prove that the statement complained of is false? Surely the claimant would be best placed to prove this, and cross-examination of the defendant should also assist. Moreover, as will be clear from the discussion of the US law in chapter 4, this is an entirely workable solution.

4.2 Honest opinion

Section 3 of the Defamation Act 2013 is perhaps most clearly intended to promote vigorous free speech – the explanatory notes to the Act acknowledge that the common law

[131] Defamation Act 1952, section 5.

predecessor to this defence was complex and not clear or user friendly. 'Fair comment' as a common law defence was seen as being weighed down by 'complex case law limiting [its] practical value'.[132] Revising the defence was aimed at making the defence more user-friendly by removing unnecessary technical difficulties and clearly stating the elements of the defence. The reformulation aimed to update and simplify the defence.[133] Whether this will indeed be the case arguably remains to be settled comprehensively in the courts but initial reception by commentators seem positive.[134]The decision on this point in *Alsaifi v Trinity Mirror Plc and Board of Directors* [2017][135]appears to bear out this interpretation.

Section 3 of the Act replaces the common law defence of 'fair comment' (or 'honest comment'),[136] which protected the non-malicious publication of an objectively fair opinion relating to a matter of public interest. The opinion had to be based on true or privileged facts, and the facts had to be generally indicated, at the least implicitly. The new defence reads as follows:

> (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
> (2) The first condition is that the statement complained of was a statement of opinion.
> (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
> (4) The third condition is that an honest person could have held the opinion on the basis of—
> (a) any fact which existed at the time the statement complained of was published;
> (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
> (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
> (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
> (7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

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[132] *Explanatory notes to the Lester Bill* para 62. Joint Committee on the Defamation Bill; *First Report: Draft Defamation Bill* [2010-12] HL Paper 203 / HC930, para 62.
[133] *Ibid* para 63.
[134] Brown, H 'Legislative Comment: Fair Comment to Honest Opinion -What's New?' (2013) *Entertainment Law Review* 236-237. See also Descheemaeker, E 'Mapping Defamation Defences' (2015) 78(4) *Modern Law Review* 641.
[135] *Alsaifi v Trinity Mirror Plc and Board of Directors* [2017] EWHC 1444 (QB) paras 85-89.
[136] as it was known since a direction from the House of Lords in *Joseph v Spiller* [2010] UKSC 53.

(a) a defence under section 4 (publication on matter of public interest);
(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

When a statement is couched as being a reflection of the facts, it is presented as the truth, and readers are not invited to disagree. But when statements are made not as reports of fact, but as of opinion or commentary, the law accords these with more protection than those of fact, as the former allows for the reader to differ, disagree or come to a different conclusion. This, in theory, encourages vigorous public debate and hence deserves protection of even factually incorrect statements. This defence is therefore clearly important in terms of freedom of speech. In essence it allows a defence that the statement was a piece of criticism or opinion based upon true facts.

Section 3 differs from the common law in three respects, which also indicate a significant liberalisation of the defence:[137] First, it does not require the opinion to be on a matter of public interest. Second, by section 3(4) (b) the opinion could be based on a 'privileged statement' i.e. statements that would have a section 4 defence and not only on facts, as was the position previously. Third, it is now an almost entirely objective defence: The defendant can rely on any fact objectively existing at the time of publication, not necessarily facts of which the defendant was apprised at the time of the statement.

Honest opinion as a defence relates mostly to editorial comments, etc. It must be an opinion, and not a statement of fact, and must indicate in either general or specific terms, what the basis for the opinion is. Further, it must be an opinion that is capable of being held by an honest person. Under the common law this defence is defeated if the claimant can show that the defendant was acting with malice – s. 3(5) instead states that the defence is defeated if it can be shown that the defendant did not actually hold the opinion.

4.3 Privilege

[137] Mullis and Scott 2014 note 87, 92-95.

The defence of privilege protects the makers of certain defamatory statements because the law considers that in the circumstances covered by this defence, free expression is more important than protection of reputation. In other words, these are occasions where it is important that people are allowed to say what they think without fear of legal action. In some instances the protection is absolute, and in others qualified by certain conditions (such as that the maker of the statement should actually hold the opinion they utter). Both absolute and qualified privilege were mostly codified in the Defamation Act 1996, which is still in operation. The Defamation Act 2013 extends and significantly liberalised the protection given by the 1996 Act in section 7.

4.3.1 Absolute privilege

The law gives some statements absolute privilege, which means that it is impossible to sue the person who makes that statement – the statement cannot be used in a court of law. The most important instance of absolute privilege relates to statements made in Parliament or in any Parliamentary report. Free speech in parliament is an ancient right. Article 9 of the Bill of Rights 1688 declares:

> That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament. (sic)

Other examples of absolute privileged statements include those made in the course of proceedings before any court or tribunal; fair and accurate media reports of such public judicial proceedings and any statement made by one spouse to another. Section 7 extends absolute privilege to contemporaneously published fair and accurate reports of proceedings in public before courts established by law anywhere in the world, and to international courts and tribunals established by international agreement.

4.3.2 Qualified privilege

This is a more limited form of privilege but it has the same effect as absolute privilege: it means that the statement cannot be used in a court of law.

At common law, the traditional statement of when qualified privilege will apply comes from Lord Atkinson in *Adam v Ward* (1917):[138]

> A privileged occasion is … an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

A good example of qualified privilege would be when an employment reference is given. Qualified privilege continues to be subject to one important restriction: it does not cover statements made with malice or with a bad motive, or if the person making it did not honestly believe it was true, or both. The 2013 Act extended the categories of statutory qualified privilege in three significant categories: peer reviewed academic publications, public proceedings, and website operators.

Peer Reviewed Statements

One of the most serious points of criticism against the common law of defamation was that it stifled academic and scientific debate. One example of the way in which powerful organisations attempted to stifle critique is the case of Simon Singh, who were found at first instance[139] to have defamed the British Chiropractic Association (BCA) by an article he wrote for the edition of the *Guardian* of 19 April 2008 published on the paper's 'Comment and Debate' page and which stated that, 'there is not a jot of evidence' for the claims made by the BCA regarding its treatments.' Dr Singh successfully appealed against this decision, with the Court of Appeal agreeing that his commentary amounted to an expression of an opinion rather than a statement of fact, and so was covered by the defence of fair comment, which, in the court's view, was 'backed by reasons'[140] (as it had to be, under the common law defence of fair comment. This defence, and its successor, are discussed in paragraph 4.3.3 directly after this discussion). The point here is not the fact that Dr Singh was vindicated in the end, but that the process through which he had to defend his scientific opinion was expensive, protracted and very difficult, and that this was used as a deterrent

[138] *Adam v Ward* [1917] AC 309.
[139] *British Chiropractic Association v Singh[*2009] EWHC 1101 (QB).
[140] *British Chiropractic Association v Singh* [2010] EWCA Civ 350 para 33.

by powerful lobbies such as the BCA to stifle criticism.[141]It is therefore a very welcome development that the 2013 by section 6 introduced a defence for the publication of peer-reviewed statements, and reviews of such statements, in scientific or academic journals. This in effect created a new defence of qualified privilege for peer-reviewed material in scientific or academic journals and reflected a core concern underlying reasons for reforming the law, namely to protect scientific and academic debate from the threat of unjustified libel proceedings. As such it is intended to encourage open and robust scientific and academic debate. To date no major cases relying on this defence had been reported. This could be interpreted as a sign of success for the inclusion of this defence, but it may equally simply mean that no cases involving peer reviewed academic papers, etc. were brought in the first place.

Public proceedings

Section 7 extended the categories of instances protected by qualified privilege in section 15 of the Defamation Act 1996, to include fair and accurate reports of 'proceedings in public', which include, amongst others, proceedings of legislatures, courts, public inquiries, international organisations or conferences, publicly listed companies etc. An important caveat to section 15 is that the matter reported must be of public interest – which brings us to the next defence.

4.3.3 Publication on matter of public interest: successor to the Reynolds defence

In order to analyse this defence, it is necessary to first examine its common law predecessor.

The Reynolds defence

A specialised 'responsible journalism' defence developed, under the common law, out of qualified privilege into a defence in its own right. The defence, commonly known as the 'Reynolds defence', arose from the case with the same name[142] and concerned a defamation claim by a politician against a newspaper. The question was raised whether

[141] For a first-hand account of Dr Singh's experience of the censoring effect of libel actions, see Singh, H 'The Libel Survivor' (2011)13(32) *Legal Week* 20-21. See also Barendt, E 'Science Commentary and the Defence of Fair Comment to Libel Proceedings' (2010) 2(1) *Journal of Media Law* 43-47.
[142] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 (hereafter 'Reynolds').

there should be a generic category for media reports covering political information and debate. The House of Lords emphasised the importance of freedom of expression and acknowledged the importance of the role played by the media to inform the public at large of political matters.

Lord Nicholls said:

> The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. The elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axe to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may already have been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information which others do not possess or have not disclosed. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.[143]

Lord Nicholls went on to say:

> …it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters that are obvious in retrospect may have been far from clear in heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.[144]

In the subsequent case of *Jameel v Wall Street Journal SPRL (No.3)*[2006][145]Lord Hoffmann set out a two-stage test for determining whether the *Reynolds* defence applied in a given case. The first stage determined whether the publication was in the public interest. By this

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[143] *Ibid* paras 204 to 205C.
[144] *Ibid*.
[145] *Jameel v Wall Street Journal SPRL (No.3)* [2006] UKHL 44; [2007] 1 AC 359, paras 48-49.

was meant the article as a whole, including the allegedly defamatory statement. If the publication passed the public interest test, the second stage asked whether the steps taken to gather and publish the information were responsible and fair.[146] It must be pointed out that Lord Hoffmann identified both of these tests as being objective, and furthermore that the non-exhaustive list of ten matters to be taken into account were to be considered in a flexible manner and with regard to practical realities.[147]

Lord Nicholls summarised what *Reynolds* privilege was concerned with in *Bonnick* [2002], where he said:

> Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.[148]

Reynolds still relevant

Section 4 of the 2013 Act, 'Publication on a matter of public interest' is clearly based on, but abolishes the Reynolds defence. However, from what follows it is clear that the principles from *Reynolds* still continue to apply.[149] Since section 4 purports to abolish and replace a very important common law defence, it is necessary to examine it in some detail. The defence states:

> 4 Publication on matter of public interest
> (1) It is a defence to an action for defamation for the defendant to show that—
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement

[146] *Ibid* para 55.
[147] *Ibid* para 56.
[148] *Bonnick v Morris* [2002] UKPC 31 [2003], 1 AC 300, para 23.
[149] Barendt, E, 'Reynolds Revived and Replaced', (2017) 9(1) *Journal of Media Law* 1-13 on the public interest qualified privilege defence to libel.

> was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
> (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
> (6) The common law defence known as the Reynolds defence is abolished.

In effect replacing the 'responsible journalism' criterion (as measured by the ten factors outlined in *Reynolds*) with that of 'reasonableness of belief', the question remains whether this entails any substantive change. The answer, in the light of relevant case law, seems to be both yes and no.[150] Yes, in the sense that it seems as if this section is an attempt to widen the scope of the 'responsible journalism' defence which focused mainly on traditional media, to encompass the reality of 'citizen-journalists' who in turn reflect the hyper-connected reality of modern life. In this way the defence protects a wider range of defendants. But also, 'no', because on the other hand it is clear that the criteria from *Reynolds* remain firmly entrenched in the courts' methodology in applying the section. This was evident from both the first instance and appeal cases of *Economou v de Freitas.*[151]

Subsection 2 does not help: In what is clearly an attempt to reformulate the ten factors listed in Reynolds, it merely states that in this enquiry, the court '…must have regard to all the circumstances of the case'. In effect, although section 4 of the 2013 Act as it says at subsection (6), abolished and replaced the common law defence identified by the House of Lords in *Reynolds*, it is clear that parties to defamation suits and courts adjudicating these matters, continue to use the factors listed in *Reynolds*. Lady Justice Sharp in the Appeal Court decision in *Economou*[152]stated that the correct approach is to '…proceeded on the

[150] Barendt note 149, 13.
[151] *Economou v de Freitas* [2018] EWCA Civ 2591 per Lady Justice Sharp, summarising the court a quo's findings (*Economou v De Freitas* [2016] EWHC 1853 (QB)) in para. 76: '[T]he judge and the parties proceeded on the footing that the common law principles identified in *Reynolds* as interpreted or applied in subsequent cases… were of relevance to the interpretation of section 4 . … [I]n my view, this is the correct approach.'
[152] *Ibid* para 75.

footing that the common law principles identified in *Reynolds* as interpreted or applied in subsequent cases… [are] of relevance to the interpretation of section 4'.[153]

Subsection (5) states: 'For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.' This, in the opinion of Mullis and Scott, muddies the waters considerably as it mingles the public interest defence with the defence of honest opinion.[154] They point out that in *Reynolds*, both Lords Nicholls and Hobhouse stressed that if statements of opinion were to be protected, this should be done by means of the defence of fair comment only.[155] Going further than that and protecting it in the 'responsible journalism' section 4 also, means that in theory editors of newspapers can defend serious allegations without evidence of fact by citing 'editorial freedom'. Mullis and Scott therefore state that 'circumspection in the levelling of allegations made is a marker of responsibility'.[156]They are of the opinion that section 4 does not draw appropriate distinction between opinion, fact, allegations or suspicions, and therefore does not correctly address the *Chase* levels of meaning.[157] From subsequent case law, however, it seems to may well prove to be an unfounded fear, as due weight does seem to be given to the 'other factors' to be taken into consideration to determine whether it was reasonable to believe that publication was in the public interest. The issue is far from clear, however, but at least it can be argued to be a clear nod in the direction of freedom of expression and particularly of the press and non-journalist commentators.

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[153] *Ibid*. The cases referred to are: *Bonnick v Morris* [2002] UKPC 31 [2003], 1 AC 300 , *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 and *Flood v Times Newspapers Ltd* [2012] UKSC 11.
[154] Mullis and Scott (2014) note 87, 95.
[155] *Reynolds,* note 142, 201 and 193-195, per Lord Nicholls, and 237-238, per Lord Hobhouse.
[156] Mullis and Scott (2014) note 87, 96.
[157] *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772 – see Ch 2 on Defamatory meaning.

A closer look at *Economou* is useful as this illustrates how the successor to the Reynolds defence widened the scope to provide a robust defence to non-journalists.[158]

The Economou case

Alexander Economou's appeal against David de Freitas stemmed from two events: a serious allegation of criminality against the claimant, namely an allegation of rape made to the police in 2013, and a truly dreadful tragedy for the defendant, the suicide of his daughter, Ms Eleanor de Freitas. In both courts it was agreed that '…there has been no monopoly of misery in relation to these events or their outcome'.[159]

The facts of the case were as follows:[160] After having spent a night in custody following an allegation of rape by the defendant's daughter, the claimant was released with no charge. He thereupon complained to the police, alleging that he'd been falsely accused of rape. The police declined to take the matter further, but Mr de Freitas then instituted a private prosecution against Ms Economou for perverting the course of justice, which upon review was taken over by the Crown Prosecution Service (CPS). Before the matter could come to trial, Ms Economou, who suffered from bipolar disorder, committed suicide. In seven subsequent news publications Mr Economou was highly critical of the CPS and their decision to prosecute his daughter. Although the claimant was not directly named, it was relatively easy to identify him as the person who'd been accused of the alleged rape.

Two main issues fell to be decided: meaning, and the defence in section 4. The claimant alleged that the statement's meaning was that he had prosecuted Ms de Freitas for perverting the course of justice on a false basis, and was guilty of her rape, or there were strong grounds for suspecting that he was. The defendant relied upon the public interest

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[158] For a comment on the Queen's Bench Division decision in *Economou*, see Lock, O 'Is It Interesting? New Judgment Considers the Scope of the "Public Interest" Defence Under the Defamation Act 2013 S. 4.(United Kingdom)' (2017) 28 *Entertainment Law Review* 16.

[159] *Economou* Appeal note 151 para 3.

[160] *Ibid* paras 2 to 8. Also see the case comment by Garner, D 'Economou v de Freitas, Court of Appeal Guidance on "Public Interest" Defence' *Inforrm*'s *Blog*, 5 December 2018, https://inforrm.org/2018/12/05/case-law-economou-v-de-freitas-court-of-appeal-guidance-on-public-interest-defence-dominic-garner/ accessed 4 April 2019.

defence under section 4. The case is especially interesting as the defendant was not a journalist, but was interviewed by professional journalists. In other words, the court in particular clarified the status of contributors and their reliance upon the conduct of the media organisation they contributed to in advancing a public interest defence.[161]

In dismissing the appeal the court found that the well versed *Reynolds* criteria were applicable here subject to a holistic approach which considered all the facts of the case. In relation to *mere contributors* to publications it was held that their standard of conduct need not reach that of professional journalists to qualify for the absolute public interest defence. Further guidance will no doubt clarify this fact-sensitive issue, building upon this significant precedent to give certainty to amateur journalists, bloggers and freelancers.

The statutory formulation in section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the *Reynolds* defence focussed on the responsibility of the publisher's conduct. This is significant as the latter entails an objective test, whereas the new defence introduces a subjective element.

As opposed to the two-stage objective approach formulated by Lord Hoffmann in *Reynolds* viz. (1) is the publication in the public interest and (2) were the steps taken to gather and publish the information responsible and fair,[162] according to the interpretation by the Court of Appeal in *Economou*, section 4 now requires a three-stage enquiry comprising both an objective and subjective element. These questions are: (1) Was the statement complained of, or did it form part of, a statement on a matter of public interest? (2) If so, did the defendant believe that publishing the statement complained of was in the public interest? (3)If so, was that belief reasonable?[163] Clearly, the second question adds an objective element.

The public interest defence failed in *Serafin v Malkiewicz* [2019].[164] The claim was about an article containing serious allegations against the claimant concerning his charitable work at

[161] Warby J listed 12 grounds for his conclusion that de Freitas had a reasonable belief it was in the public interest to publish the statements: *Economou* note 151, para 249.
[162] *Reynolds* note 142 para 55.
[163] *Economou* Appeal note 151 para 87.
[164] *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852.

a Polish cultural organisation and a care home for elderly Polish people, and about his business dealings. The defendants did not approach the claimant for comment before the article's publication. At trial, the judge found that the defendants had succeeded in showing a public interest defence under the Defamation Act 2013 section 4 in relation to all of the allegations. However, this judgment was overruled on appeal. The Court of Appeal started off by stating that the public interest in publication was to be balanced with the fact that an individual's right to reputation under the ECHR Article 8 would be breached by the publication of unproven allegations without a remedy. The Appeal Court was of the opinion that the section 4 public interest defence needed to be confined to the circumstances necessary to protect the right to freedom of expression contained in Article 10 ECHR. When considering whether an article was in the public interest, the court needed to consider not only the subject matter but also the context, timing, tone, seriousness and all other relevant factors. The Appeal Court reaffirmed that the checklist from *Reynolds* therefore remained relevant. [165] On the facts the Court found that the trial judge had erred in finding that the statements were in the public interest pursuant to section 4(1)(a). Broadly speaking, the article was not mainly about how the cultural organisation and the care home were run as charities, a subject which could have contributed to any debate in the Polish community as to broader charitable management issues. Instead, the Court of Appeal found that the article mainly targeted the claimant's personal and private life. The court opined that the trial judge had given insufficient consideration to the claimant's Article 8 right and the irreparable reputational damage that would be caused by the article's publication, and whether the public needed to know the information at the time the article was published.[166]

The Court then turned to the question whether the defendants reasonably believed that the statements were in the public interest. Given that the defendants were journalists, the Court held that they should have adhered to reasonable journalistic standards which meant carrying out such enquiries and checks as it was reasonable to expect of them as journalists. Not only did they not contact the claimant prior to publication, they also did not proffer a credible reason for their omission. In short, clearly applying the criteria from *Reynolds,* the

[165] *Ibid* paras 47-48.
[166] *Ibid* paras 51, 55, 57-58, 62.

Court of Appeal stated that most of the allegations made in the article were serious and reputationally damaging to the claimant; the information in the article was of no public interest; the sources of the published allegations included people who were not sympathetic to the claimant, who wanted to remain anonymous and who had limited direct knowledge of the facts; the steps taken to verify the information had been inadequate; there was no urgency in publication; no comment had been sought from the claimant; and the tone of the article was disparaging of the claimant.[167]

The Court of Appeal in *Serafin* overturned not only the defence of public interest, but also the defence of truth. It reaffirmed the continued relevance of *Reynolds* as well as the presumption of falsity and reverse burden of proof in defamation cases.[168] The case is currently on appeal to the Supreme Court.

At the moment, opinion is divided as to whether the section 4 defence constitutes a simplification and improvement of the *Reynolds* defence. Following the decision in *Economou* Barendt opined that although the case did not resolve every question about the scope of the defence, it did show a high regard for the concerns of defendants who raise the public interest defence in libel cases.[169] On the other hand some commentators are of the opinion that the defence is *de trop*, or that as far as a robust responsible journalism defence is concerned, the legislature missed out on a golden opportunity for reform.[170]

4.3.4 Author, editor or publisher (s 10) and Operators of websites (s 5)

This used to be known in the common law as 'innocent publication' and aims to protect those who do not have any editorial control over the material they handle. The defence extends to those who provide access to information on the internet where the information is provided by a person over whom the service provider has no control.

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[167] *Ibid* paras 65, 68-69, 76, 83-84.
[168] Weinert, E 'Serafin v Malkiewicz - Guidance on Responsible Journalism' (2019) 30 (7) *Entertainment Law Review* 228-231.
[169] Barendt note 149.
[170] Cf. Hooper, D, Waite, K and Murphy, O 'Defamation Act 2013 – What Difference Will It Really Make?' (2013) *Entertainment Law Review* 199, 201-2 and Kenyon, AT 'Protecting Speech in Defamation Law: Beyond Reynolds-style Defences' (2014) 6(1/2) *Journal of Media Law* 21-46.

Section 5 of the Defamation Act 2013 introduced a new defence to actions that are brought in defamation against operators of websites in respect of a statement posted on the website. In such an instance the operator can raise as a defence that it was not the operator who posted the statement. If the real author cannot be identified (and therefore sued) by the claimant, however, the claimant will be entitled to complain to the operator and if the operator does not respond to the complaint, it may be sued in defamation. The important caveat here is that this defence is intended for the protection of facilitators of publication of defamatory statements not created by the operator itself. Malice defeats the defence, as would failure to respond to notices of complaint in accordance with the procedure set out in the Defamation (Operators of Websites) Regulations 2013.[171] The law around internet defamation is complex and evolving and this is reflected in the fact that the regulations drafted to flesh out section 5, are themselves complex and cumbersome.[172]

Section 10 deals with more 'traditional' publishers but provide essentially the same defence as it relates to defendants who do not exercise editorial control.

How does this amend the common law? It is likely that *Byrne v Dean* [1937][173]would be decided differently, if it were to come before the courts today, as section 10 of the 2013 Act would preclude jurisdiction to hear a defamation action against the proprietors of the club, other than where it was not reasonably practicable for an action to be brought against the author of the notice. Although the same applies to more recent internet cases such as *Tamiz v Google Inc* [2013][174] and jurisdiction would be denied at first, given that the author could not be identified, the result under the common law and the 2013 Act regime would for all intents and purposes be the same: the ISP could be held liable provided it had been placed on notice. It is submitted that although the defence is now formalised and stated more clearly, the result for free speech is unchanged or may actually be worse, as ISPs

[171] SI 2013/3028.
[172] *Ibid*.
[173] *Byrne v Dean* [1937] 1 KB 818 (CA): in this case the Court of Appeal held that the proprietors of a golf club who failed to remove an allegedly defamatory notice from the club's notice board had taken part in the publication of the notice by allowing it to rest on the wall, even though the notice had been placed on the wall without the consent of the proprietors.
[174]*Tamiz v Google Inc* [2013] EWCA Civ 68.

instead of engaging with the merits of the notice, may just take the path of least resistance and remove all statements complained of without any investigation.

5. Conclusions

Having examined relevant parts of the Defamation Act 2013, related statutory instruments and procedural rule amendments, and key case law, a clearer picture can now be formed on the effect of the reforms enacted. This chapter set out to do two things: to make an attempt at gauging whether the Defamation Act 2013 delivers on solving the problems with the common law of defamation that led to its enactment, and whether benefits of the change are apparent.

The benchmarks against which this exercise was done include whether the playing field between defamation claimants (who it was argued, were unfairly advantaged) and defendants has been levelled; more specifically by addressing the costs associated with bringing or defending a claim and to which extent the Act addressed the 'potent trilogy' of fundamental principles peculiar to defamation actions namely the presumption of falsity, the irrebuttable presumption of damages, and the strict liability nature of libel and some slander claims. Further benchmarks included the issues of libel tourism and the chilling of free speech.

From an examination of the Act, it is clear that it did not change the structure of the common law as far as defamation in England and Wales is concerned. The focus is still very much on the defences, and the reverse burden of proof is retained. It is submitted that a golden opportunity was therefore missed to fundamentally change the nature of defamation law, and that a fundamental change was indeed necessary. An alternative structure is possible – that is clear from jurisdictions such as the US, as will be seen from the discussion in chapter 4.

Moving on to the changes that the Act did in fact make, the most fundamental change is wrought by section 1, dealing with the serious harm requirement. The scope of this section was decisively clarified by the Supreme Court in *Lachaux* where it was held that the section entails more than a threshold as per the *Jameel* exception. The defamation claimant now carries an evidentiary burden of proving to the court that their reputation is or is likely to be

seriously harmed. The claimant also now needs to prove causation of their harm. Since the common law libel action was actionable *per se*, no damage needed to be proved and thus causation did not come into the equation. In fact, the presumption of harm assisted the claimant. Now that assistance is taken away and an extra factor to prove is added. In this sense the defamation claimant's burden of proof is more onerous under the Act than it was under the common law. Although the defendant's intention in publishing the aggrieving statement may be relevant to prove serious harm to reputation, the tort of defamation remains one of strict liability.

There are other welcome innovations and changes in the reforms. The scrapping of the jury trial is not to be regretted. Expanding the defence of publication in the public interest, and of protecting opinion, are to be welcomed by free speech advocates, as are the inclusion of protection for academic and scientific publications and internet intermediaries. But in the final analysis it remains unclear to what extent the vexing issue of balancing freedom of speech with the protection of an individual's reputation is really addressed. So although some progress have been made, most notably the final and welcome demise of conditional fee arrangements, the issue of costs and complexity could have been addressed in much more detail.

The focus now shifts in the following chapters to analogous law in three relevant jurisdictions, starting with the US as the state with arguably the most stringent protection of free speech in the world.

CHAPTER 4 DEFAMATION IN THE UNITED STATES OF AMERICA

1. Introduction

No other country protects freedom of speech to the same extent as the United States of America (US). In an analysis of the UK Defamation Act 2013 largely informed by the debates around free speech, it is therefore useful to examine the US as a jurisdiction that accords the highest protection to free speech in defamation claims.

The US Constitution values free speech very highly, prioritising it over other rights. This in turn is reflected in the US law of defamation, which had undergone a profound transformation in the latter half of the twentieth century. For common law scholars, making sense of the US Supreme Court's[1] reshaping of defamation law is impossible without understanding the key position accorded to the First Amendment, guaranteeing free speech in the US. Any discussion of US defamation law thus needs to include an exposition of the role and influence of the constitutional protection of free speech.

Further, in any discussion of US law a nod must go to the fact that we are dealing with a federal system, where much of the law of defamation remains the creature of state tort law. These laws are in their turn descended from the common law, and therefore suffer from the same convoluted history and haphazard evolution as that of the other common law jurisdictions across the globe.[2] However, the most significant development on a federal, i.e. state-wide level, occurred in 1964 when the Supreme Court in *New York Times Co. v Sullivan* (1964)[3] 'constitutionalised' a substantial portion of the law of defamation by holding that the First Amendment to the Constitution places limitations on the defamation rules created by the states.

Thus, from initially closely mirroring the English common law tradition, in most important respects US defamation law has now devolved to its opposite. In particular, US defamation

[1] In this chapter, all references to the Supreme Court are to the US Federal Supreme Court, unless otherwise stated.
[2] Keeton, WP, Dobbs, DB, Keeton RE *et al Prosser & Keeton on the Law of Torts* (West Group Publishing, 5th edn 1984) 772.
[3] *New York Times Company v Sullivan,* 376 US 254 (1964).

law is fault based, there is no reverse burden of proof, and the tort is generally not actionable *per se*. It could be argued that where the English common law of defamation favoured the claimant, the opposite was the case in the US. The defamation claimant in the US under most circumstances face a very uphill battle. In what follows we examine how the US law of defamation's move away from the English common law took place, and compare the relative advantages and disadvantages of this highly contrasting way of approaching defamation law.

2. Constitutional protection of freedom of speech

The Constitution of the United States of America guarantees and protects freedom of speech. The First Amendment to the Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

It is important to note that the First Amendment and the free speech protection it offers are binding only on the *state*. The Supreme Court stated that as 'a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'.[4] Freedom of speech in the US, then, is first and foremost protected from infringement by government. As to the reasons why this is so, a brief historical detour is useful.

2.1 Free speech as prerequisite for democracy

The United States can be seen as a, if not *the*, model of a liberal democratic republic:[5] It is 'liberal' in that it protects civil liberties and political freedom by means of the rule of law and constitutional limitation; 'democratic' as American citizens elect their leaders; and 'republican' because policy decisions are primarily made by elected leaders.[6] McCanse

[4] *Ashcroft v American Civil Liberties Union,* 535 US 564, 573 (2002). *See also United States v Alvarez*, 567 US 709 (2012); *Brown v Entertainment Merchants Ass'n*, 564 US 756 (2011).
[5] See in general, Dworkin, R *A Matter of Principle* (Harvard University Press, 1985).
[6] McCanse Wright, A 'Civil Society and Cybersurveillance' (2017) 70(3) *Arkansas Law Review* 745-768.

Wright points out that one of the essential features of the American political scheme is civil society, which presupposes a social sphere, separate from government but at the same time necessary as forming the basis of legitimate government (i.e., the consent of the governed) as well as the building blocks of democratic self-government (i.e., empowered citizens).[7] Here historical and constitutional analysis should be complemented by civil society theory. In this context questions arise as to what kind of citizen a liberal democracy needs, what zone of autonomy is necessary to build that kind of citizen, and what space is required to build the political culture necessary for government by the people.[8] In the US, the presupposition seems to be that democracy only functions fully when citizens can freely speak their mind.

2.2 Absolute versus relative prohibition

Thomas Jefferson famously stated that freedom of expression 'cannot be limited without being lost.'[9] To this day, a debate continues between free speech absolutists, who claim that the US government and the states have no power to regulate or limit speech, and those who believe that restrictions are appropriate.[10] Justice Black, a vocal absolutist, argued that the First Amendment should be taken at face value: '[T]he unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that those who drafted our Bill of Rights did all the "balancing" that was to be done in this field.'[11] He went on to emphasise that the very object of adopting the First Amendment was to put the freedoms protected there completely out of congressional control.[12] As stated in chapter 1, the reasons for protecting free speech are indisputably important and could even be argued to be eternally valid for liberal democracies.[13] The reasons for protecting speech included finding the truth, the individual's right to autonomy and self- expression, and for meaningful citizen participation in democracy. Howard argues that it is for this latter reason that the

[7] *Ibid* 746.
[8] *Ibid*.
[9] Letter to James Currie, 28 January 1786, Library of Congress.
[10] *Konigsberg v State Bar of California*, 366 US 36, 60-61 (1961) (Black, J dissenting).
[11] *Ibid*.
[12] *Ibid*.
[13] Chapter 1, para 6.1.

US accords such high protection to free speech, more than in virtually any other liberal democracy: If citizens do not feel free to express themselves fully there can be no meaningful public debate and the state loses legitimacy.[14]

Given this, it comes as no surprise that freedom of expression has been accorded a preferred position in the US constitutional hierarchy. Free speech frequently prevails over other countervailing interests. Bar a few exceptions, the US and state governments are given only limited authority to regulate or control speech, regardless of whether the dispute is about the content or opinion expressed in the speech.[15] The right to free speech is regarded as so important that even 'the most noxious forms of extreme speech imaginable' are protected.[16]

A prohibition on any laws prohibiting freedom of speech in the US at first glance may seem absolute. But in reality this does not mean that the right to freedom of expression trumps all other fundamental rights in the US. Even from a purely practical point of view it seems as if this absolutist position is impossible to sustain, and an examination of case law shows that the US courts, including the Federal Supreme Court, do indeed depart from a literal or absolute interpretation of the First Amendment. Many cases can be quoted as examples where free speech was restricted,[17] but perhaps Holmes J put it best in *Schenk v US* (1919), a landmark decision on the First Amendment: 'The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.'[18] At its simplest, freedom of speech sometimes needs to be restricted in order to enable others to exercise their own right to freedom of speech.

Barendt thus points out that in the US, freedom of speech is not regarded as an undifferentiated monolith. Various forms of speech are given differing levels of protection

[14] Howard, E *Freedom of Expression and Religious Hate Speech in Europe* (Routledge, London 2018), 113.
[15] *R.A.V. v City of St. Paul,* 505 US 377 (1992).
[16] Weinstein, J 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech' in Hare, I and Weinstein, J (eds) *Extreme Speech and Democracy* (OUP, Oxford 2009) 81. For a detailed discussion of the protection of extreme speech in the US see Howard, note 14, 112-120.
[17] A select sample would include the 'prior restraint' cases, of which the prime example is the famous *Pentagon Papers* case: *New York Times v US,* 403 US 713(1971).
[18] *Schenk v US,* 249 US 47, 52 (1919).

with particularly strong protection being accorded to political speech as opposed to, for example, commercial speech or advertising.[19] Whilst the courts perform a balancing exercise when free speech conflicts with other rights, as courts do in other jurisdictions, in the US there is a strong presumption in favour of free speech. More specifically, the courts take a strong position that the government's ability to limit or control speech should be limited, both as far as content of speech (except for certain limited categories of speech) as well as opinions expressed in that speech are concerned.[20] The reason for this goes back to the very notion of liberal democracy; the conviction that the power to govern derives from the consent of the governed.[21] And if the power to govern derives from the consent of the governed, then freedom of expression is not simply a luxury, but must be regarded as a cornerstone of the governmental system. The courts' view is that the First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'.[22] The Supreme Court has stated that speech concerning public affairs is more than self-expression; it is the essence of self-government.[23] Indeed, it is regarded as essential to the maintenance of democratic institutions.[24]

It is therefore not surprising that the Supreme Court has specifically formulated principles intended to guard against the danger of according the First Amendment right to freedom of speech less protection than it should enjoy, i.e. to guard against it being ranked as just another issue to consider in combination with other factors in a constitutional democracy. These guiding principles have clearly set the threshold to infringe free speech very high.

[19] Barendt, E. *Freedom of Speech* (2nd edn OUP, Oxford 2005), 48.
20 *R.A.V. v City of St. Paul* note 15.
21 US Declaration of Independence (July 4, 1776).
22 See *Garrison v Louisiana*, 379 US 64, 74–75 (1964); *Snyder v Phelps*, 131S. Ct. 1207, 1215 (2010) (citing *New York Times Co. v Sullivan*, 376 US 254, 270 (1964).
[23] *Ibid*; Weaver, RL, Hancock, C and Knecthle, J *The First Amendment: Cases, Materials & Problems* (Carolina Academic Press, 5th ed., 2017).
[24] *McDonald v City of Chicago,* 561 US 742 (2010).

2.3 Permissible limitation of freedom of expression in the United States

Clear and Present Danger (of Imminent Lawless Action)

Foremost among the instances where speech may be curtailed is the 'clear and present danger' test: Free speech is allowed unless it can be shown that allowing it presents a clear and present danger, or put another way, when it is intended to, and likely to, produce imminent lawless behaviour.[25] This test was first formulated by Justice Holmes in *Schenk v United States* (1919) as follows:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[26]

The Supreme Court further explained this test in *Brandenburg v Ohio* (1969) as meaning that speech calling for violence or other illegal acts may be restricted only if it 'is directed to inciting or producing imminent lawless action and is likely to incite such action'.[27]

If one compares the use of this test to the practice in other common law jurisdictions, including England and Wales, insulting and inflammatory speech that would almost certainly fall foul of contempt of court proceedings in these jurisdictions would be protected under the First Amendment in the US.[28] A proper appreciation of the extent to which free speech is protected in the US is crucial for understanding the US law of defamation.

Prohibition against prior constraint

The courts are extremely reluctant to issue prior restraints, i.e. prohibitory injunctive relief before publication, against speech, as this is mostly regarded as being a form of censorship. The following case is a good example. In *Near v Minnesota* (1931)[29] a local newspaper published a series of articles alleging, amongst others, that a Jewish gangster controlled gambling, bootlegging, and racketeering in Minneapolis, and that law enforcement officers

[25] *Brandenburg v Ohio,* 395 US 444 (1969).
[26] *Schenk* note 18.
[27] *Brandenburg v Ohio,* note 25.
[28] Barendt note 19 chapter IX.
[29] *Near v Minnesota,* 283 US 697 (1931).

and agencies were not energetically performing their duties. Prior to publication, the county attorney sought an injunction against publication of the articles, alleging them to be defamatory.[30]The Court held that an injunction would constitute an unconstitutional prior restraint on speech.[31] The Court's view was that any injunction would be censorship which interfered with a person's 'right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.'[32]If this then results in defamatory statements being published, the Court recognized that in such a case the publisher could be held liable for damages after the fact: 'if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'[33]This case was decided in 1932, before defamatory speech was recognised as 'protected speech', i.e. speech that is protected by the First Amendment.

The Court subsequently extended the prohibition against injunctions to orders designed to protect national security. In the famous 'Pentagon Papers' case,[34]an employee who worked at the US Department of Defence stole a classified document relating to Vietnam policy making. When two newspapers to whom the employee had delivered the document, sought to publish it, the US government sought declaratory and injunctive relief to prevent the publication. The Court emphasised that any system of prior restraints will suffer from a heavy presumption against its constitutional validity, when it comes to be adjudicated, and that a claimant who petitions for such constraint will bear a very heavy burden of justification for the imposition of such a restraint. On the facts, the Court concluded that the government had failed to meet its burden.[35]As a result, the newspapers were free to publish the document even though it had been stolen. Following the Pentagon Papers case, courts can only grant a prior restraint if the state concerned showed that it would otherwise suffer direct, immediate and irreparable damage.

[30] *Ibid* 704.
[31] *Ibid* 713-715.
[32] *Ibid* 713-714.
[33] Ibid. at 714.
[34] *New York Times Co. v United States* 403 US 713 (1971).
[35] *Ibid*, 714.

Compelling reason necessary for restriction of freedom of expression

Finally, and most importantly, a state cannot restrict freedom of speech (based on the content of the offending speech) unless it can prove a *compelling* reason to do so – put another way, if there is any other less draconian way of protecting the interest concerned, that state will not be able to do so by restricting freedom of speech.[36]Again, the reason for this relates to the emphasis on participation of everyone in the public discourse in the US, and the US shows a remarkable 'hostility to the content-based regulation of public discourse'.[37]US law clearly distinguishes between content-based and content-neutral restrictions: restrictions for the former are based on the content of the message, whilst restrictions for the latter are based on reasons unrelated to the message such as time, place or manner speech.[38] Content-based restrictions are seen as being likelier to skew public debate, and for this reason the US regards contents-based restriction of speech with suspicion and the presumption is that it is unconstitutional.[39]Perhaps the starkest contrast that could be given as an example is the fact that Holocaust denial, prohibited in many Western democracies, would count as protected speech under the First Amendment in the US.[40]

Against this background the focus now needs to shift to the way in which US law protects reputation, before the law of defamation itself is examined.

[36] Barendt, note 19, 51.
[37] Weinstein, note 16, 81.
[38] *Ibid.*
[39] Howard, note 14, 114. See also Stone, G 'Free Speech in the Twenty-first Century: Ten Lessons from the Twentieth Century' in Koltay, A (ed) *Comparative Perspectives in the Fundamental Freedom of Expression* (Wolter Kluwer, Budapest 2015) 124-125.
[40] To name one example, in Germany Holocaust denial is punishable under sections 130 and 185 of the Criminal Code. For a comparative analysis of US and German law in this regard see Brugger, W 'Ban on or Protection of Hate Speech - Some Observations Based on German and American Law' (2002) 17 *Tulane European and Civil Law Forum* 1. For the ECtHR jurisprudence in this field see Lobba, P 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 *European Journal Of International Law* 237.

3. Protection of reputation

Supreme Court Justice Potter Stewart stated in *Rosenblatt v Baer* (1966) that an individual's right to protection of their own good name

> [r]eflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[41]

Once the relative values and the extent of their protection in US law are understood, the way in which US courts balance speech and reputation when these come into conflict may be examined.

4. Contemporary US defamation law

Turning to defamation specifically, the almost visceral distrust of governmental restriction of free speech is particularly evident here. However, this was not always the case. Until 1964, US defamation law did not differ fundamentally from the common law of defamation. Before that time, defamation liability rules were determined largely by the individual states who were free to strike the balance they deemed appropriate between speech and protection of reputation. Where this balance was struck differed from state to state. The reason for this disparity was because for much of US history, the First Amendment constitutional free speech guarantee did not apply to the states, and therefore the states possessed broad authority to determine the content of defamation liability rules. This situation changed in 1940 when the Supreme Court incorporated the First Amendment into the Fourteenth Amendment (the due process clause), and made it applicable to the states.[42]

[41] *Rosenblatt v Baer,* 383 US 75, 92 (1966) (Stewart, J., concurring). Justice Stewart's words were quoted with approval in the Court's landmark decision in *Gertz v Robert Welch, Inc*., 418 US 323, 341 (1974), and most recently in the Court's reinterpretation of *Gertz*, in *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc*., 105 S. Ct. 2939 (1985).

[42] *Cantwell v Connecticut,* 310 US 296, 303 (1940).

Until the 1960s, the general approach of US jurisprudence was to treat common law actions for defamation and privacy as posing no threat to free speech values. Judges reasoned that the right to speak freely was predicated on the corresponding responsibility not to abuse such right by speaking in ways deemed tortious under state law. Further, because the common law of defamation includes elements and defences designed to accommodate free speech concerns, the courts did not generally see any constitutional concerns in the existence and operation of these civil actions.[43] So up until 1964 to a large extent US jurisprudence on defamation mirrored the common law. This changed fundamentally after the landmark decision in *New York Times v Sullivan* (1964).[44]

4.1 New York Times v Sullivan

This case should be understood in the context of the social upheaval in 1960s America, more specifically the civil liberties struggle in the American South. A publication in the *New York Times* discussed an incident involving police and students in Alabama, and allegedly defamed the local police commissioner, who subsequently sued.[45] The relevant Alabama law required, at the time, that the defendant should prove the truth of their assertions. This reflected the common law reverse burden of proof still operant in England and Wales. Also reflecting the English common law characterisation of defamation as being actionable *per se*, the Alabama law allowed the jury to presume damages without any need to prove pecuniary injury.[46] The claimant Sullivan offered no proof of reputational harm but instead relied on the common law presumption of harm. He won his case in the Alabama Court, where the jury awarded him $500,000 in compensatory and reputational damages. On appeal, this verdict was affirmed.[47] The matter then went on further appeal to the Federal Supreme Court.

Supreme Court ruling

The US Supreme Court for the first time held that the First Amendment sets limits on the common law of libel and slander. The majority opinion, authored by Justice William

[43] Goldberg JCP and Zipursky, BC *Torts: The Oxford Introductions to US Law*, (OUP, Oxford, 2010) 308.
[44] *New York Times v Sullivan* note 34.
[45] *Ibid* 267.
[46] *Ibid*.
[47] *Ibid* 260.

Brennan, held that a government official cannot recover for defamatory falsehood published innocently or as a result of mere carelessness. Instead, such official has to prove with clear and convincing evidence that the statements were published with actual malice. The latter is defined as knowledge of, or reckless disregard for, the statement's falsity. In the Court's view, the mere fact that an official's reputation had suffered injury 'affords no more warrant for repressing speech'.[48] The Court, in reversing the state judgments, and in rejecting the common law presumption of damages and reverse burden of proof, therefore struck the balance between speech and reputation firmly in favour of freedom of expression.[49]

4.2 Actual malice, fault and falsity, and the burden of proof

Sullivan declared a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.[50]Recognising that 'erroneous statement is inevitable in free debate', the Court held that there must be 'breathing space' for free expression.[51] A public official who brings a defamation suit must bear the burden of proof on the question of truth.[52] Furthermore, the Court held that not only did the plaintiff bear the burden to prove that the defamatory statement was false, they also had to prove that it was made with actual malice.[53] Put another way, the defamation claimant must prove that the defendant knew the statement was false or acted in reckless disregard for whether it was true or false.[54]

4.3 From public officials to public figures

Sullivan on its facts concerned government officials, or public officials. However, the Supreme Court, after *Sullivan*, quickly extended the scope of the limitation on defamation

[48] *Ibid* 272.
[49] *Ibid* 270.
[50] *Ibid* 270.
[51] *Ibid* 271.
[52] *Ibid* 279-280.
[53] *Ibid.*
[54] *Ibid.*

actions. The most significant extension of the constitutional limits introduced by *Sullivan* occurred once it was decided in *Curtis Publishing Company v Butts* (1967)[55] to apply such limits not only to public officials but to any public figure.[56] The Court explained that a public figure is either a 'general purpose public figure', meaning a household name, or a 'limited purpose public figure', meaning a person who involved themselves in a matter of public concern and who were then allegedly defamed in connection to such matter.[57] In *Curtis* this meant the Commander of the Mississippi Highway Patrol was seen as a 'public official' within the meaning of the actual malice standard. Similar examples include a state court judge.[58] This means that an ordinary citizen who is defamed in connection with their voluntary participation in a debate or an event that has caught the public's eye has to, in effect, go through the same procedure as a public official: they have to prove actual malice, falsity and actual damage to reputation. It is clear that the Supreme Court felt that freedom of speech is such an important constitutional principle that it is necessary to block not only government actors from using civil defamation actions to suppress political speech, but also to create the widest possible space for public discourse without fear of being sued for libel.

4.4 Purely private figures: *Gertz*

The constitutional limitations introduced by *Sullivan* therefore apply to public officials as well as public figures. But what about private individuals who fall under neither category? For these claimants, defamation actions are subject to lower evidentiary standards. The Supreme Court in *Gertz v Robert Welch* (1974)[59] did not extend the actual malice standard to private individuals even though they may be involved in matters of public interest. This case involved a lawyer who had acted on behalf of the family of a victim of police brutality. He was subsequently described by far right media as involved in a communist plot to discredit local police. The issue before the Court was whether acting in this way rendered the lawyer a limited purpose public figure. The answer to this, the Court held, was negative.

[55] *Curtis Publishing Company v Butts (conjoined with Associated Press v Walker),* 388 US 130 (1967).
[56] *Ibid* 132.
[57] *Ibid* 154-155.
[58] *Rinaldi v Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S. 2d 943 (1977).
[59] *Gertz v Robert Welch,* 418 US 323 (1974).

The next question was then what a purely private figure suing for defamatory speech on a matter of public concern must prove in defamation actions, and the answer that the Court provided was that it was incumbent to prove that the defendant acted at least *carelessly* with respect to the truth or falsity of their statement. In other words, where a private person claims in defamation, the defendant can successfully raise a defence that they actually and reasonably believed their statement to be true (even if it is not). However, it remains clear that there can nevertheless be no liability without proof of fault, and even private individuals may not recover presumed or punitive damages without proving actual malice. More specifically *Gertz* means the following: if the claimant can only prove carelessness, they can only claim special damages, and will have to prove actual loss;[60] if the claimant can prove actual malice, then they can claim general damages which include presumed damage (which is the common law rule) and punitive damages, without having to prove actual loss.[61]

If a case involves a private individual involved in a purely private matter, with no public interest, the Court suggested in *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985)[62]that states are granted great latitude to define defamation standards. For example, the states might allow claimants to recover presumed or punitive damages without proof of actual malice.[63]

5 Comparison to UK defamation law

5.1 Differences

Claimant determining the applicable law

It is clear that the level of constitutional protection accorded to defamatory speech depends on the status of the defamation claimant, with the highest protection given to speech concerning public officials, or public figures where the public interest is concerned. In these instances, the 'actual malice' requirement makes it all but impossible for these figures to succeed in defamation claims. For 'purely private' claimants more leeway is allowed, with

[60] Albeit this can include for example emotional distress caused, job loss etc.
[61] *Gertz* note 59, 348-349. See also Goldberg and Zipursky, note 43, 326.
[62] *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.,* 164 US 749 (1985).
[63] *Ibid* 760.

states being able to set their own defamation rules. However it must be noted that even in the last category the US defamation claimant still faces a much more difficult evidentiary task than their UK counterparts, as they still need to prove falsity or at least negligence. They shoulder the burden of proof and also need to prove damages.

Fault requirement and the burden of proof

The US law of defamation is clearly fault based. The whole burden falls on the claimant to prove not only fault but also falsity. As far as public officials and other public figures are concerned, actual malice must be proved by the claimant. The burden falls on the claimant to prove that a defamatory and false statement concerning them was published by the defendant, and that the defendant acted not only with intent but with actual malice. By contrast, liability in England and Wales remains strict, with no fault requirement. There, the burden of proof remains largely on the defamation defendant. Under the common law in England and Wales, the claimant merely had to present the court with a *prima facie* defamatory statement. The burden then shifted to the defendant to convince the court that they have one of several possible defences, including that of truth. This reverse burden of proof survived the 2013 reforms largely intact, as is clear from the preceding discussion in chapters 1 to 3. Although the UK Defamation Act 2013 significantly improves the scope and ease of possible defences, the burden of proof still shifts onto the defendant as soon as the claimant has convinced the court that there was a defamatory statement published that harmed (or was likely to harm) their reputation.

Damages

As far as compensatory damages in defamation actions in the US are concerned, it is for the court to determine whether a particular harm can be compensated in this way, and for the jury or other trier of fact to determine the amount of damages recoverable as compensation.[64] As far as punitive damages are concerned, if the matter concerned a private individual, it fell to the jury to decide whether the defamatory matter was published

[64] Restatement (Second) of Torts (1977) Division Five – Defamation, Section 616.

with knowledge of its falsity, or with reckless indifference as to truth or falsity, or solely for the purpose of causing harm to the plaintiff. Only in these instances would the plaintiff be entitled to punitive damages.[65]

Where the Constitution is engaged, i.e. where the matter concerns public officials or public figures, punitive damages cannot constitutionally be awarded if the defendant was merely negligent in failing to ascertain the falsity of the defamatory communication. In other words, negligence does not suffice for the fault requirement here, actual malice needs to be proven before punitive damages may be awarded.[66]

The requirement to prove damages, be they compensatory or punitive, stands in contrast to the common law of defamation in England and Wales which was actionable *per se*. Although Section 1 of the Defamation Act 2013 now requires the claimant to prove actual or likely harm to their reputation, this still falls short of requiring proof of damages.

5.2 Similarities

The 2013 reforms did not bring about any significant convergence with US law. Nevertheless some similarities do exist.

Single v multiple publication rule

The multiple publication rule, refers to the doctrine of republication i.e. the notion that someone who published something that contained another's defamatory statement is treated as a publisher and can be sued in their own right. There are of course qualifications to this, and the Defamation Act 2013 restricts this in sections 8 and 10. But the possibility to sue multiple publishers for the same statement still exists in both jurisdictions.

However, there is one major caveat to this. Even after the liberalised regime ushered in by the 2013 Act, the situation *vis-à-vis* internet service providers (ISPs) in this regard still differs greatly across the two jurisdictions. In the US, providers and users of interactive computer

[65] *Ibid*.
[66] *Ibid* section 621 comment d.

services, including ISPs, content hosts, and online search engines, enjoy complete statutory immunity from suit as regards the publication of information provided by others. For example, section 230(c) of the US Communications Decency Act 1996[67] contains a broad immunity from liability for internet intermediaries and others who facilitate or participate in the publication of online defamatory statements that they did not create. The section reads as follows, under the following heading:

> **Protection for "Good Samaritan" Blocking and Screening of Offensive Material**
> *(1) Treatment of publisher or speaker*
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> *(2) Civil liability*
>
> No provider or user of an interactive computer service shall be held liable on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

As can be seen, the section was intended to protect internet intermediaries who removed offensive material from their computer systems or websites from free speech suits by the providers of the material, even where the removed material was constitutionally protected.[68]

Thus the very existence of this statutory provision indicates the fundamental difference between the two jurisdictions: Whereas in England and Wales ISPs, etc. need statutory intervention in order to protect them from *defamation* suits for statements posted by others, in the United States, statutory intervention was deemed necessary to protect ISPs, etc. from suit by publishers on *free speech* grounds. In other words, in the former it is about what gets published and in the latter about what does not. Either way, ISPs are placed in the

[67] Communications Decency Act 1996 47 USC.
[68] *Zeran v America Online, Inc.* 958 F Supp 1124 (ED Va, 1997), 1134.

position of judging whether statements ought to be published and the desirability of placing this editorial burden on these businesses is questionable.

Defences

Even though the constitutional protection defendants in the US enjoy ever since *Sullivan*, by means of its powerful limiting action, effectively superseding?? common law defences, these defences nevertheless still exist. So, just as in England and Wales, defendants may rely on, *inter alia*, absolute or qualified privilege, truth, reportage, and fair comment on public issues.

6. Analysis

Here it is pertinent to again revisit the landmark ruling in *New York Times v Sullivan,* and to reflect on how and why it heralded such a marked break with the then long established common law.[69] The Supreme Court justices found it troubling that the decisions of the state trial judge had stretched the common law definition of defamation to its breaking point by allowing the jury to conclude that the publication identified Mr Sullivan himself when it spoke only of law enforcement bodies in general. This is similar to the way false innuendo still operates in UK defamation law. The jury was able to give a grossly excessive damages award because they did not consider any evidence (nor was any evidence tendered) of actual damage to the plaintiff's reputation. This reflects the characterisation of defamation as actionable *per se*, and until the recent UK Supreme Court decision in *Lachaux*,[70] continued to be the case in England and Wales.

It is interesting to note that contemporary US textbook writers unhesitatingly describe the lower courts' judgments in *Sullivan* as 'a thinly veiled effort by state and local governmental officials to suppress criticism of their policies'.[71] In this respect, they argue, the lawyers for the New York Times were right to argue that the tort of libel was in this particular instance

[69] Goldberg and Zipursky note 43, 322.
[70] *Lachaux v Independent Print Ltd and another* [2019] UKSC 27.
[71] Goldberg and Zipursky, note 69, 322.

operating as the equivalent of the sort of impermissible effort by government to censor political speech that founders like Jefferson and Madison had long ago decried as unconstitutional.[72] So strong were the feelings by the Court that three of the Justices (Black, Douglas and Goldberg) wrote concurring opinions indicating that they would have gone further than the majority opinion by immunising from liability even those who, in bad faith or out of malice, publish defamatory statements in the course of addressing 'public affairs.[73]

The subsequent widening of the net from first public officials, to public figures, to even in some instances, private figures, also deserve some more reflection. The Courts have indeed construed the public figure concept very widely. It has been broadened so much that 'everyone from the President of the United States to low-level government employees may be included in the category. Even football players and belly dancers have been judged to be public figures for purposes of applying *Sullivan'*.[74] It seems that if a person wields any influence at all, they may be at risk of being labelled a public figure. The result of being so labelled is, as pointed out above, the requirement of having to prove actual malice in defamation actions.

The realities of modern defamation litigation in the US further entail that even private figures who sue are forced to plead more than just actual damages. The reason for this is mainly because most lawyers, usually working under contingency fee agreements, are reluctant to take on risky defamation cases unless potential recovery is high.[75] This in turn leads to damage inflation by including presumed and punitive damages far in excess of actual damages. But when the claimant pleads presumed damages, the *Gertz* rule requiring actual malice, not just negligence, is activated and this adds to the claimant's burden of proof.[76] In the US, even though by the standards of England and Wales, defamation defendants are given almost unimaginable free speech protection, there are still those clamouring for even more protection. Hagans, for example, argues that all critical speech

[72] *Ibid*.
[73] *New York Times v Sullivan* note 3.
[74] Anderson, DA 'Is Libel Law Worth Reforming?' (1991) 140 *University of Pennsylvania Law Review* 487, 502-3.
[75] *Ibid.*
[76] *Ibid*.

regardless whether it concerns public officials, public figures or private persons, should find equal protection in the law,[77] and he quotes former Chief Justice Brennan: 'Truthful speech has value. False speech mistakenly believed to be true, while valueless, should be protected to avoid self-censorship of truthful speech. Known falsehood is neither valuable nor necessary to preserve free debate and thus has no constitutional protection.'[78]

This raises the question as to how the American law of defamation compares to England and Wales's post-2013, reformed defamation law. An interesting empirical study, conducted before, during and after the *Reynolds* litigation in England and Wales, provides a starting point for analysis. Professor Russell Weaver, an eminent US scholar, together with American, British and Australian counterparts, began a multi-year project designed to gain greater insight into how the media was functioning in the US, the UK and Australia.[79] After conducting extensive interviews in these jurisdictions, Weaver and his research team found that the British media was nowhere near as aggressive or bold as their American counterparts, and indeed that British media reporting was significantly affected by British defamation law.[80] In contrast, the interviews conducted over a period of years ultimately confirmed that the underpinnings of the *New York Times* decision were essentially correct. The conclusion was that the British media seemed to suffer from significant chilling of speech whereas this did not apply to US media outlets at all.[81]

7. Conclusion

Freedom of expression has been accorded a preferred position in the US constitutional hierarchy. Even though free speech absolutism has been rejected, free speech claims

[77] Hagans, WG 'Who Does the First Amendment Protect?: Why the Plaintiff Should Bear the Burden of Proof in Any Defamation Action' (2007) 26(3) *The Review of Litigation* 613, 638.
[78] *Dun & Bradstreet v Greenmoss Builders,* 472 US 749, 610 (1985).
[79] This project culminated in a series of articles consolidated into the following monograph: Weaver, RL, Kenyon, AT, Partlett, DF and Walker, CP *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006).
[80] *Ibid*, 183-200.
[81] *Ibid,* 131-200. See also Weaver, RL 'British Defamation Reform: an American Perspective' (2012) 63(1) *Northern Ireland Legal Quarterly* 97-117.

frequently prevail over other countervailing interests**,** such as many defamation claims.**[82]** To a much larger extent than in England and Wales, even after the inception of the 2013 Act, defamation in the US currently closely resembles the tort of negligence. The reasons for this convergence are twofold: Defamation in the US requires proof of *mens rea* in the form of intention/actual malice, and it requires harm actually suffered by the claimant, who bears the burden of proof. The result is that the pursuit of defamation litigation in the US has dropped to an extremely low level.[83] Thomas Jefferson's famous statement that freedom of expression 'cannot be limited without being lost'[84] clearly still reflects the core value of US jurisprudence in this area.

It is doubtful that lawmakers and the courts in England and Wales would ever want to go this far, but nevertheless there are valid lessons that may be learnt from the US as far as the balancing of defamation law in favour of free speech is concerned. Perhaps the most valuable is the fact that defamation law in the US provides a paradigm for fault-based liability, where the burden of proof is firmly on the claimant and damages are calculated in a clearly defined manner. There are signs of convergence such as for example the Section 1 requirement in the Defamation Act 2013 that claimants now have to prove harm to reputation. However, as is clear from the discussion in the preceding chapters, despite the 2013 reforms, English defamation law is still fundamentally different from that of the US. If the UK Defamation Act 2013 did not take the English law of defamation closer to its American counterpart, did it align more closely to other jurisdictions? In the next chapter the law of Germany, being another influential liberal democracy with constitutional protection of free speech, is examined.

[82] *Curtis Publishing Co. v Butts,* note 55; *Associated Press v Walker*, 388 US 130 (1967*); New York Times Co. v Sullivan*, note 3. This is also the case for many privacy claims - *Time, Inc. v Hill*, 385 US 374 (1967).
[83] Weaver *et a*l note 79, 6-7.
[84] Note 9.

CHAPTER 5 DEFAMATION IN GERMANY

1. Introduction

In this chapter, the focus moves to Germany and the way in which its legal system treats defamation claims. Germany is a valuable comparator jurisdiction *vis-à-vis* the UK in general and England and Wales specifically for a variety of reasons. It is an influential and leading member of the European Union (EU), whose laws will continue to directly influence legal and political issues in the UK for an indefinite period of time. It is also a signatory of the European Convention of Human Rights (ECHR / Convention) and as such, subject to the jurisdiction of the European Court of Human Rights (ECtHR), where its jurists continue to play a prominent role.[1] Given the UK's ongoing participation in the Convention regime, the German influence in that forum will remain important. The German law as such also merits attention. Its roots are ancient and it represents one of the world's leading legal systems of thought. Since its coming into force on 24 May 1949, the German Basic Law (known as the *Grundgesetz* and abbreviated as GG)[2] has become one of the most influential constitutional systems in the world.[3] Some commentators view the German model as on a par with US constitutionalism, with many states across Europe and Latin America, for example, emulating the German system.[4]

As in the US, the rights engaged in a defamation suit also enjoy constitutional protection in Germany, but there are significant differences. One of these is the primacy that the GG accords to the right to human dignity, whereas by contrast in the US, free speech enjoys the strong First Amendment protection discussed in the preceding chapter. The content and

[1] For example, the current vice-president of the Court is Angelika Nussberger, a German lawyer and academic. For the full list of current and past judges, see <https://www.echr.coe.int/Pages/home.aspx?p=court/judges>.
[2] An official translation of the GG by Professors Tomuschat, C, Currie, DP, Kommers, DP and Kerr, R, in cooperation with the Language Service of the German Bundestag is available at <https://www.gesetze-im-internet.de/englisch_gg/index.html>. All references to the GG in this thesis are to this translation.
[3] Hall, JB 'Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany', (2008) 9 *German Law Journal* 771.
[4] *Ibid* 771. See also: Kokott, J 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization-With Particular Reference to the German Basic Law', in Starck, C (ed.) *Constitutionalism, Universalism, and Democracy - A Comparative Analysis* (Nomos, Baden-Baden 1999) 71-134; and Quint, P 'What is a Twentieth-Century Constitution?'(2007) 67 *Modern Law Review* 238.

operation of the German law balancing free speech with reputational interests form the subject of this chapter.

Some caveats for the common law scholar

Before examining the substantive law of a state in a comparative analysis, the system of law followed by the state itself, if different from that of the other comparator states, needs some attention. The US shares with England and Wales a common law tradition, facilitating the comparative analysis as many premises are the same. When looking at Germany, however, the analyst needs to bear in mind that the system of law is that of the civil law, and for the comparison to make any logical sense, systemic differences need to be borne in mind throughout. The relevant differences and characteristics unique to German law are first addressed before the substantive German law relating to defamation is analysed.

Specialisation and federalism

In Germany there is a plethora of different, specialised courts, each with their own practices. This is inevitably the result of the desire for increased specialisation which is an important characteristic of the contemporary German judicial structure. For instance, instead of one federal Supreme Court, there are five different Supreme Courts, each with their own jurisdiction.[5] For this thesis the following two courts and their case law are important: The Federal Constitutional Court, (*Bundesverfassungsgericht*, BVerfG) and the Federal Supreme Court (*Bundesgerichtshof,* BGH). The BGH is the Supreme Court for civil and criminal matters, whereas the BVerfG is entrusted with the task of ensuring the preservation of the GG and the control of the constitutionality of legislation. It bears noting that there is a very strong federal tradition in Germany. However, unlike in the US, the government maintains no federal courts at the first and second level[6] but instead each state has its own constitutional court ensuring that the state constitution is observed. Federal devolution is observed and enjoys commitment at the highest levels. This means that the

[5] Together with the BGH four other Supreme Courts exist: the *Bundesverwaltungsgericht* dealing with administrative law; the *Bundesfinanzhof* dealing with financial matters; the *Bundesarbeitsgericht* tasked with labour matters, and the *Bundessocialgericht* which oversees social legislation.
[6] The one exception to this is the Federal Patent Court which acts only as an appeal court.

German administration of justice is considerably decentralised.[7] In such a system the chances are high for diverging case law from the different Supreme Courts on matters of substance. To resolve this conflict, and in order to ensure the unity of the federal law, a 'Common Senate' (*Gemeinsamer Senat*) composed of judges from the five Supreme Courts rules whenever one of the Supreme Courts consciously departs from the case law of another Supreme Court .

For present purposes focus remains on the BGH which stands at the apex of the judicial hierarchy in civil and criminal matters, and which hears cases from all German courts.

Judicial precedent

In principle, the doctrine of binding precedent, as practiced in common law jurisdictions, is not known in German law. However, this does not mean that cases are not important, or indeed that there are no binding precedents at all. Two examples of where decisions can be binding on other courts are: A decision of the BVerfG is binding on the constitutional organs of the federal and state government; and, if after an appeal on a point of law, the BGH has reversed a decision of a lower court and sent the matter back for retrial, then the lower court is bound by the ruling of the BGH on the matter of law. In practice it also seldom happens that an inferior court would easily depart from the line taken by the BGH, especially if there is a series of decisions (*ständige Rechtsprechung*) with similar conclusions on the same issue. [8]

German cases and their import

Because there is no general system of binding precedent in Germany, courts are not obliged to attempt the detailed consideration of material which is necessary in the common law in order to gauge whether the case under consideration is covered by earlier authority and if so, whether it is materially different and thus distinguishable on the facts.

[7] Markesinis, B, Bell, J and Janssen, A *Markesinis's German Law of Torts: a Comparative Treatise* (5th edn, Hart Publishing, Chicago 2019) 2-3. All translations of German cases referred to in this chapter are from this book, unless otherwise stated.
[8] Markesinis *et al* note 7, 7.

Another feature in German case law which looks unusual to common law jurists is the detailed consideration of the views of German academic writers. The 'dominant opinion' (*herrschende Meinung*) as reflected in the majority of decisions as well as academic writing will enjoy strong persuasive authority. It even happens that academic discourse on a particular matter is so highly regarded by judges that their decisions sometimes contain a very lucid summary of the views of the academy.[9] To common law eyes, the fact that academic writing is accorded similar and in some instances even higher authority than previous judgments doubtless appears somewhat unusual. However, this could be seen as a result of the fact that the law is after all codified as Germany is a civil law jurisdiction, as well as a result of the education and training particular to German lawyers.

Codification

As with most civil law systems, technically only statute and to a lesser extent custom are the true sources of law. Markesinis, a leading commentator on German law, remarked that all German judgments contain two reasons for their results: the published ones and the 'real' ones.[10] For a comparatist, especially one hailing from a common law jurisdiction, it is very important to note that the same importance could not be given to a German case *simpliciter* in the same way as it could be for an English case. To obtain a complete picture it is important to research beyond the text of a judgment and to furthermore take into account not only statutes but also other sources such as preparatory works and academic commentaries. Therefore, in order to begin to understand the true similarities and differences between the different legal systems, one needs to fully and properly study more than just German case law: the relevant statutory provision/s as well as academic commentary also need serious scrutiny. Reading German cases, it is striking that although earlier case law does get quoted, this is usually by way of illustration or as examples of a particular established principle. But previous cases are not used as building blocks for the new decision – they simply are not given the same level of scrutiny as is usual in an English court. For a German judge the primary building block is the relevant statutory code, followed by the academic commentary on such code. The relevant code and provisions are

[9] *Ibid* 6.
[10] *Ibid* 10.

referenced and interpreted deductively to the particular facts before the court. The level of detailed reasoning evident in English cases is generally absent in German counterparts, the idea being that all the necessary thinking on the topic had already been done by the drafting committee of the code.[11] The German judge's task truly is to speak, not make, the law.

The relevant codes play a prominent role in both the German legal system but also in the German psyche. The Civil Code (the *Bürgerliches Gesetzbuch,* BGB), for instance, came into force on 1 January 1900 and symbolised the successful unification of the modern German state after decades if not centuries of tortuous negotiations. It put an end to a confusing diversity of local law, municipal law and customary law.[12] The BGB consists of articles that are usually referred to as paragraphs. Some 30 paragraphs are devoted to the law of torts. Compared to the French Civil Code (the *Code Civil*) the BGB provides a much more systematic treatment of the subject, which reflects the exhaustive approach taken to the drafting of the law by German lawyers. The law of tort in the BGB is a mixture of general and particular provisions. This means that for some issues, a general directive only is given, transferring most of the burden from the shoulders of the legislators to the judge, whereas for others regulation is precise enough to largely do most of the heavy legal lifting for the judge, who is merely required to match the facts to the prescribed legal outcome.[13] If one examines the law comparatively, this means that the German system is positioned around halfway between the all-encompassing and open ended system of general clause regulation found in the French *Code Civil* on the one hand, and the traditional English writ system which resembled a distinct pigeonholing approach on the other.

So, when examining German law one must bear these caveats in mind, namely to focus on the relevant statutory codes, case law as well as academic commentary when comparing the German law on defamation to that of the other jurisdictions in this thesis. The relevant statutory provisions include the BGB as well as the German Criminal Code, the *Strafgesetzbuch* (StGB), because the law which is compared with the common law tort of

[11] Kötz, H 'Scholarship and the Courts: A Comparative Survey' in Merryman, JH and Clark, DS (eds.) *Essays in Honour of Henry Merryman on his Seventieth Birthday* (Duncker and Hamblot, Berlin 1990) 190.
[12] Wieacker, F *Privatrechtsgeschichte der Neuzeit unter Besonderer Berücksichtigung der Deutschen Entwicklung* (3rd edn, Vandenhoeck & Ruprecht, 2016), or the English translation of an earlier edition by Weir, T *A History of Private Law in Europe: With Particular Reference to Germany* (OUP, Oxford 1996).
[13] Markesinis et al 2019 note 7, 15.

defamation can be found in both in Germany. As the German Constitution plays a prominent role the discussion starts with an examination of the relevant provisions of the GG. After the relevant Codes, judgments of the BVerfG and the BGH are scrutinised. Finally comparisons will be made to the law of England and Wales, the US in order to once again address the central question of this thesis, namely how best to balance freedom of expression with the protection of an individual's right to their reputation.

2. Constitutional protection of the right to freedom of expression

As is the case in the US, freedom of expression enjoys constitutional protection in Germany. Article 5(1) of the GG states:

Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting via the radio, television and cinema shall be guaranteed. There shall be no censorship.

What is more, the state is under a positive duty to promote freedom of expression: Article 1(3) provides that the fundamental rights contained in the GG bind the legislature, the executive and the judiciary as directly applicable law. In this way speech protection seems to extend, in Germany, even beyond the strong constitutional protection guaranteed under the First Amendment in the US. Indeed, where the US Constitution paints a broad picture, the GG goes into more detail: Not only is mention made of written and pictorial speech, but it is made clear that the free speech right comprises both the right to impart and the right to receive information, and both are separately recognised. The BVerfG explicitly stated that *Meinungsfreiheit,* or the right to express one's opinion freely, is separate from, and does not form part of *Informationsfreiheit,* the right to receive information.[14]Furthermore, *Meinungsfreiheit* includes not only statements of opinion, but also statements of fact, unless the person making the statement knows that the statement is false.[15] This becomes important when judging defamatory statements.

[14] *Leipziger Volkszeitung* 27 BVerfGE 71 (1969).
[15] *Ibid*.

The previous chapter described how the First Amendment to the US Constitution prioritises the right to free speech over other fundamental rights. By contrast, in Germany the highest priority is given to the inviolable dignity of the human being. Article 1(1) of the GG states: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' It therefore does not surprise that the right to freedom of expression is limited 'by the provisions of the general laws and statutory provisions for the protection of young people and the obligation to respect personal honour [*Recht der persönlichen Ehre*]'.[16]

The high protection given to human dignity in German law is a direct result of the country's National Socialist past. In *Abortion Reform Law I* (1975), the BVerfG stated:

> The Basic Law contains principles **[…]** which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism. The almighty totalitarian state demanded limitless authority over all aspects of social life and, in pursuing its goals, had no regard for individual life. In contrast to this, the Basic Law established a value-oriented order which puts the individual and his dignity into the very center of all its provisions.[17]

This theme runs through the most seminal cases in the broad area of personality rights: In *Lüth* (discussed below), the BVerfG stated that 'the Basic Law is not value neutral',[18] and in *Mephisto*[19] the BVerfG made it clear that the GG unifies a system of fundamental values, according to which the Court would resolve cases.

3. Protection of reputation as a subcategory of personality rights

Whereas other jurisdictions provide specific defamation acts, the German defamation system is more differentiated.[20] Further to the Article 1 GG duty on all state authorities to respect and protect the inviolable right to human dignity, Article 2 GG states that everyone has the right to the free development of their personality provided this does not infringe upon the rights of others or offend against the constitutional order or the moral code

[16] Article 5(2).
[17] *Abortion I* BVerfGE 39, 1 (1975).
[18] *Lüth* BVerfGE 7, 198 (1958).
[19] *Mephisto* 30 BVerfGE 173 (1971).
[20] For a detailed analysis about the origin of the strong personality rights in Germany see Whitman, JQ 'The Two Western Cultures of Privacy: Dignity versus Liberty', (2004) *Yale Law Journal*, 1180.

(*Sittengesetz*). These two provisions together with paragraphs 823 and 826 of the BGB create the constitutional basis for reputational (and privacy) protection, known as the general personality right (*Allgemeines Persönlichkeitsrecht*).[21] This is a bundle of rights that protect different aspects of an individual's personality from unauthorized public intrusions. The general personality right comprises a number of different rights such as the right to one's image, the right to one's name, and the right to oppose publication of private facts.[22] This means that the legal interests in privacy and reputation are not distinguished to the same extent as they are in the US and the UK. It also means that cases dealing with the general personality right may and do engage one, a combination of, or all of the rights just listed.

Therefore, at first glance, it looks as if the scales in Germany are tilted in favour of reputational protection vis-à-vis free speech, as the former forms part of the general personality right, which in turn resonates with inherent human dignity to a larger extent than the exercise of free speech. In practice, reputational protection and free speech are balanced in a very nuanced and sometimes complex way in German disputes engaging these two rights.

4 Defamation law in Germany

4.1 Criminal law

In contrast to the UK and the US, where defamation suits are pursued through the civil courts, it is mainly a criminal offence in Germany. The law of libel and slander is governed mainly by Part 14, paragraphs 185 to 200 of the StGB, or German Criminal Code, which contains provisions punishing individual and collective defamation or insult *(Beleidigungsdelikte* or *Delikte gegen die persönliche Ehre)* .'Insult' and 'defamation' here are used in a wide sense (covering all criminal offences against honour) as well as in their narrower sense. In the narrow sense, 'insult' (*Beleidigung)* refers to the abuse of or an

[21] The German Federal Constitutional Court acknowledged for the first time the general personality right in *Lebach* BVerfGE35, 202, 1973. For further details, see Schwartz, PM and Pfeifer, KN 'Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?' (2010) 98 *California Law Review* 1925.

[22] Coors, C 'Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights' (2010) 11 *German Law Journal* 527, 528.

insult directed at the recipient in private, and is covered by paragraph 185 only. As publication to a third party of the defamatory statement is a sine qua non for a defamation action in common law jurisdictions, the German offence of 'insult' therefore exceeds the scope of common law defamation law. If third parties were also made aware of the aggrieving statement, paragraphs 186 and 187 are engaged. The former covers defamation and the latter covers intentional defamation. Both provisions deal with factual assertions capable of reducing esteem for the victimised party, made in the presence of third parties. Put another way, defamation occurs when asserting or disseminating a fact related to another person which may defame them or negatively affect public opinion about them. Given the inclusion of 'insult' as an offence, it is therefore clear that the common law notion of defamation is narrower than the broad German notions of insult and defamation.

Insult is punished with imprisonment not exceeding one year or a fine. If the insult is committed by means of an assault, imprisonment of up to two years may be imposed.[23] Defamation is punished with a fine or imprisonment for up to one year. A sentence of imprisonment for up to two years can be imposed if the act is committed publicly or through the dissemination of written materials.[24]

Intentional defamation comprises intentionally and knowingly asserting or disseminating an untrue fact related to another person, which may defame them or negatively affect public opinion about them or endanger their creditworthiness. Punishment includes imprisonment not exceeding two years or a fine, and, if the act was committed publicly, in a meeting or through dissemination of written materials to imprisonment not exceeding five years.[25] It is clear that the fault element plays a major role in the German law on criminal defamation, in contrast to the UK where the tort remains one of strict liability. However, it must also be stressed that even disseminating true facts may constitute criminal defamation, as paragraph 192 StGB shows.

Specific provision is made for the defamation of 'persons in the political arena': In terms of paragraph 188 StGB, if a politician is defamed publicly, in a meeting or through

[23] Para 185.
[24] Para 186.
[25] Para 187.

dissemination of written materials based on the position of that person in public life, and if the offence could make their public activities substantially more difficult, the defamer may face imprisonment from three months to five years, depending on whether the defamation was intentional.[26] The protection accorded to politicians in Germany is in stark contrast to the fact that it would be almost impossible for politicians to sue in defamation in the US.[27]In England and Wales, whilst political parties are unable to pursue a defamation suit, individual politicians may indeed institute a civil claim in defamation.[28] As will be seen in the next chapter, the ECtHR is also of the opinion that politicians and political parties are required to have 'thicker skin' in this regard.

It is also possible to bring a criminal prosecution in German law for violating the memory of the dead, meaning that unlike most common law jurisdictions including the UK, defamation suits may be brought in Germany to protect the reputation of a deceased person.[29]

To obtain an interim injunction, the claimant has to persuade the court on the balance of probabilities that the statement is false, defamatory or relates to their private life.[30] The defendant usually does not have the chance to challenge the claimant's evidence until after the injunction has been granted. This is in contrast to the prohibition against prior constraint in the US.[31] While interlocutory and interim injunctions are granted in England and Wales, these are subject to stringent controls.[32] In Germany, publication generally occurs if the alleged false and/or defamatory material is read, heard, accessed or seen. A single instance of publication may be sufficient to bring a case.

[26] Paras 188(1) and (2).
[27] See the discussion in chapter 4, para 4.3.
[28] In *Goldsmith v Bhoyrul* [1998] QB 459 the English High Court held that the principle established in *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534, preventing central and local government institutions bringing actions in defamation at common law on the ground that those holding office must remain open to criticism, extended also to political parties.
[29] Para 189.
[30] Given that the standard of proof in criminal matters is usually to prove the matter 'beyond reasonable doubt', this standard, which is more commonly the civil standard of proof, is somewhat surprising in this context. The StGB relates to criminal matters, after all, and defines defamation and insult as crimes.
[31] See chapter 4, para 2.3.
[32] Section 12(3) of the UK Human Rights Act 1998 limits prior constraint: '(3)No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'.

Unlike the absolute protection afforded by a defence of truth in the UK, paragraph 192 StGB allows the possibility of being found guilty of insult or defamation despite proof of truth of the asserted or disseminated fact. If the insult or defamation results from the form of the assertion or dissemination, or of the circumstances under which it was made, the assertion may still be defined as an insult or defamation.

Paragraph 193 StGB contains a defence similar to the common law defence of fair comment. Critical opinions about scientific, artistic or commercial achievements are protected, except if the insult results from the form of the utterance of the circumstances under which it was made. The same reasoning applies to other similar instances, such as utterances made in order to exercise or protect rights or to safeguard legitimate interests, remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant.

An insult may only be prosecuted upon request by the alleged victim. An 'ex officio' prosecution, i.e. on the initiative of the state, may be made if the insult comprised a persecution of the victim as a member of a group under the National Socialist or another authoritarian regime, if this group is a part of the population and the insult is connected to this persecution. If the victim objects to this, however, the offence may not be prosecuted ex officio.[33] Even after the death of the victim, relatives retain the right to initiate a prosecution or to object to an *ex officio* prosecution.[34]

Not only are politicians allowed to institute defamation prosecutions, so are public officials or their superiors on their behalf, as well as churches and religious associations.[35] And in perhaps the greatest contrast to the situation in English law, a legislative body of the German Federation, a state in the federation, or any other political body within the Federal Republic of Germany may also institute a prosecution in defamation.[36]

[33] Para 194(1).
[34] Para 194(2).
[35] Para 194(3).
[36] Para 194(4).

Finally, the preservation of legitimate interests as defined by paragraph 193 may preclude punishment of critical or negative judgments. It reads:

> Critical judgements concerning scientific, artistic, or commercial services, likewise statements made in the exercise of or in defense of rights or for the preservation of legitimate interests, as well as reproofs and reprimands of subordinates by superiors, official complaints or judgements on the part of a civil servant and similar cases are punishable only insofar as the existence of an insult arises from the form of the statement or from the circumstances under which it occurred.

The object of legal protection in these provisions is, as pointed out by Brugger,[37] the right to one's social worth (i.e., one's reputation or external honour) and also the right to be respected as a human being (i.e., one's internal worth or integrity). In this sense the German law of defamation has a far wider scope than that of the UK or the US. The question is whether this leads to an imbalance vis-à-vis free speech in Germany, and to answer that question one needs to examine how the courts handle such conflicts.

A good place to start is to examine the retention of criminal defamation and its far-reaching scope of application. The Jan Böhmermann affair illustrates several deficiencies in the retention of defamation as a criminal matter in Germany.

The Jan Böhmermann affair

In March 2016, satirist and comedian Jan Böhmermann included on his TV show a satirical poem about President Erdoğan of Turkey, accusing him of, among other things, repressing minorities, kicking Kurds and slapping Christians while watching child porn.

President Erdoğan responded by lodging a complaint against Böhmermann for insult under paragraph 103 of the *StGB*. This rarely used provision prohibited insulting foreign heads of state but requires that the government gave consent to the prosecution of such cases. The Turkish president received Chancellor Angela Merkel's permission for proceedings to go ahead. She stated that the German government would permit Erdoğan's action to proceed, but also that the relevant law, which dates back to 1871, would be repealed. (Paragraph

[37] Brugger, W 'The Treatment of Hate Speech in German Constitutional Law (Part I)' (2003) 4 *German Law Journal* 1, 15.

103 was in fact repealed later the same year.) President Erdoğan in addition to seeking the injunction in Hamburg also filed a separate and more serious paragraph criminal complaint alleging 'insult' by Böhmermann.[38]

There are several troubling aspects around this matter. Although the content of the 'poem' was inherently offensive, it did contain legitimate criticism and was directed against a public, not a private figure. The critic was indeed silenced with an injunction, and had to be placed under police protection.[39] There are no further formal records of the matter being pursued through the German courts. Far from being an end to the issue, this is troubling, as it indicates an ease with silencing critique that is antithetical to the free exercise of speech.

4.2 Civil law

The German Civil Code *(Bürgerliches Gesetzbuch* or BGB*)* also addresses defamation. If criminal law provisions against insult and defamation apply, civil liability can often also be established in terms of the BGB.[40] Paragraph 823(1) BGB is also significant for defamation claimants, as it provides for the very important 'personality right' *(Allgemeines Persönlichkeitsrecht).* Remedies include compensation for material damages, retraction of false assertions of facts, and, in some cases,[41] compensation for pain and suffering. Payment of damages is required when the speaker is convicted of disseminating false assertions of fact about another person that subsequently damage that person's credit-worthiness.[42]

4.3 Remedies

The German system favours a variety of remedies that place less emphasis upon money awards; for example, the publication of a counterstatement (*Gegendarstellungsanspruch)* or a claim for retraction (*Widerruf)*.[43] Paragraph 200 StGB also makes provision for the publication of the conviction upon application of the victim or a person otherwise entitled

[38] Editorial, 'The Guardian View on the Jan Böhmermann Affair: No Joke' (*The Guardian* 22 April 2016) https://www.theguardian.com/commentisfree/2016/apr/22/the-guardian-view-on-the-jan-bohmermann-affair-no-joke accessed 3 March 2020.
[39] *Ibid*.
[40] Para 823(2) BGB in combination with para 185(ff) StGB.
[41] Based on paragraph 847 of the BGB.
[42] Para 824 BGB.
[43] Coors, note 22, 530.

to file a request. The manner of publication is up to the court, with the aim of achieving parity: if the insult was committed through publication in a newspaper or magazine the publication must also be included in a newspaper or magazine, if possible in the same one which contained the insult.

5. Guidelines from the German Constitutional Court

From the above it can be deduced that there are two facts particular to the German law which indicate very strong protection of reputation: retaining criminal defamation, and conflating reputation with privacy as deserving of the strong constitutional protection of Article 1's 'inviolability' provision. However, reputation, or indeed any of the personality rights contained in the general personality right does not always trump other concerns. Instead, the way in which the German law is set out results in a far more *ad hoc* and contextual analysis of competing interests. So, for instance, where political and other public discourse is concerned, there is a presumption in favour of freedom of expression. Likewise statements of opinion are accorded more protection than statements of fact. Relevant case law reveal the nuanced use of the balancing exercise and that competing rights may be treated differently in differing cases, depending on the circumstances surrounding the facts.

5.1 Balancing exercise

German courts attempted to find a balance between competing rights from an early stage. A good case to start when examining this balancing exercise is the seminal case of *Lüth*[44]as the BVerfG not only established the balancing formula, but also confirmed an obligation on the German courts to apply the values underlying the GG to private law suits.

Lüth (1958)

Decided relatively shortly after the Second World War, in *Lüth* the German BVerfG established that the right to freedom of expression as enshrined in Article 5(2) GG is limited not only by Article 1, but also by provisions in general laws including provisions concerning

[44] *Lüth* note 18.

defamation both in the criminal law[45] and in tort: The relevant BGB provisions prescribe that anyone who intentionally or negligently injures the life, body, health, freedom, property or similar right of another is liable for any resultant loss;[46] and anyone who intentionally inflicts damage on another in a manner contrary to morality is obliged to compensate the other for the damage so inflicted.[47]

The case involved an action brought by a film director, Harlan, against Lüth, who had called for the director's film to be boycotted in protest against the director's past associations with the Nazi regime. The Hamburg Landgericht issued judgment in favour of the complainant, ordering the defendant, on pain of fine or imprisonment, to refrain from further calls for boycotting the said film. Mr Lüth took the matter on appeal to the BVerfG, arguing that the Landgericht's judgment infringed his basic right to free expression of opinion as laid down in Article 5(1) of the GG.

The BVerfG noted that by prohibiting the complainant from making statements apt to lead others to join him in boycotting Harlan's films, the judgment clearly restricts the complainant's freedom of expression of his opinion. The Landgericht had granted the injunction as a matter of private law on the basis that the complainant's statements were tortious under paragraph 826 BGB. Thus the public authority had restricted the complainant's freedom of expression on the basis of the plaintiff's private law claim.

Horizontal application and limitation of free speech

The BVerfG in *Lüth* thus had to consider whether the fundamental rights in the Constitution constrained only the state, or whether they prevailed against everyone in private legal relations. The Court emphasised that Article 5(2) clearly shows that freedom of expression is not absolute, but may be limited by the provisions of general law, as discussed above, as well as by specific laws such as the law protecting the right to personal honour. The Court held that the GG's fundamental rights were aimed primarily at protecting citizens against the state, but they also incorporated an objective scale of values which applied, as a matter

[45] *StGB* paragraphs 185-94. See the discussion of the German law of criminal defamation in paragraph 4.1 above.
[46] Para 823.
[47] Para 826.

of constitutional law, throughout the entire legal system. As such, the substance of the rights is expressed indirectly in the rules of private law, most evidently in its mandatory provisions. The Court found that rules of private law may count as 'general laws' which may restrict the basic right of freedom of expression under Article 5(2) GG. However, such 'general laws' must be interpreted in the light of the special significance in a free democratic state of the basic right to freedom of expression.

The Court stressed that the GG protects not only the expression of opinion, but also its inherent or intended effect on others, for the whole point of an expression of opinion is to have an effect on the environment of ideas. Thus value judgments, which always have an intellectual aim, namely to persuade others, are protected by Article 5(1) of the GG. Put another way, it is the stance of the speaker as expressed in the value-judgment by which they hope to affect others which is principally protected by this basic right. In this sense the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which are in their turn also deserving of protection. There has to be a 'balance of interests'; the right to express an opinion must yield if its exercise infringes interests of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.[48]

The Court reasoned that the rules of private law may well be ranked as 'general laws' in the sense of Article 5(2) of the GG even though up to then, the rights contained in the GG had been considered good only as against the state. The Court came to the logical conclusion that if the fundamental right to free expression of opinion affects relations of private law as well and favours free expression of opinion against the fellow citizen also, then rules of private law which operate to protect superior legal interests must also be taken into account as possibly limiting the right. After all, if provisions of criminal law designed to protect honour or other essential aspects of human personality can set limits to the exercise of the fundamental right to freedom of expression, there is no good reason why similar provisions of private law should not equally do so.[49]However, the Court held that in the

[48] *Lüth* note 18 paras 36 to 39.
[49] *Ibid*, paras 40-41.

context of public discussion, a presumption in favour of freedom of expression must be applied. Therefore the Court concluded that Mr Lüth's call for a boycott of Harlan's film was a valid expression of his right to free expression.

In summary, the balancing formula established by the BVerfG in this case enjoins the lower courts to weigh up the competing interests in freedom of speech and in personal reputation appropriately in the light of all relevant facts and law in each case. Defamation laws are not simply to be applied literally – in each instance the laws themselves must be interpreted and applied so they do not unduly restrict freedom of speech.[50]

A noticeable characteristic of German case law is thus the detailed consideration given to all relevant factors, including all relevant laws. This means that some predictability is sacrificed in the interest of flexibility. But nevertheless, the BVerfG did issue a number of guidelines in subsequent cases.

Soldiers are murderers (1995)

In '*Soldiers are murderers'* (1995) the Court emphasised that due weight should be given to the character of the speech or publication and the context in which it was made or issued.[51] If defamatory remarks are made incidentally in the course of a contribution to public discourse, then the speech should be protected from criminal or civil proceedings. The case concerned an appeal to the BVerfG about the criminal conviction for insult arising out of four conjoined cases,[52] and illustrate several important points about how competing interests are balanced by German courts. A detailed analysis of this case is therefore instructive.

The facts broadly concerned statements to the effect that soldiers are, *de facto* and of necessity, murderers. Individual soldiers, as well as the Federal Army itself, instituted and won criminal prosecutions against the appellants founded on insult[53]as well as the specific

[50] Barendt, E. *Freedom of Speech* (2ndedn OUP, Oxford 2005), 214.
[51] *Soldiers are murderers* 93 BVerfGE 266 (1995).
[52] 1 BvR 1476/9; 1 BvR 1980/91; 1 BvR 102/92) and 1 BvR 221/92.
[53] Para 185 StGB.

paragraph of the StGB allowing state departments to sue for insult.[54] The BVerfG It started off by reiterating that the statements for which the complainants had been punished for insult enjoy the protection of Article 5(1) of the GG.[55]It also pointed out that, in contrast to assertions of fact, statements of opinion are characterised by the subjective attitude of the person expressing themselves to the object of the statement. They contain the individual's judgement about facts, ideas or persons. The protection of the basic right relates to this personal attitude. It therefore exists independently of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless. The protection does not only relate to the content of the statement, but also to its form. The fact that a statement is formulated in a polemical or hurtful way does not remove it from the area of protection of the basic right.[56]

The statements for which the complainants had been punished for insult are opinions in this sense, which are always covered by the protection of the basic right. The complainants in their statements that soldiers are murderers or potential murderers did not claim that particular soldiers had committed a murder in the past. They were instead expressing a judgement about soldiers and about the profession of soldier which under certain circumstances compels the killing of other human beings. The criminal courts also proceeded on the basis that it was a value judgement, not an assertion about facts. It was clear to the Court that punishment for these statements constituted an intrusion into the protected area of the basic right to freedom of expression.[57]

However, the Court then went on to stress that the basic right to freedom of expression does not enjoy absolute protection. According to Article 5(2) of the GG it is limited by the provisions of general statutes, the statutory provisions for the protection of young people, and the right to personal honour.[58] The Court then examined whether the criminal provision is reconcilable with Article 5(1) GG, which primarily protects personal honour. Within the framework of the general right of personality derived from Article 2(1) in combination with

[54] Para 194 StGB.
[55] *Soldiers are murderers* note 51 para 101.
[56] *Ibid*, paras 102-105.
[57] *Ibid*, para 106.
[58] Para 185 *StGB*, which forms the basis of the decisions that were being challenged, belongs to this category of general statutes protecting the right to personal honour.

Article 1(1) GG, it explained that honour, itself, enjoys basic right protection. It can indeed be harmed by expressions of opinion. Therefore it is expressly recognised in Article 5(2) of the GG as a ground justifying limitations on the freedom of expression. But the Court went on to say that it does not follow from this that the legislature could limit freedom of expression in the interest of personal honour as it pleases. Instead it should keep in mind the restricted right, and avoid excessive limitations of free speech.

The Court then turned its attention to the fact that this particular provision of the criminal code[59] also extends protection to state institutions and not just to individuals. In this regard, the norm cannot be justified from the point of view of personal honour, because state institutions have no personal honour, nor can they have the general right of personality. The Court noted that instead paragraph 185 is justified as a protective norm in favour of state institutions as it ranks with the general laws in the sense of Article 5(2) GG. State institutions cannot fulfil their function without a minimum degree of social acceptance. They ought, therefore, in principle to be protected from verbal onslaughts which threaten to undermine this. The criminal law protection ought not however to lead to state institutions being shielded from public criticism, even if it takes a harsh form. This should be guaranteed in a special way by the basic right to freely express an opinion. Against this background the Court then balanced the competing interests of the soldiers and the Federal army on the one hand and the conscientious objectors on the other.

The Court concluded that Article 5(1) requires a balancing operation, between the importance on the one hand of freedom of expression and on the other hand of the legal interest for the benefit of which it has been limited. This is to be undertaken within the framework of the features of the definition of the statutes concerned. Paragraph 185 StGB cannot be interpreted so that it extends the concept of insult so widely that it exceeds the requirements of the protection of honour or protection of institutions or leaves no more room for taking freedom of expression into consideration. Nor can it be interpreted in a manner which would deter people from exercising their right to free speech, which in turn would lead to even permissible criticism remaining unspoken through fear of sanctions.

[59] Para 185 StGB.

Therefore, having weighed up all the competing interests and rights the BVerfG quashed the criminal convictions.

Soldiers are murderers illustrated several relevant points: The manner in which reputation is protected through the criminal law of insult; the fact that criminal defamation may be pursued by individuals as well as institutions such as the German army; the inclusion of reputation as forming part of the highest ranking right in German law, the right to human dignity; and finally it illustrates that even so, it is subject to constitutional constraints that balances competing rights in a fact-specific context.

5.2 Public discourse, context and the right to reply

Publication during public discussion is therefore protected by the presumption in favour of freedom of expression. In *Flugblatt*[60]a defamation conviction for publication of a leaflet concerning the involvement of two politicians in the 1939 invasion of Poland was quashed by the BVerfG as the lower court had failed to take into account the political significance of the leaflet in furthering public discourse. It is only if the predominant character of a statement is not a contribution to political debate, but the disparagement of an individual that the statement should then be characterized as an insult.[61]A dispute between critics and an art professor was given the same treatment by the BVerfG, which held that the context of the debate had to be considered, namely a contribution to a debate about the arts. In the same case the Court upheld the 'retaliation' principle (*Gegenschlag*) in terms of which defamatory remarks that form part of a reply to a personal attack are protected speech.[62]

5.3 Status of the libel complainant

The BVerfG also takes the status of the defamation complainant into account. For example, the Court stated that when the lower courts stopped a Social Democratic Party candidate from repeating a charge that the Bavarian Christian Social Union was akin to a neo-Nazi party, this failed to respect his freedom of expression.[63] The reasoning in this is informed by

[60] *Flugblatt* 43 BVerfGE 130 (176).
[61] *Coerced democrat* 82 BVerfGE 272 (1990).
[62] *Römerberg* 54 BVerfGE 129 (1980). See also *Schmidt-Spiegel* 12 BverfGE 113 (1961).
[63] *NPD Europas* 61 BVerfGE 1 (1982).

the belief that anyone who engages voluntarily in public debate forfeits to some extent their right not to be criticised. Furthermore, a political party and individual politicians usually have sufficient opportunity and means to reply to insulting or defamatory attacks.[64] The BVerfG also distinguishes between citizens and the press. Although in general publishers may be required to substantiate their allegations, free speech protection requires that this burden should not be too high. Furthermore, the high standard of care expected of the press is not required for individuals because the latter do not have the same ability to conduct research and to check sources. In this sense the German courts echo the stance in English cases such as *Economou v De Freitas* [2018][65]- in *Bayer-Aktionäre* (1991)[66]the BVerfG held that individuals are entitled to rely on uncontradicted press reports as a basis for making statements which turn out to be untrue and defamatory.

5.4 Opinions

The BVerfG has held that more freedom should be allowed in the expression of opinion than for assertion of facts – this was clearly illustrated in the *Soldiers are murderers* case discussed above.[67] However, this is tempered by the key question whether the statement is primarily an insult or personal abuse, or whether it forms part of a contribution to public discussion. If the former, i.e. if the personal insult predominates, then the personality rights including reputational protection must prevail. Put another way: In principle, whether a statement should be punished as an insult or protected by freedom of expression must be decided by means of a balance. But, when a statement is characterized as *Schmähkritik* (abusive criticism) freedom of expression is trumped from the outset. Whether or not something is seen as abusive criticism and therefore severely sanctioned, is decided by making an overall assessment of the content of the statement, and also of whether the statement has a factual basis. Only if, on the merits of the case, a statement is aimed solely at the defamation of a person as such, for example in the context of a private feud, can an assessment be considered an insult; in that regard, the reason and context of the statement must be determined. If, on the other hand, the statement is, as is usually the case, in the

[64] Barendt, n.50 215.
[65] See the discussion in chapter 3, para 4.3.3.
[66] *Bayer-Aktionäre* 85 BVerfGE 1, 21 (1991)
[67] Para 5.1 above.

context of a substantive dispute, a balance is needed which takes into consideration the importance of the statement in the specific circumstances of the individual case. Put another way: it is crucial to determine whether a statement should primarily be regarded as a direct insult or abuse of a person, or whether the statement is an expression of an opinion. If the former, then the free speech right takes a back seat. If the latter, strong protection is given. The problem is that it is not always easy to distinguish. If a statement is made up of a mix of invective and opinion, the statement should be characterized as an opinion: in this way free speech is protected.[68]

The Böll case (1980)[69]

The case of Heinrich Böll illustrates the importance of the distinction between an expression of opinion and factual allegations. Böll, a well-known author, brought a civil action against a broadcaster who quoted him inaccurately as stating that West Germany (as it then was) was rotten and that it mercilessly hunted down terrorists. The BVerfG held that the fundamental right to freely express an opinion protected in Article 5(1) GG) does not protect inaccurate quotation. On the facts of the case the broadcast misquoted the author, and the Court held that misquotation amounts to the provision of false information. This accords with the common law in the US: making untrue allegations of fact, knowing them to be false, falls outside any kind of free speech protection, and is therefore not covered by Article 5 of the GG.

The Coerced Democrat case (1990)[70]

The criminal or civil courts in Germany are tasked with finding meaning and to determine whether the statement complained of amount to an insult or are defamatory of the complainant. These findings are then reviewable by the BVerfG, as arbitrary or incorrect decisions on meaning by the lower courts could prejudice the exercise of free speech rights. The *Coerced Democrat* case provides a good illustration. An article was published concerning a number of politicians including the complainant, who only became democrats

[68] Barendt note 50, 216.
[69] *Böll* 54 BVerfGE 208 (1980).
[70] *Coerced Democrats* 82 BVerfGE 272 (1990).

out of necessity and who satisfied the desire for strong government similar to the type provided by the Nazi Führer. The courts at first instance found that this meant that the complainant was a barely concealed Nazi – and this was a serious insult. However, the BVerfG held that there was another possible meaning of the article, namely that some Germans still longed for a strong leader and put the complainant in that role.

The 'Nazi Witch Trials' case

In the most recent Constitutional Court decision[71]the conflict between the right to freedom of expression and the protection of honour once again came under scrutiny. The complainant was the plaintiff in a civil court case, who criticised the conduct of the judge's trial as being 'ore reminiscent of a medieval witch trial than of a trial conducted in accordance with the rule of law, and compared the proceedings to what he understood to be the case of proceedings in Nazi Germany. The complainant was found guilty of insult in terms of paragraph 185 of the StGB. On appeal, the BVerfG held that this had been incorrectly classified by the specialised courts as an insult. The main reasons for the Chamber's decision were as follows. The statements fell within the scope of the fundamental right to freedom of expression, since the polemical or infringing wording of a statement does not, in principle, deprive it of the scope of the protection of the fundamental right. The fundamental right under Article 5 does not apply without reservation, but is limited in the provisions of the general laws, in this case in particular by paragraph 185 of the StGB. Paragraph 5 requires, in principle, a balancing of the impairment which threatens the freedom of expression of the person expressing himself on the one hand and the personal honour of the person affected by the statement on the other. The right to sharply criticise measures by public authorities without fear of state sanctions is at the heart of freedom of expression, which is why it is accorded such relatively high weight when balanced against other rights. In particular, it does not allow the complainant to be

[71] *Nazi Witch Trials* 1 BvR 2433/17. As far as the author is aware, at the time of submission of this thesis there was no English translation available for this case. For a critique of the way in which the general personality right tends to curtail free speech in Germany, as illustrated by the *Nazi Witch Trials* case, see the blog entry by: Gaul, C 'Lob der Abwägung! Warum die Rechtsfigur der Schmähkritik beerdigt werden sollte' *Junge Wissenschaft im Öffentlichen Recht* 1 August 2019 < https://www.juwiss.de/79-2019/> accessed 1 March 2020.

limited to what is necessary to criticise the rule of law and thus deny him a right to polemical speech.

The Court repeated that in the case of intentional insults no balance is necessary between freedom of expression and the right to personality, because then freedom of expression will be subordinate to the protection of honour. However, this is based on an objective assessment: as long as there is a link to a substantive dispute and the statements are not limited to a mere personal defamation or reduction of those affected by the statement, as in the case of the private feud, they will not be classified as an insult. Whether such a factual reference exists must be determined taking into account the reason and context of the statement. In this case, the Court held that the statements complained of did not constitute an insult. The wording was directed against the conduct of the proceedings and not against the judge as a person. Historical comparisons with National Socialism or accusations of a 'medieval' attitude may have special weight in the context of the weighing up, but do not justify the assumption of the existence of insult.

All Cops Are Bastards (2016)[72]

The BVerfG found that having 'ACAB' (an acronym for 'all cops are bastards') printed on his trousers was a protected form of the complainant's right to freedom of expression under Article 5 of the GG. The First Instance Court in Munich convicted the complainant of insult under paragraph 185 StGB on the basis that the slogan on his trousers amounted to a personalized insult against individual policemen.

The BverfG however found that the abbreviation on the complainant's trousers was an expression of opinion, showing his general disapproval of the police, and therefore fell under the protection of Article 5 GG. The Court stated that the right to freedom of expression is subject to restrictions, including, as mentioned before, an insult under paragraph 185 StGB. However, the Court pointed out that if the expressed criticism refers to a collective it usually does not concern individual misbehaviour and the individual is less affected by the criticism. The Court therefore disagreed with the lower courts' finding that

[72] *All Cops Are Bastards* 1BvR 257/14.

the complainant's expression did not refer to the police as a collective, but in particular to the specific policemen in the stadium. The BverfG, found that the expression referred to the police as a collective and the complainant's mere presence in the stadium with the knowledge that the police would be there and notice the printing on his trousers did not amount to an intention to insult specific individual policemen. Indeed, the Court found that the acronym specifically referred to the police as a collective, and was therefore protected under the right to freedom of expression under Article 5 GG and could therefore not be restricted and penalized as an insult under paragraph 185 of the StGB.

In the preceding chapter, it was shown that in the US there are strict guidelines from the Supreme Court on the way in which competing rights should be balanced in defamation actions. German jurisprudence in this area of law proceeds in a more ad hoc manner, but nevertheless there are some relevant guidelines from the BVerfG, particularly emphasising that due weight should be given to the character of the statement. In the end, however, these guidelines still allow for much contextual flexibility in the lower courts.

6. Conclusion

A comparative analysis can now be attempted of the three jurisdictions discussed so far, namely England and Wales, the US and Germany, to gauge how the competing interests in free speech and protection of reputation are handled. In all three jurisdictions, these rights are given strong legal protection, and the core question in this thesis is to discover how they may best be properly balanced – one of the aims of the reform of the common law of defamation in England through the Defamation Act 2013. At first glance, taking the relevant codes into account, it looks as if the German defamation claimant is in a much stronger position than in common law jurisdictions: Not only is defamation defined more broadly to also include personal insult, it is also regarded and prosecuted as a crime without losing the right to pursue damages in a civil matter, and the action survives the death of the defamed or insulted person, which is not the case in the US and England and Wales. But in reality the practice of defamation law in Germany tends to lead to a much more balanced result as free speech is also subject to constitutional protection.

In fact both the US and Germany differ from the UK in this key respect, namely constitutional protection of free speech. In the UK, free speech is protected instead in the

Human Rights Act 1998, which is an ordinary Parliamentary statute. In the next section the focus is therefore placed on the US and Germany and whether there is anything to be gained by protecting freedom of speech on a constitutional basis.[73]

The main difference between the German and US approach to defamation law can be explained by their respective understanding of the relative weight of certain constitutional norms. This is not surprising, as the two countries were created in different centuries and were furthermore shaped by entirely different sets of historical circumstances. Both countries are nevertheless leading models of liberal democratic constitutionalism and, at the end of the day, their common values outweigh their differences. Kommers explains the essential difference between the two jurisdictions by characterising the GG as a constitution of dignity and the US counterpart as a constitution of liberty.[74] The GG merges liberal constitutionalism with a strong commitment to social solidarity and in so doing it balances responsibilities with rights. By contrast, American constitutional rhetoric focuses strongly on rights and the rule of law, and some would say that there is very little if any focus on the common good.[75] Put another way, in Germany human dignity informs all jurisprudence, in the US this role is fulfilled by liberty.

The German system of constitutional checks and balances are much more flexible but suffer from complexity and unpredictability. Nevertheless the UK may consider the value of placing the norms on a constitutional basis, which means there is a guiding principle aiding decision making. Although the laws of England and Wales do not extend constitutional protection to free speech as such, it does incorporate into its domestic law[76] the principles of the European Convention on Human Rights and these rights are strongly adhered to and implemented in UK courts.

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[73] Milo, D *Defamation and Freedom of Speech* (OUP, Oxford 2008) argues that there are compelling reasons for the constitutional protection of free speech, and examines the way in which this is achieved in several Commonwealth jurisdictions including the UK, Canada, Australia, South Africa and India, amongst others.
[74] Kommers, DP, 'Can German Constitutionalism Serve as a Model for the United States' (2019) 20 *German Law Journal* 559, 561.
[75] *Ibid*. See also Glendon, MA *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, 1991).
[76] By means of the Human Rights Act 1998.

In contrast to Germany, in the US the key case *New York Times v. Sullivan* (1964) has made it virtually impossible for a politician to collect damages for a defamatory statement of fact about his public conduct.[77] Whether this is entirely a good idea is debatable. It could indeed be argued that *Sullivan* and related decisions may have something to do with the increasing debasement and trivialisation of political debate in the United States. This is ironic when one remembers the facts of *Sullivan*, which dealt with a powerful politician wishing to silence critique. An example of how the US absolutist interpretation of free speech may indeed work to shield powerful interest groups and wealthy individuals from state regulation of their political expenditures can be found in *Buckley v Valeo* (1976) where the Court ruled that money is speech, and thus struck down a federal law limiting the amounts of money any one candidate or organisation could spend in an election campaign.[78] The US speech law can therefore be criticised as lacking proportionality and balance.[79] If *Sullivan* made it difficult for public figures to win defamation claims in the US, it may seem that the opposite is the case in Germany. No distinction as to the status of the claimant is made in Germany, where the more prominent question is whether the speech contributed to public discourse, rather than whom it concerned. Although politicians, public officials, state organisations, churches, and the like are all entitled to pursue defamation claims, the German courts do require of them to expect more scrutiny and critique than individuals.

At first glance it may seem alarming, especially given the authoritarian history of Nazi Germany, that critique of government, state officials, military personnel and politicians may be prosecuted as a crime under the guise of insult or defamation under the German criminal code. Moreover, the standard of proof is the same as for a civil case, which means that insult and defamation are classified as crimes, but with a low evidentiary burden on the prosecutor. In this sense the German system seems to tilt in the same direction as the pre-reformed UK common law of defamation, i.e. favouring the defamation claimant. However, it is precisely in this area where the balance between the legislative, executive and judicial branches of the German *RechtsStaat* is beautifully illustrated: the courts, following the

[77] *New York Times Company v Sullivan,* 376 US 254 (1964).
[78] *Buckley v Valeo,* 424 US 1 (1976).
[79] Kommers note 74, 566.

guiding principles of the German constitution, place very high value on the desirability of free and frank political speech and in their decisions reflect the notion that political parties and politicians, public organisations and public figures, ought to and must submit to higher levels of scrutiny and critique. This also illustrates the necessity of gauging German law by reference to statute, case law, and commentary.

Unlike in the UK and the US, in Germany personality rights including reputational rights are protected even after the death of the holder of the right of personality. The only proviso is that this is the case only as long as the non-material interests in the personality rights still exist. The powers associated with the personality right pass to the heir/s of the holder of the personality right and can be exercised by them in accordance with the express or presumed will of the deceased.[80]

Other notable comparisons include: In Germany, as in the UK, the press is held to a higher standard than individuals, whereas in the US the press is almost unassailable, at least as far as 'public figures' are concerned. In German defamation cases, injunctions are given very early on in proceedings, which sits uncomfortably with UK and especially US sensibilities about prior constraint.

In the end the German courts engage in a balancing exercise, utilising proscriptive statutory rules from a variety of statutes (criminal and civil codes, the constitution) in a complex and fact-specific manner. The overall result is that the two competing interests, free speech and reputation, are balanced on an ad hoc basis which is very context specific. This is a flexible approach that leads to justice in individual cases but compared to the certainty in for instance the US, the German system seems highly unpredictable and complex.

Against this background the jurisprudence of the European Court of Human Rights, and especially its highly evolved balancing mechanism for weighing up competing fundamental rights, is examined in the next chapter.

[80] *Marlene Dietrich* 1 BGH ZR 49/97 (1999).

CHAPTER 6 DEFAMATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

1. Introduction

In the preceding chapters it was noted that the vexing issue of balancing freedom of speech with the protection of an individual's reputation was one of the main drivers of the reformation attempt culminating in the Defamation Act 2013. The effects so far of this reform as evidenced from cases heard in England and Wales were examined in chapter 3, and in chapters 4 and 5 the ways in which US and German law deal with this issue were also analysed. It was further argued that the legislative attempt in England and Wales to redress the balance in favour of free speech[1] does not go nearly far enough. One of the areas that may have exercised an influence on the reform is the more or less co-synchronous jurisprudence in related areas coming from the European Court of Human Rights (ECtHR).[2]

In terms of the Human Rights Act 1998, English courts are under a duty to develop the law in accordance with the various rights and freedoms contained in the European Convention of Human Rights (ECHR).[3] This means that their decisions should, as far as not in conflict with primary legislation, be compatible with Convention rights.[4] These obligations mean that courts are now enabled, in cases where Convention rights are potentially in conflict with

[1] As mentioned in the introductory chapter, the terms 'free speech' and 'freedom of expression are used interchangeably throughout the thesis.
[2] Also referred to in this chapter as 'the Court'.
[3] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14. Also referred to in this chapter as 'the Convention'.
[4] Section 2 of the Human Rights Act 1998 (the HRA) reads: '— Interpretation of Convention rights.
(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,
whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.' See also sections 6(1), (2) and 3(1).

common law principles, to depart from or develop the common law to resolve such conflict to favour rights such as the right to freedom of expression under Article 10 ECHR. This right as well others such as the right to a fair and public hearing under Article 6, or the right to respect for private and family life under Article 8 of the ECHR will doubtlessly continue to be used in support of competing interpretations of the Defamation Act 2013.[5]

It is therefore of particular importance to examine the treatment of defamation by the ECtHR, the Court's methodology and guiding principles, the possible influence of its case law on judicial reasoning in England and Wales, and lessons that may be learnt *vis à vis* the key question raised in this thesis namely how to achieve a proper balance between the protection of reputation and free speech in the defamation law of England and Wales. This chapter attempts to examine this fluid relationship, as well as the notion that the Court's conflation of privacy law with reputational rights has been and continues to be a significant issue for defamation jurisprudence in England and Wales.

1.1 The ECtHR: balancing competing rights

The ECtHR is an international court that was set up in 1959, with the stated aim of ruling on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The Court monitors respect for the human rights of some 800 million Europeans in the 47 Council of Europe member States that have ratified the Convention. This entails cases involving rights set out in the Convention, such as the rights to life, fair hearings, respect for private and family life, freedom of expression, freedom of thought, conscience and religion and the protection of property - to name but a few. Frequently disputes relate to discrete rights but often also relate to rights in competition with each other, in which case the Court is tasked with ensuring that a fair balance is struck between the relevant competing rights or interests.[6] The Court uses several devices or tools to assist in this exercise, such as allowing a margin of appreciation to member States, as well as utilising the doctrine of proportionality. These doctrines are

5 Collins, M *Collins on Defamation* (OUP, Oxford 2014) 459.
[6] *Von Hannover v Germany (No.2)*(Nos 40660/08 and 60641/08) [2012] EMLR 16 paras 98-99.

discussed below in conjunction with the competing rights relevant to this thesis, namely freedom of expression and the right to reputation.

1.2 Recognition of the chilling effect

It has been noted that the ECtHR often remarks that certain measures and sanctions interfering with the right to free speech may have a chilling effect on the exercise of the right to freedom of expression.[7] Although mention of the chilling effect is not limited to freedom of expression jurisprudence under Article 10, it arises in that context most often. Furthermore, it has been applied in relation to a variety of state interferences, including for example abortion laws,[8] and interferences with the right of individual petition under Article 34 of the Convention.[9] O Fathaigh worked out that the phrase had been mentioned in over 100 judgments up to 2013 alone, and remarked that it was therefore surprising that at the same time there had been a notable absence of scholarly attention to the judicial significance of this chilling effect principle.[10] How then, does the Court address this issue? In essence, the ECtHR jurisprudence seem to indicate that only a narrow margin should be allowed to a State when the restriction of free speech concerns political speech or is likely to discourage people from making criticisms or contributing to public discussion of issues affecting the life of the community.[11] Therefore, it distinguishes kinds of speech and the level of protection that should be accorded to each.

The Court also states that it is of central concern to ensure that any measures taken by national authorities do not chill debates on matters of legitimate public interest.[12] The ECtHR recognises that free speech may be chilled in various ways for a variety of reasons, and it has specifically included and examined defamation in a number of cases, which will be

[7] O Fathaigh, R 'Article 10 and the Chilling Effect Principle' (2013) *European Human Rights Law Review* 304.
[8] *Tysiąç v Poland* 45 EHRR 42 (2007) para 116; and *A v Ireland* 53 EHRR 13 (2011) para 178.
[9] *McShane v United Kingdom* 35 EHRR 23 (2002) para 151; and *Colibaba v Moldova* 49 EHRR 44 (2009) para 68.
[10] O Fathaigh note 7.
[11] *Lingens v Austria* 8 EHRR 407(1986) and Filipova, V 'Standards of Protection of Freedom of Expression and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' (2012) *Coventry Law Journal* 64.
[12] McGonagle,T, McGonagle, M and Ó Fathaigh, R *Freedom of Expression and Defamation – A Study of the Case Law of the European Court of Human Rights* (Council of Europe, Strasbourg 2016) 24.

examined in this chapter. Furthermore it recognises that chilling free speech could, in fact, be seen as a form of self-censorship.[13]More specifically, people may self-censor due to fear of disproportionate sanctions,[14]with the most obvious example here being the fear of criminal sanctions for defamation. The ECtHR noted that in such a case, even in the event of an eventual acquittal, the mere existence of the fear of the sanction tends to discourage persons from making certain statements.[15]

Also relevant to the current discussion, the ECtHR explicitly stated that unpredictably large damages are capable of chilling free speech. In *Independent News and Media v Ireland* (2005)[16]it was held that it is not necessary to rule on whether a specific damages award, such as the one under consideration, had in fact chilled speech; instead, 'as matter of principle, unpredictably large damages awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny'.[17] The ECtHR went on to say that even if the assessment of damages in libel cases is an inherently complex and uncertain exercise, any such uncertainty must be kept to a minimum.[18]

The ECtHR also recognises that chilling free speech is detrimental to the whole of society.[19]In *Bladet Tromsø v Norway* (1999) it was reiterated that when measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern, it is the duty of the court to accord the issue the most careful scrutiny.[20] It must also be noted that it is the Court's expressed view that the press is the watchdog of society. In *Castells v Spain* it stated that

> It is nevertheless incumbent on it [the press] to impart information and ideas on political questions and on other matters of public interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and

[13] *Vajnai v Hungary*No. 33629/06, ECHR 2008, para 54.
[14] *Cumpănă and Mazăre v. Romania* [GC], No. 33348/96, ECHR 2004-XI, para 114.
[15] *Altuğ Taner Akçam v. Turkey,* No.27520/07, 25 October 2011, (2016) 62 EHRR 12, para 68.
[16] *Independent News and Media and Independent News Ireland Limited v Ireland,* No. 55120/00, ECHR 2005-V, (2006) 42 EHRR 46.
[17] *Ibid* para 114.
[18] *Ibid.*
[19] *Cumpănă and Mazăre v Romania* note 14, para 114.
[20] *Bladet Tromsø and Stensaas v Norway,*No. 21980/93 ECHR 20 May 1999, para 64. See also *Jersild v Denmark*, (A/298), (1995) 19 EHRR 1 paras 31 and 35.

> attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[21]

Against this background, the ECtHR's jurisprudence on defamation as such may now be fruitfully examined.

2. Developments in the ECtHR

Over the past decade and a half, two major channels of development in the field of defamation and freedom of expressions are interesting. On the one hand there has been a move in the UK to right the balance between a tilt in favour of defamation claimants, arguably at the expense of the principle of freedom of speech in general. Almost during the same time frame, it can be observed that ECtHR jurisprudence has been moving away from the notion of giving precedence to freedom of speech when competing with reputation rights to regarding these as two equal rights to be balanced in the context of their own specific circumstances. As will become clear, these decisions followed from and built upon the fact that the ECtHR regards reputation as a subspecies of privacy and as such falling under the protection of the Article 8 right to respect for private life of the Convention.

To fully understand the jurisprudence from the ECtHR on defamation, one therefore needs to also keep in mind relevant development in its treatment of the right to privacy. To do this, it is necessary to start by examining Articles 10 and 8, as dealing specifically with reputation and free speech.

2.1 Freedom of Expression

The relevant parts of Article 10 of the Convention read (with author's emphasis):

> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation* or rights of others,

[21] *Castells v Spain* Application No. 11798/85, 23 April 1992, para 42.

for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Note that Article 10 contains its own exceptions in paragraph 2, among which is specifically included the protection of reputation. The exception is narrowly construed in that it is triggered only when prescribed by law and deemed necessary in a democratic society.

The ECtHR recognises that the right to freedom of expression is (and should be) applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that may be deemed offensive or shocking, or that may disturb the State or any sector of the population: Such are the demands of pluralism, tolerance and broadmindedness without which there can be no democratic society.[22]

This frames the debate, and within this broad and permissive framework the Court uses a standard test to determine whether a violation of Article 10 is legally justified. In other words, the premise is that free speech is to be accorded the highest possible protection with the proviso that this is not absolute. Restrictions are possible: Paragraph 2 of Article 10 sets out that free speech may be restricted provided that certain conditions are met. The justification for this is the notion that the right to free speech carries with it certain corresponding duties and responsibilities. These duties and responsibilities are not clearly defined, but would depend on the facts surrounding each individual case.[23]

First, the interference with free speech must be prescribed by law, which in turn speaks to its accessibility and foreseeability. Second, it must pursue a legitimate aim, these being the aims set out in Article 10(2) and which include protection of reputation (i.e. defamation law broadly speaking). Third, the interference must be necessary in a democratic society, which is interpreted as meaning that it must satisfy a pressing social need and be proportionate to the aim pursued.

[22] *Handyside v the United Kingdom,* 7 December 197, Series A, No. 24, para 49.
[23] *Fressoz and Roire v France* [GC], No. 29183/95, ECHR 1999-I, para 52.

2.2 Privacy conflated with reputational rights, leading to a devaluation of the status of Article 10

It is now necessary to examine Article 8 of the Convention, which concerns the right to a person's private and family life and therefore can be seen as protecting the right to privacy. This right expanded through the jurisprudence of the ECtHR to include the protection of reputation. How this came about is examined in more detail below. It is recognised that Article 8 is only engaged if the attack on a person's reputation constitutes so serious an interference with their privacy[24] that it could be construed as undermining their personal integrity.[25] In *Axel Springer AG v Germany* (2012) the Court held that in order for Article 8 to come into play, an attack on a person's reputation had to attain 'a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.'[26]

Nonetheless, it must be noted that the expansion of privacy protection as such has arguably occurred to a certain extent at the expense of the right to freedom of expression. In *Flux v Moldova(No. 6)* (2008), for example, the dissenting judges severely criticised the majority judgment (in favour of privacy) as having 'thrown the protection of freedom of expression as far back as it possibly could'.[27] To understand this development, i.e. the Article 10 versus Article 8 question, we should reflect on the wording of the latter, the right to respect for private and family life:

> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first case that dealt with a conflict between Articles 8 and 10, that is free speech and privacy, was *Lingens v Austria* (1986).[28]In this 1980s case the ECtHR found firmly in favour of

[24] In this chapter, the right to privacy refers to Article 8(1) ECHR i.e. the right to respect for one's private and family life, one's home and correspondence, and may be used interchangeably.
[25] *Karakó v Hungary* note 48 para 23.
[26] *Axel Springer AG v Germany* [GC], No. 39954/08, 7 February 2012; [2012] EMLR 15, para 83.
[27] *Flux v Moldova(No. 6)* No. 22824/04, 29 July 2008, para 17.
[28] *Lingens v Austria*, 8 July 1986, Series A No. 103.

free speech. The facts are illustrative of an often repeated conflict between the two competing rights under discussion: The applicant (Mr Lingens) had been held liable for criminal defamation when he published two articles alleging that the Austrian Chancellor had, amongst others, protected former members of the Nazi SS. It was agreed that Mr Lingens' conviction was indeed an interference by a public authority with his exercise of the Article 10(1) right to freedom of expression: what was at issue was whether or not this interference was justified.

The Austrian Government asserted that there was a conflict between two rights secured in the Convention—freedom of expression (Article 10) and the right to respect for private life (Article 8) and that these two rights should be balanced against each other.[29] The Court made short shrift of this argument by pointing out the public nature of the comments complained of as well as the fact that the claimant was a politician. It held that there was accordingly no need in this instance to read Article 10 in the light of Article 8.[30]The Court emphasised that the limits of acceptable criticism are wider as regards a politician as such, than for a private individual. The reason for this is because politicians 'inevitably and knowingly' lay themselves open to close scrutiny by both journalists and the public at large. Because of this inevitable scrutiny, the politician must consequently display a greater degree of tolerance. It was held that without doubt, Article 10(2) enables the reputation of all individuals to be protected, and this protection of course extends to politicians too, even when they are not acting in their private capacity. But in cases like these the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[31]

The approach in *Lingens* can be summarised as holding that Article 10 applications do not automatically engage Article 8, but should be decided only on the exceptions raised in its own paragraph 2. This clearly placed the protection of free speech in a position of priority, at least as far as political speech is concerned.

[29] *Ibid* para 37.
[30] *Ibid* para 38.
[31] *Ibid* para 42.

However, it must also be noted that whilst concurring with the overall decision reached by the Court, Judge Thor Vilhjálmsson was of the dissenting opinion that Article 10 of the Convention has to be interpreted and applied by taking the Article 8 right to respect for private life, as one of the factors relevant to the question whether or not freedom of expression was subjected to restrictions and penalties that were necessary in a democratic society for the protection of the reputation of others. In later cases this notion gained traction.

A line of decisions followed which established that reputation is to be seen as falling under the protection accorded to privacy in Article 8.[32] Subsequent ECtHR decisions therefore rejected the approach from *Lingens* that Article 10 applications do not automatically engage Article 8. This series of cases commenced in 2004 with *Radio France v France.*[33] In this case the court held that 'the right to reputation does indeed figure among the rights safeguarded by Art.8 of the Convention, as an element of the right to respect for private life'.[34] In *Bédat v Switzerland* (2016)[35]the Court held that a person's right to protection of their reputation is encompassed by Article 8 as part of the right to respect for private life.[36]

In *Chauvy v France* (2005)[37]the Court held that the impugned interference was to be examined in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. It was necessary to assess whether the interference in issue had been 'proportionate to the legitimate aims pursued', and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'. In addition, it had to be established whether the national authorities had struck a fair balance when protecting two values at issue, namely, on the one hand, freedom of

[32] *N. v Sweden*, No. 11366/85; Mullis, A and Scott, A 'The Swing of the Pendulum: Reputation, Expression and the Recentering of the English Libel Law' (2012) 63 *Northern Ireland Legal Quarterly* 27-58; *Chauvy & Others v France* (64915/01) (2005) 41 EHRR 29; *Cumpana v Romania* (33348/96) (2005) 41 EHRR 200; *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462; [2005] QB 972; *Pfeifer v Austria* (12556/03) (2007) 48 EHRR 175, paras 33 and 35; *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, paras 37-42.
[33] *Radio France and Others v. France,* No. 53984/00, ECHR 2004-II.
[34] *Ibid* para 31.
[35] *Bédat v. Switzerland* [GC] No. 56925/08 29 March 2016.
[36] *Ibid* para 72.
[37] *Chauvy & Others v France* (64915/01) (2005) 41 EHRR 29.

expression protected by Article 10 and, on the other, the right of the claimants to protect their reputation, a right protected by Article 8.[38] No explanation was given as to why the Court included the right to reputation as part of the right to privacy.

A more cogent explanation was provided in 2007 in *Pfeifer v Austria*.[39]The Court justified the inclusion of reputation under privacy protection by holding that a person's reputation forms part of their personal identity and psychological integrity and therefore also falls within the scope of their private life, and therefore the conclusion was that Article 8 applies.[40] It is interesting to note that this mirrors the position in Germany where reputation rights are seen as part of the general personality right. It is interesting to note here that in his dissenting judgment Judge Schäffer agreed that freedom of expression does not automatically prevail over the rights of others if an applicant complains to the Court of an infringement of the right to freedom of information, and on the other hand, the protection of private life will not necessarily prevail over freedom of expression if the applicant complains to the Court of a violation of the right to respect for private life (for example, failure to protect their reputation).[41] But he then went even further, and opined that the Court had a positive, i.e. an affirmative, duty to balance at times multipolar rights - even if not raised *in casu.* In other words, where both values are at stake, the Court's balancing exercise ought not to depend on which particular article of the Convention had been relied on in the case before it. Howard highlighted this debate, namely – should the Court confine itself to the issues brought before it? Or should it be pro-active and include what it regards to be relevant law even if not relied upon by the parties to the case?[42] Even where both conflicting rights are placed in front of the court, there is a structural imbalance implicit in the way in which competing rights are adjudicated: it could be argued that invariably the right advanced by the applicant receives more attention from the court than that advanced by the defendant, for the primary function of the court would be to directly address the

[38] *Ibid* para H14 (j).
[39] *Pfeifer v Austria*, No.12556/03, 15 November 2007; (2009) 48 EHRR 8**.**
[40] *Ibid* para 35.
[41] *Ibid* O-II5 5.
[42] Howard, E *Freedom of Expression and Religious Hate Speech in Europe* (Routledge, London 2018) 47-49.

legal question posed by the applicant.[43] Tulkens agrees with this, concluding that 'the test of necessity would tend to lean in favour of the applicant's right…this leads implicitly to establishing a presumption in favour of the applicant'.[44] The decision as to the relative weights of competing rights is also inescapably subjective – it would be virtually impossible for judges not to place value judgements on competing rights. Furthermore, the parties may not be in a symmetrical position against each other: Tulkens gives the example of *Otto-Preminger-Institut v Austria* (1994)[45] where 'the possibility cannot be ruled out that the balance of rights was influenced more or less consciously' by the fact that what was on the scales was an individual filmmaker's right to freedom of expression, 'against the interests of all Catholics in the Austrian province of Tyrol'.[46] In this regard Howard rightly points out that the predisposition, be it conscious or subconscious, to give more weight to the majority view in a society should be handled circumspectly by the Court, as it is often the minority views and interests that most need to be protected.[47]

The approach taken in *Pfeifer v Austria* was confirmed in *Karako v Hungary* (2011):[48] If only Article 8 is raised by the parties, and a potential conflict exists with Article 10, it is up to the Court to balance the competing articles notwithstanding whether the parties themselves had raised Article 10. The effect of this on the concerns raised by Tulkens and Howard above are unclear.

In *Axel Springer v Germany*[49] the Court further attempted to clarify the relationship between freedom of expression and protection of reputation by reiterating that it regarded the right to protection of reputation as a right which is protected by Article 8 of the

[43] Brems, E 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 305.
[44] Tulkens, F 'Conflicts between Fundamental Rights: Contrasting Views on Articles 9 and 10 of the European Convention on Human Rights' in Venice Commission *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (2010 Strasbourg, Council of Europe, Science and Technique of Democracy No. 47) 125.
[45] *Otto-Preminger-Institut v Austria* No. 13470/87, 20 September 1994.
[46] Tulkens note 44.
[47] Howard note 42, 49.
[48] *Karakó v Hungary* No.39311/05, 28 April 2009; (2011) 52 EHRR 36, paras 17 and 26.
[49] *Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012; [2012] EMLR 15, paras 83 and 84.

Convention as part of the right to respect for private life. As such, when examining the necessity of an interference in a democratic society in the interests of the 'protection of the reputation or rights of others', the Court stated that it may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases. These could be on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8.

Likewise in *Print Zeitungsverlag GmbH v Austria* (2013)[50]it was held that domestic courts were under a duty to verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, and reiterated 'the right to protection of reputation is a right protected by Article 8 of the Convention as part of the right to respect for private life'.[51]

Reputation rights were therefore (rightly or wrongly) elevated to the same status and protected in the same manner as privacy rights in the ECtHR, and from the case law it is clear that the Court has moved away from according primacy to free speech: it is regarded as equal in principle to other Convention rights. It then follows that the next question is how the Court determines which right should triumph in case of conflict. To answer this the discussion needs to return specifically to the right to reputation and defamation in ECtHR jurisprudence, and to examine how the Court balances these competing rights.

2.3 Balancing Articles 10 and 8

So how does the ECtHR balance, specifically, interests under Article 8 and Article 10 of the Convention when they conflict? The Court has established the following general guidelines: [52]As a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, *a priori*, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an

[50] *Print Zeitungsverlag GmbH v Austria* No. 26547/07, 10 October 2013.
[51] *Ibid* para 2.
[52] As summarised in *Delfi v Estonia* [GC] No. 64569/09, 16 June 2015, para 139. See also *Høiness v Norway* No. 43624/14, 19 March 2019, para 66.

offending article or under Article 8 of the Convention by the person who has been the subject of that article.[53] Accordingly, the margin of appreciation should, again, in principle be the same in both cases.[54]Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the Court would require strong reasons to substitute its view for that of the domestic courts.[55] In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights.[56]

An examination of ECtHR jurisprudence furthermore shows that proportionality is the key to deciding cases where freedom of expression conflict with defamation, in substantially the same way as other instances where fundamental rights conflict with each other.[57]Proportionality is further recognised as very important because of the chilling effect on public debate and on free speech that may be the result of defamation laws that may be overly protective of reputational interests and/or may provide for far-reaching remedies or sanctions.[58]These principles deserve some further attention.

2.3.1. Margin of appreciation

The Court recognises that the Convention may be interpreted differently across nations, and accords them a margin of appreciation within which the Court will not interfere. This doctrine was developed through the Court's case law,[59]and is now enshrined in the Preamble to the Convention.[60]A new recital has been added at the end of the Preamble

[53] See the discussion in paragraph 2.2 above.
[54] *Axel Springer* note 26 para 87; *Von Hannover v. Germany (No. 2)* [GC] Nos. 40660/08and 60641/08, para 106, ECHR 2012 and *Mosley v the United Kingdom* No. 48009/08, para 111, 10 May 2011.
[55] *Axel Springer* note 26 para 88, *Von Hannover (No. 2)* note 54 para 107.
[56] *Evans v the United Kingdom* [GC] No. 6339/05, para 77, ECHR 2007-I; *Chassagnou and Others v France* [GC] Nos. 25088/94, 28331/95 and 28443/95, para 113, ECHR 1999-III; and *Ashby Donald and Others v France* No. 36769/08, 10 January 2013, para 40.
[57] McGonagle *et al* note 12.
[58] *Ibid*, 10.
[59] *Handyside v the United Kingdom,* note 22 paras 47 to 50.
[60] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213). This Protocol was ratified by all Member States. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=2XKbxmFx>last accessed 25 May 2019.

containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law.[61]Put another way, the member States enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.[62] Nevertheless, it needs to be remembered that the margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court remains to review whether decisions taken by national authorities are compatible with the Convention, albeit having due regard to the State's margin of appreciation. The reason for the margin of appreciation doctrine lies in the absence of a European consensus on matters such as public morals, religion, decency, etc. and indeed whether such matters should be regulated in the first place, on the one hand, and the value placed on certain kinds of speech (such as political speech) in promoting democracy, on the other hand.

It could well be argued that there is evidence of a distinct 'procedural turn' inferred from the Court's jurisprudence, meaning that in most cases the Court would draw a positive inference from due procedural diligence at the national level.[63] However, this does not go so far as complete deference – the Court still can and does use its own normative engagement on the issue in question, where it deems it necessary.[64] Carefully constructed and executed national decision-making processes would mostly indicate lenient review of the outcome by the ECtHR, whereas deficient processes would lead to a stricter review by

[61] Council of Europe, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213), Explanatory Report, para 7.
[62] *Ibid* para 9.
[63] Propelier, P and Van de Heyning, C 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 *European Constitutional Law Review* 230, 248-249.
[64] Arnardóttir, Oddný Mjöll, 'The "Procedural Turn" Under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) *International Journal of Constitutional Law* 9, 10.

the Court.[65] This stance is reflected, for example, in *Animal Defenders v United Kingdom* (2013) where the Court held that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance…to the operation of the relevant margin of appreciation'.[66]

Types of speech

One of the ways in which the margin of appreciation doctrine is applied to defamation cases in particular, is by means of distinguishing between different types of speech. So, for instance, very little leeway for restricting free speech is tolerated when the speech is political expression, whereas it is up to each state how much free speech on matters such as religion, morals etc. would be allowed. [67] The Court therefore differentiates between kinds of speech, giving them higher and lower degrees of protection according to where they fit on a spectrum of speech. The important role of the press is also recognised. In *Dyundin v Russia* (2008) the Court held that in the context of the balancing exercise under Article 10:

> [W]here the reporting by a journalist of statements made by third parties is concerned, the relevant test is not whether the journalist can prove the veracity of the statements, but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established.[68]

Similarly, in *Lingens v Austria* (1986)[69]the Court placed great emphasis on the public nature of the comments complained of as well as the fact that the claimant was a politician. On the basis of proportionality (discussed below), it held that there was accordingly no need in that instance to read Article 10 in the light of Article 8.[70]The Court stressed that the limits of acceptable criticism are wider as regards a politician as such, than for a private individual.

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[65] *Ibid* 11.
[66] *Animal Defenders v United Kingdom*, No 48876/08, 22 April 2013 para 108. See also *Von Hannover v Germany (No.2)* note 6, paras 104-107.
[67] For instance, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Evans v the United Kingdom* [GC] No. 6339/05, para 77, ECHR 2007-I; *Chassagnou and Others v. France* [GC] Nos. 25088/94, 28331/95 and 28443/95, para 113, ECHR 1999-III; and *Ashby Donald and Others v France* No. 36769/08, para 40, 10 January 2013.
[68] *Dyundin v Russia* No 37406/03, 14 October 2008 at para 35.
[69] *Lingens v Austria* note 11.
[70] *Ibid* para 38.

The reason is because politicians 'inevitably and knowingly' lay themselves open to close scrutiny by both journalists and the public at large. Because of this inevitable scrutiny, the politician must consequently display a greater degree of tolerance. It was held that without doubt, Article 10(2) enables the reputation of all individuals to be protected, and this protection of course extends to politicians too, even when they are not acting in their private capacity. But in cases like these the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[71]

From the preceding discussion it is clear that the Court, as a matter of principle, guarantees that the rights in Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who was the subject of that article.[72]The Court's view is that therefore the margin of appreciation should in principle be the same in both cases,[73] but adjusted according to the types of speech under scrutiny.

2.3.2 Proportionality

Given the importance of this doctrine both in the ECtHR jurisprudence as well as in the courts of England and Wales, it bears repeating what the doctrine actually means. The most well-known definition from English case law about proportionality, is a dictum of Lord Diplock, describing proportionality as meaning '[i]n plain English, "you must not use a steam hammer to crack a nut, if a nutcracker would do".'[74] In practical terms, the doctrine entails the following: Not only are the two rights themselves weighed up against each other in the context of each individual case, the court will also assess the proportionality of interfering with either right. Under the proportionality doctrine, any limitation of a right must have a legitimate aim, and the limitation must be both rationally connected to and necessary to achieve the aim. What is more, there must be no less restrictive alternative

[71] *Ibid* para 42.
[72] *Delfi v Estonia* No. 64569/09, 16 June 2015, para 139.
[73] *Ibid.* See also *Axel Springer* note 49 para 87, and *Von Hannover v. Germany (No. 2)* note 66, para 106.
[74] *R v Goldstein* [1983] 1 WLR 151, 155B.

than the limitation. So, if the aim can be fulfilled via a less restrictive alternative, then the limitation will be held to be disproportionate.[75]

In making the proportionality assessment in the case of an intermediate facing liability for defamatory postings by third parties, the Court has also identified the following specific aspects of freedom of expression as being relevant for the concrete assessment of the interference in question:[76] the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company.[77]

In case of a successful claim in defamation, the nature and severity of the possible sanctions are also balanced against the interference with freedom of expression guaranteed by Article 10. So even if a claim in defamation succeeds, the penalty imposed may be found to be disproportionate. For example, in *Cumpãnã and Mazãre v Romania* (2004) the Court stated that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Art.10.[78]The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.[79]The fear of disproportionate sanctions is further recognised by the Court as having a potentially chilling effect on free speech, and therefore proportionality must be very carefully maintained. As stated in *Cumpãnã and Mazãre v Romania* (2004):

> The chilling effect that the fear of such sanctions poses on the exercise of journalistic freedom of expression is evident. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on the present applicants, who, as the Court has held above, were undeniably entitled to bring to the attention of the public the topic of

[75] *Sunday Times v the United Kingdom* No 6538/74, 26 April 1979 para 6.
[76] *Høiness v Norway* No. 43624/14, 19 March 2019 para 67.
[77] *Delfi* note 72 paras 142-143 and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* No. 22947/13, 2 February 2016, para 69.
[78] *Cumpãnã and Mazãre v Romania* [GC], No. 33348/96, ECHR 2004-XI.
[79] *Ibid* para 111.

the signing of the partnership agreement between the city authorities and the private company concerned. [80]

The English common law of defamation was also subjected to the proportionality test in several instances at the ECtHR.[81] Two cases suffice to illustrate the point. The first concerned the common law 'multiple publication' rule, and the second the issue of whether fees and costs associated with common law libel claims were disproportionate. In *Times Newspapers Ltd v United Kingdom* [2009][82]at issue was whether the 'multiple publication rule' as applied in the courts of England and Wales following the rule in *Duke of Brunswick v Harmer* (1849)[83] was disproportionate. The multiple publication rule entailed that each publication of defamatory words gave rise to a fresh publication, so that a new cause of action accrued whenever the words were read by users. Given the nature of internet publication and/or archiving, this could be very onerous Although 'proportionality' is not mentioned in the case, the words 'proportionate' and 'disproportionate' did come up in the judgment repeatedly, thus indicating that the court regarded proportionality to be an important determinant. One of the key characteristics of the common law multiple publication rule was that a historic defamation claim could be revived long after the original statement was made. The Court emphasised that while an aggrieved applicant must be afforded a real opportunity to vindicate their right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.[84]

In *MGN Ltd v United Kingdom* [2011][85]the issue was whether legal costs which far outstripped the nominal damages awarded to the claimant, under the UK's Conditional Fee

[80] *Ibid* para 114.
[81] See for instance the discussion of the disproportionate costs regime in the 'McLibel' case (*Steel and Morris v UK* [2005] 18 BHRC 545) in chapter 2, para 4.1.1.
[82] *Times Newspapers Ltd v. United Kingdom,* ECHR, 10 March 2009, [2009] EMLR 14.
[83] *Duke of Brunswick v Harmer* (1849) 14 Q.B. 185.
[84] *Times Newspapers* note 82. para 48. *In casu*, the Court however held on the facts that the finding by the domestic courts that the applicant had libelled the claimant by the continued publication on the internet of the two articles was a justified and proportionate restriction on the applicant's right to freedom of expression: para 49.
[85] *MGN Ltd v United Kingdom,* No. 39401/04 [2011] 1 Costs L.O. 84.

Arrangements regime,[86] were disproportionate. The applicant, Mirror Group Newspapers, was required in the domestic litigation to pay legal costs, in addition to its own, in the sum of £1,086,295.47 after an award of damages of only £3,500 was awarded to the model Naomi Campbell in her privacy claim against the applicant.[87] The applicant argued that the disproportionate costs amounted to an infringement of its Article 10 right to freedom of expression. It is informative to contrast the UK House of Lords'[88] stance on proportionality in this regard with that expressed in the ECtHR: Lord Hoffmann in the House of Lords did express concern about the indirect effect of the threat of heavy liability in terms of costs on the newspaper's decisions as to whether to publish information which ought to be published but which carried a risk of legal proceedings against it. However, he considered that the newspaper's right could be restricted to protect the rights of Ms Campbell under Article 8 and the right of litigants under Article 6 to access to a court. He further considered that the applicant's argument confused two concepts of proportionality: whereas the Civil Procedure Rules on costs were concerned with whether expenditure on ligation was proportionate to the amount at stake, the interests of the parties and other relevant factors, Article 10 was concerned with whether the rule requiring unsuccessful defendants to pay the reasonable and proportionate costs of their adversary and contribute to the funding of other ligation was a proportionate interference given that the aim was to provide those other litigants with access to justice. He considered that it had been open to the legislature to choose to fund access to justice in that way. He also considered that it was desirable to have a general rule in order to enable the scheme to work in a practical and effective way and that concentration on the individual case and the particularities of Ms Campbell's circumstances would undermine that scheme. Hence, the House of Lords' decision that Ms Campbell's success fee should not be disallowed simply on the ground that the applicant's liability would be inconsistent with its rights under Article 10.[89]

[86] See also the discussion of conditional fee arrangements in chapter 3, para 3.2.3 'Costs and Complexity' and in particular the discussion of the Supreme Court decision in *Times Newspapers Ltd v Flood* [2017] UKSC 33. 1415.

[87] See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

[88] Now the Supreme Court.

[89] See *Campbell v. MGN Limited (No. 2)* [2005] UKHL 61, paras 23-28.

By contrast, the ECtHR held that there had indeed been a violation of Art.10 of the Convention as regards the success fees payable by the applicant.[90] The court considered 'that the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters'.[91]

2.3.3 Other doctrines

Finally, brief mention should be made that the Court also utilises other interpretive principles, apart from those discussed above, to judge whether a particular limit on free speech is justified. These include the 'practical and effective' doctrine, the 'living instrument' doctrine and the 'positive obligations' doctrine. The 'practical and effective' doctrine states that all rights guaranteed under the Convention must be 'practical and effective' and not merely theoretical or illusory.[92] In terms of the 'living instrument' doctrine the Convention is interpreted in Court as a living instrument that needs to be interpreted against present day conditions.[93] Finally in terms of the positive obligations doctrine it is sometimes necessary for states to act, rather than just refraining from acting, i.e. affirmative action is sometimes indicated rather than refraining from interfering with individuals' human rights. [94]

It may now be useful to use a specific case study to illustrate the points made above, examining two ECtHR cases with fairly similar facts. At this point a simple caveat must be made: for common law readers, compared to reported cases from the common law, jurisprudence from the ECtHR does not always very clearly state the reasons for decisions or the principles on which such decisions are based. Having said that, there is still much to be gained from delving into substantial judgments emanating from the ECtHR.

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[90] *MGN Ltd v United Kingdom,* No. 39401/04 [2011] 1 Costs L.O. 84, paras 215-219.
[91] *Ibid* para 219. See also Hughes, K 'Balancing Rights and the Margin of Appreciation: Article 10, Breach of Confidence and Success Fees' (2011) 3(1) *Journal of Media Law*, 29-48.
[92] *Airy v Ireland* 9 October 1979, Series A no. 32 para 24.
[93] *Tyrer v the United Kingdom* 25 April 1978, Series A No. 26 para 31; *Matthews v. the United Kingdom* [GC] No. 24833/94, ECHR 1999-I para 39.
[94] McGonagle note 12, 13.

2.4 Application in the ECtHR: a case study of *Delfi v Estonia* and *Høiness v Norway*

Unfortunately the Court is not always as consistent as one would hope for in its application of the principles discussed above. This can be illustrated by the differing conclusions reached on very similar facts in *Delfi v Estonia*[95] and *Høiness v Norway*.[96] Both cases involved defamation claims by well-known figures against online publishers of 'below the line' comments made by anonymous members of the public. These are comments that are to be found by posted by readers of online articles 'below the bottom line' as it were, of the published article. These comments are usually anonymous and are not always moderated by the online publications. In both cases the defendants exercised no editorial control over the comments, and in both cases they deleted the comments that were complained of very speedily. The ECtHR in both cases upheld the findings of the respective national courts – but in the case of *Delfi* this meant that the defamation claim succeeded whereas in *Høiness* the claim failed.

The different results from fairly similar facts could at first glance be read as an inconsistency on the part of the ECtHR. However, it could also be argued that the Court was merely exercising its commitment to allowing a wide margin of appreciation whilst reserving the option to engage normatively should the need arise, for example where the national courts clearly did not correctly balance relevant competing Convention rights. It is therefore worthwhile reflecting on these two judgments as a case study of how the Court, whilst applying the same principles to similar facts, could nevertheless reach different conclusions.

2.4.1 Delfi v Estonia

It makes sense to start with the earlier case as it was subjected to a much more thorough treatment by the Grand Chamber of the ECtHR. In *Delfi* the applicant company were the owners of the *Delfi* news portal, with large readership in Estonia and Lithuania. *Delfi* had published a critical but non-contentious article about a large public limited company, 'SLK', which in turn elicited 185 comments in a 24 hour period, 20 of which were identified as

[95] *Delfi* note 72.
[96] *Høiness v Norway* No. 43624/14, 19 March 2019.

containing personal threats and were offensive against the sole shareholder of SLK.[97]SLK successfully sued the defendant in libel based on these 'below the line' comments, despite the fact that most of the comments were made anonymously and that there was evidence that the defendant had in effect censored many of the most inflammatory statements, and had removed the offensive comments when requested.[98] The ECtHR affirmed this decision, and held the internet portal (that is the publisher of an online newspaper) liable for offensive comments made by its readers.

The parties did not dispute that the domestic courts' decisions in respect of the applicant (the publishing company Delfi) constituted an interference with its freedom of expression, but the applicant contended that this was not justified. Another contention, namely the possibility of suing the makers of the statements rather than newspaper, was given short shrift by the Court: in principle this was possible but in reality many of the posts were anonymous and the identity of the potential defendants was thus very difficult if not impossible to ascertain. [99]

In its reasoning the Court stated that when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the 'protection of the reputation or rights of others' (as stipulated in Article 10(2)), the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8.[100]However, the Court stopped short of suggesting that the Article 8 right to privacy had come into play, stating that for the Article 8 right to protection of reputation to be engaged,

[97] *Delfi* note 72 paras 11-17.
[98] *Ibid* para 18.
[99] *Ibid* paras 84-87, 91.
[100] *Ibid* para 110.

the attack must be made in a manner causing serious prejudice to the personal enjoyment of private life.[101]

So how did it go about judging whether or not the defamation claim in Estonia had struck the correct balance? The Court reiterated the principle that an interference with the applicant's right to freedom of expression had to be 'prescribed by law', have one or more legitimate aims in the light of Article 10(2) of the Convention, and be 'necessary in a democratic society'.[102] The Court proceeded to accord various weights to factors that were to be placed on this balance. These can be summarised as three main areas of concern: the fact that the speech under scrutiny were uttered in the context of a commercial venture, foreseeability as a fault element, and the culpability of an internet intermediary.

In assessing the context of the comments, the ECtHR attached great weight to the fact that the *Delfi* news portal was a commercially and professionally operated site which actively encouraged comments in order to maximise advertising revenue.[103] As such, the anonymity allowed on the comments section whilst indubitably encouraging free speech had to be weighed against the rights and freedoms of others[104] in the light of this consideration. This stance is clearly displayed by Judge Zupančič in his concurring opinion, when he stated 'to enable technically the publication of extremely aggressive forms of defamation, all this due to crass commercial interest, and then to shrug one's shoulders, maintaining that an Internet provider is not responsible for these attacks on the personality rights of others, is totally unacceptable'.[105] Serious issue can be taken with this stance,[106] and it is submitted that the correct position is that espoused by Judges Sajó and Tsotoria in their dissenting opinion, where they argued that to find that responsibility of any speaker, including the press, is enhanced by the presence of an economic interest is going too far. Furthermore, they pointed out, this is not in line with previous case law.[107]

[101] *Ibid* para 137.
[102] *Ibid* para 7
[103] *Ibid* para 144.
[104] *Ibid* para 147.
[105] *Ibid* Concurring Opinion of Judge Zupančič.
[106] See Hall, J 'User-generated content on the internet, and intermediate liability for the dissemination of unlawful comments in the European Court of Human Rights' (2017) *Nottingham Law Journal* 103, 107-108.
[107] *Delfi* note 72 Joint Dissenting Opinion of Judges Sajó and Tsotoria, para 28.

The comments in question had been insulting, threatening and defamatory. The Court clearly placed a high value on the fact that the nature of these comments was foreseeable by the applicant. The article's nature was provocative and as such the Court opined that the applicant should have expected offensive posts, and therefore have exercised an extra degree of caution so as to avoid a defamation action. The applicant did use filters, and it did remove offensive comments when notified. However, the Court found that the former was easy to circumvent and the other measures were ineffective to prevent harm being caused to others. This essentially moves away from a traditional requirement of actual knowledge to the lesser requirement of constructive knowledge, and arguably creates strict liability for the dissemination of such comments.[108]

It is widely recognised that there are clear differences between a traditional media publisher and a news intermediary. It could therefore be argued that the relative ease with which the Court accepted an intermediary as a publisher of the comments indicate that the Court failed to truly distinguish between the two.[109]

The reality, it is submitted, falls somewhere in between, with the Court recognising that in this case the applicant, albeit an internet intermediary, did exercise some editorial control over the comments. The Court stressed the measure of editorial control exercised by the applicant. The publication of both the news articles and also subsequent readers' comments was part of the applicant company's professional activity. Its advertising revenue depended on the number of readers and/or their comments. Furthermore, publishing on a large Internet news portal, such as that of the applicant means that a wide audience is reached. The Court noted that 'the applicant company – and not a person whose reputation could be at stake – was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public.' It was also significant, as an indication of editorial control, that the actual writers of comments could

[108] Hall note 106, 108.
[109] *Ibid* 107.

not modify or delete their comments once posted on the *Delfi* news portal, and that only the applicant itself could do this.[110] Finally the Court noted that considering that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, a damages award given by the domestic court to the equivalent of EUR 320 in non-pecuniary damages could not be seen as disproportionate.

The impact of this case mainly relates to the increasing possibility faced by publishers for being found liable for 'below the line' comments over which it may be difficult to exercise editorial control. However, the case is further significant because it set the precedent that an attack on personal honour and reputation must be sufficiently serious before Article 8 of the Convention will come into play.[111] In this respect it is congruent with the 'serious harm' threshold set in English defamation law, discussed in the previous chapter.[112] In this sense it also clarifies the line of cases discussed above in para. 2.2 which stated that the Court was under a duty to include an Article 8 analysis in cases engaging Article 10, i.e. by stating *when* this duty was triggered.

The same issues came before the Court again recently.

2.4.2 Høiness v Norway[113]

In November 2010, a series of objectifying and vulgar comments about a prominent Norwegian lawyer and television personality, Mona Høiness, were posted on a discussion forum operated by the online news portal *Hegnar Online*. Ms Høiness sued the news portal and its editor for defamation, averring amongst others that her honour had been infringed. As to the fact that the discussion forum was distinct from the editorial content of the online edition, she argued that the defendants had the same editorial responsibility for the comments as if they had been letters from readers printed in a newspaper.[114] At first

[110] Para 89.
[111] Para 137.
[112] See the discussion of Section 1 of the Defamation Act 2013 and the related jurisprudence in para 3.2.1, chapter 3.
[113] *Høiness v Norway* No. 43624/14, 19 March 2019.
[114] *Ibid* para 22. For a concise case note, see Rowe, S 'Case Law: Høiness v Norway, Refusal to Impose Liability for Anonymous Comments Online Did Dot Breach Article 8' Inforrm's Blog, 14 May 2019,

instance and at appeal, the Norwegian courts held that, in accordance with the penal code governing defamation in Norway, the claim could not succeed as the defendants had not acted negligently – they had taken down the offending statements within seconds of being notified.[115] Furthermore, the courts were of the view that the anonymous statements in the forum, albeit tasteless and vulgar, were not sufficiently 'serious' to found a libel claim. In fact, the court at first instance remarked that 'most readers would find that the comments said more about those posting them than about the people mentioned in the comments.'[116]

Permission to appeal to the Norwegian Supreme Court having been denied, the applicant initiated proceedings at the ECtHR , averring that the domestic authorities, by not sufficiently protecting her right to respect for her private life (and requiring her to pay the defendants' costs in her failed claims against them), had acted contrary to her Article 8 rights.[117] However, in a marked departure from their decision on similar facts in *Delfi*, the ECtHR did not uphold her claim. It held that the domestic courts had acted within their margin of appreciation when seeking the balance between Høiness's Article 8 rights and the opposing right of expression under Article 10 of Hegnar Media AS.

The Court followed its precedent from *Delfi* by reiterating the seriousness threshold before Article 8 is engaged.[118]In this regard, the Court also considered the kind of speech that was complained of. The ECtHR considered it unnecessary to examine the nature of the impugned comments in depth because they did not amount to unprotected speech, such as hate speech or incitement to violence.[119]

The decision in *Delfi*, being delivered by the Grand Chamber of the ECtHR, was much more detailed than the Court's later decision in *Høiness.* In *Delfi*, for instance, the Grand Chamber of the Court examined in detail not only its own relevant jurisprudence, but also other

<https://inforrm.org/2019/05/14/case-law-hoiness-v-norway-refusal-to-impose-liability-for-anonymous-comments-online-did-not-breach-article-8-samuel-rowe/> accessed 25 May 2019.

[115] Para 39.

[116] Para 26.

[117] Para 48.

[118] *Høiness* note 113 para 64.

[119] *Ibid* para 69.

relevant international law principles,[120] and it paid special attention to relevant European Union instruments,[121] and case law from the Court of Justice of the European Union (CJEU).[122] In particular, the Court examined the CJEU decision in *Google Spain SL*(2014)[123]which is known as the case that established the European 'right to be forgotten'. The CJEU considered that a fair balance should be sought between the legitimate interest of Internet users in having access to the information and the data subject's fundamental rights. The data subject's fundamental rights, as a general rule, overrode the interest of Internet users, but that balance might, however, depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information. The CJEU held that in certain cases the operator of a search engine was obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, even when its publication in itself on the web pages in question was lawful. This is now generally known as the 'right to be forgotten'.

The Court in *Delfi* then noted the CJEU *Papasavvas* (2014) case,[124]which concerned a defamation claim against an internet intermediary for statements made on its online platform. The CJEU found that, since a newspaper publishing company which posted an online version of a newspaper on its website had, in principle, knowledge of the information which it posted and exercised control over that information, it could not be considered to be an "intermediary service provider" within the meaning of the E-Commerce Directive, whether or not access to that website was free of charge.[125] Thus, it held that the limitations of civil liability specified in the Directive[126] did not apply to the case of a newspaper

[120] See *Delfi*, note 72 paras 44-47 for the Court's discussion of Council of Europe documents and paras 48–49 for the United Nations Human Rights Council's report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27 of 16 ay 2011).
[121] *Delfi* paras 50-51. The Court scrutinised, in detail, Council Directives on electronic commerce (Directive 2000/31/EC); and Directive 94/38/EC on information provision and rules.
[122] *Delfi* note 72 paras 53-57.
[123] *Google Spain SL and Google Inc.* CJEU Case C-131/12 13 May 2014.
[124] *Sotiris Papasavvas* C-291/13, 11 September 2014.
[125] Articles 12 to 14 of Directive 2000/31/EC
[126] *Ibid*.

publishing company which operated a website on which the online version of a newspaper was posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on the website, since it had knowledge of the information posted and exercised control over that information, whether or not access to the website was free of charge. It is surprising that the CJEU in *Papasavvas* nowhere considered the arguably relevant free speech implications of the claim,[127] and also that this omission is not noted by the ECtHR in its scrutiny of that case in *Delfi.*

Be that as it may, it is clear from these two apparently contrasting cases, that the threshold that must be surpassed before liability in defamation is imposed by the Strasbourg court is set very high. However, the bar for liability at the domestic level may be set considerably lower, making it difficult for domestic decision-makers to impose the domestic legislation whilst adhering to their obligations to apply the legal principles flowing from the ECHR and ECtHR.[128]

3. Conclusion

The United Kingdom is a signatory to the European Convention of Human Rights. As such, and in terms of the Human Rights Act 1998, English courts are under a duty to develop the law in accordance with the various rights and freedoms contained in the Convention. It also means that their decisions should, as far as not in conflict with primary legislation, be compatible with Convention rights[129] and this in turn means that the courts are under an

[127] For information on the CJEU's stance in this area, see Jones, M 'EU Law Relating to Online Infringement of Personality Rights – Is EU Law Effective in Preventing Forum Shopping for the Pursuit of Actions Arising From Online Infringement of Personality Rights?' in Weaver, RL *et al* (eds), *Privacy in a Digital Age Perspectives from Two Continents* (Carolina Academic Press, Durham, North Carolina, 2017) 47, 66-68.

[128] It is also unclear how the decision in *Høiness* will interact with proposed domestic legislation put forward by the British government, in its White Paper on Online Harms, which would impose a duty of care on online platforms to protect users from, amongst other things, material which is lawful but harmful. These so-called online harms will be policed by a new regulator that will be responsible for drawing up codes of conduct and with powers to impose a range of sanctions, including fines, if the duty of care is not met. The statutory duty of care would be imposed on a whole range of digital players of all sizes, and would force them to put in place a range of measures to protect their users from "online harms". See the summary of this White Paper at <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper-executive-summary--2>

[129] Section 2 of the Human Rights Act 1998.

obligation to consider the decision emanating from the ECtHR on Convention interpretation and application.

But apart from this legal obligation, it is also very useful from a purely theoretical, and/or a comparative legal perspective, to take note of ECtHR case law. It seems as if the senior judiciary in their deliberations are increasingly, in addition to Common Law jurisdictions, also referring to European decisions both from the ECtHR and the CJEU.[130] It may be very fruitful to keep a close eye on defamation judgments from the ECtHR in general as these provide a handy summary of the way in which the tension between free speech concerns and reputational and/or privacy rights are resolved in other European countries. In this way the ECtHR jurisprudence could be viewed as a mirror of the Zeitgeist concerning these issues and of intrinsic value.

From the preceding discussion, a few issues relevant to the central themes of this thesis deserve to be highlighted.

3.1 Balancing speech with reputation

In moving away from treating the right to reputation as a narrowly construed internal exception to Article 10 rights and according it the status of a fully-fledged right to be balanced on equal terms with freedom of expression, it may be queried whether the ECtHR is taking sufficient account of the potential chilling effect on freedom of expression. It could very well be argued that there is currently an almost Europe wide trend towards restrictions on speech. This is evidenced by both pronouncements such as the *Google Spain* 'right to be forgotten' cases,[131] as well as tightening of regulation of speech, such as the recently enacted General Data Protection Regulation (GDPR).[132] Given that a balance skewed against free speech is a spectre that the UK only recently tackled with some will in the Defamation

[130] Gilliker, P *The Europeanisation of English Tort Law* (2014, Oxford and Portland, Oregon, Hart Publishing).
[131] Note 123.
[132] Regulation (EU) 2016/679 ('GDPR') adopted on 27 April 2016. The GDPR came into force in 2018. For a critique of European data protection laws, see Pearce, H 'A Systems Approach to Data Protection law and Policy in a World of Big Data?, (2016) 22(4) *Computer and Telecommunications Law Review* 90, 90-93; and on some of the implications of the GDPR see Jones, M 'Privilege, Power and the Perversion of Privacy Protection' in Weaver, RL *et al Comparative Perspectives on Privacy in an Internet Era*, The Global Papers Series, Volume VII (2019, Carolina Academic Press, Durham, North Carolina) 141-164; Szydlo, M 'The Independence of Data Protection Authorities in EU Law: Between Safeguarding Fundamental Rights and Ensuring the Integrity of the Internal Market' (2017) 42(3) *European Law Review* 369-387.

Act 2013, it may be of some concern that it seems as if the direction in which the ECtHR is heading is more commensurate with a conservative approach to judicial interpretation of the 2013 Act. For these reasons what happens in Europe should be of concern to freedom of speech advocates in the UK.

3.2 The proportionality test

At first glance the ECtHR's adherence to the proportionality principle is laudable. But it needs to be kept in mind that proportionality as such is a relative concept, with the question always remaining: 'relative to what'? It has been pointed out that although proportionality matters very much in law, its moral dimension is elusive. A reference to this principle could be regarded as being elliptical since there is no moral principle to act proportionately *tout court*. For example: It is usually a specific type of action that one should take in proportion to a specific factor; one should use force in self-defence in proportion to the seriousness of the threat that the attacker poses; or one should punish in proportion to the gravity of the wrong.[133]

In this sense, what may be interpreted as a recent procedural shift in the balancing exercise performed by the ECtHR may prove to be of concern as it may well come at the cost of the Court's willingness to engage with issues at a normative or substantive level.[134] This brings us back to the fact that the ECtHR started out with giving free speech a lot of weight and now see it as only one of many rights.

3.3 Margin of appreciation: types of speech

The Court differentiates between kinds of speech, giving them higher and lower degrees of protection according to where they fit on the spectrum of speech. This makes sense, and reflects the position in many other jurisdictions, including those subject to the jurisdiction of the ECtHR.

Finally it must be noted that the vote to leave the European Union does not affect, without more, the UK's relationship with the ECtHR and its jurisprudence and therefore until such

[133]Letsas, G 'Proportionality as Fittingness: The Moral Dimension of Proportionality' (2018) 71(1) *Current Legal Problems* 53, 54-55, 86.

[134] See the discussion in para 2.3.1 above, as well as the comments by Propelier and Van de Heyning, note 63.

time as (and if) the UK ends this relationship, the ECHR and the decisions by the ECtHR will continue to play an important part in domestic jurisprudence.

Against this background, i.e. the of jurisprudence from a supranational jurisdiction and court which the courts in England and Wales are to a certain extent bound to follow, the comparative analyses undertaken in this thesis may now be assessed in full in the next and final chapter.

CHAPTER 7 CONCLUSION

1. Introduction

It has long been argued that the UK common law of defamation chilled free speech. Litigation was costly, protracted and complex. The structure of the tort favoured claimants, with the aid of several legal presumptions whose inherent merit was questionable. Academics, consumers, scientists, victims of crime, journalists and others complained about being silenced in freely disseminating opinions and thoughts. High profile instances of 'libel tourism' resulted, prompting various actors including the United States Federal Government, the European Parliament and the UK Government itself, to call for reform. The Defamation Act 2013, which came into effect in 2014, was an ambitious and long-awaited attempt at redressing the balance. This thesis comprises an attempt at gauging the effectiveness of the UK Defamation Act 2013 in achieving the primary aims for which it was enacted. Of these, the key question informing this thesis is to which extent the Act succeeded in redressing the balance between freedom of speech on the one hand, and the protection of reputation, on the other. Under this broad umbrella closely related issues needed to be examined, such as whether the inequality of arms between defamation claimants and defendants were resolved by the Act, and whether the issue of libel tourism (itself an indication of the imbalance between the parties in a defamation suit) was adequately addressed. In addressing these issues, three main premises are followed in this thesis: the analysis is confined to those aspects of the Defamation Act 2013 that bear on the restriction of freedom of speech; the terms freedom of speech, freedom of expression, and free speech were used interchangeably; and the corresponding law in three key foreign jurisdictions are examined to try and gauge insights and bases of comparison. These jurisdictions are the United States (US), Germany the case law of the European Court of Human Rights (ECtHR).

The main argument throughout this book has been that although the Defamation Act 2013 goes some way towards redressing the balance in favour of free speech, it does not go nearly far enough.

2. The value of a comparative analysis

It was argued that a comparative analysis of relevant jurisdictions were a valuable exercise, not only in the abstract, but also in practical terms. In chapter one the argument is made that globalised speech magnified both the potential for almost limitless and free expression, but that this is at the cost of potentially devastating harm to individuals' reputation. It also certainly poses difficult private international / choice of law problems, and where a particular jurisdiction becomes known as claimant-friendly, serves to encourage forum shopping. This was a particular problem for the UK, as it was (rightly or wrongly) seen as the 'libel capital of the world'. The European Parliament in 2012 termed the UK libel law the most claimant-friendly in the world. It was also seen as a national humiliation when in 2010 the US promulgated laws rendering defamation awards granted in English courts unenforceable in the US. Given the increasingly interconnected nature of the world, negative sentiment such as these expressed by traditional allies and trading partners of the UK are doubtless of concern to policy makers. Domestic defamation reform therefore had an international element, and as a result it is fruitful to compare the legal landscape in prominent and relevant jurisdictions. Chapter one goes on to explain the choice of comparator jurisdictions.

The US was the logical choice for a comparator jurisdiction where freedom of expression is strongly protected. The continental perspective is reflected in the choice of examining the legal regime in Germany, which is arguably the leading member of the European Union. Germany also makes a natural choice because, just like the US, there is an element of constitutional protection given to the competing rights under consideration. To supplement this, relevant case law from the ECtHR is also examined. As the members of the EU are signatories of the European Convention of Human Rights (ECHR) for which the ECtHR is the dispute resolution body, an array of continental thought on defamation and free speech is available. ECtHR judgments are also important because of the commitment of the UK through the Human Rights Act 1998 in honouring and implementing the provisions of the ECHR.

3. Reputation, speech, and the events that led to the Defamation Act 2013

Chapter 2 reflects on the two central concepts which are engaged by defamation law, namely reputation and free expression. Both of these values were examined through the lens of societal interests. The chapter first examines the reasons why free speech is, or should be, legally protected. Several of the most important theoretical bases underlying the value of free speech allocate the benefit of free speech in this manner. For instance, John Stuart Mill's stated goal in *On Liberty* was to identify the nature and limits of the power which can be legitimately exercised by society over the individual. His famous argument from truth emphasises the interests of society in discovering the truth. The argument goes that society should not merely tolerate, but embrace speech that is considered objectionable. There are four main reasons for this: Nobody is infallible, and therefore we must be open to the possibility that an opinion that deviates from the mainstream might be true. Next, even where an argument is substantially wrong, it may still contain a portion of truth that is missing from the accepted opinion. If the prevailing opinion is completely true, it still needs to be open to challenge for it is only through frequent challenge and vigorous defence that those who hold the opinion can fully understand the rational grounds for the opinion. Finally, related to the last point and of particular importance to our current analysis, Mill argues that in the absence of vigorous debate, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on character and conduct. In short, an argument may persuade the audience members to change their minds, or it may cause them to defend their stance on the matter. Either way, the focus is on the argument, the message, the speech, rather than the speaker. The speaker has the right to free speech only as a function of delivering the message.

Free speech is also defended through the lens of citizen participation in a democracy. Exponents of political speech emphasise the importance of the electorate being able to access a variety of opinions on political and social matters. A further theory explores free speech as an aspect of individual self-fulfilment or autonomy and holds that the justification for freedom of speech proceeds from the right of an individual to consider all the arguments and views that may determine their course of action. Of course the liberal notion of

individual autonomy also includes the speaker's right to determine the content of their speech. The categorisation of the right as being a societal good is clear.

Against this background, the *raison d'être* for defamation law, i.e. reputational interest, was next examined. It is commonly accepted that reputation could be regarded as personal property, or as part of a person's honour, or as a function of the inherent dignity of all human beings, and thus worthy of protection for one or all or a combination of these reasons. It is submitted that it is often overlooked that there is also a clear societal interest underlying these values.

The image of the market society underlies and informs the view of reputation as property. This view resonates strongly with the pervasive neoliberal world view, and also explains why non-human actors such as companies are able to sue in defamation. In short, this view of reputation sees it as a form of intangible property that may be damaged and as such result in monetary loss which can be compensated. When looking at the next view of reputation, that of 'honour', it is interesting to remember that the civil law of defamation in England in large part developed because the Star Chamber outlawed duelling, the traditional means of restoring honour. The modern conception of 'honour' arguably confuses the external concept of honour with the internal concept of the inherent dignity of man, and may be reflected in the grand and ongoing project of the current and previous century, namely the idea and practice of Human Rights. However, all the elements of a cause of action in defamation in the common law confirm that what is protected is an external conception of image, rather than an internal conception of self. This is later contrasted with the German, and to an extent also the ECtHR's interpretation of reputation at least overlapping with the subjective element of inherent human dignity. Everything that the claimant needs to prove in a UK defamation trial focuses on the attitudes of the community – that the statement identified the claimant, directly or indirectly, that it was defamatory, and that it was made public through publication to a third party. As such it is the projection of the self to society that the law protects and it is argued that this is, in the UK at least, the core interest protected by defamation law. The common denominator in reputation as property and as honour is the involvement of society, of other people. The value of the company's reputation is determined by society's view, as is the *de facto* reputation of the individual.

It was therefore argued that reputation as the focus of defamation law is a societal construct that seeks to mediate the relationship between individuals and the society in which they exist. Whereas any single one of these reasons (property, honour, dignity) seem inadequate to fully explain the law's protection of reputation, when taken in combination a more coherent rationale emerges. The importance placed on one aspect of reputation over another also goes some way in explaining the differences in legal norms and approaches across the jurisdictions examined in this thesis. For instance, in Germany the constitutional emphasis is on human dignity, and this is clearly reflected and indeed imbedded in the German law of defamation. In the US, where the primary constitutional norm is freedom of expression, reputation can rightly be seen as relegated to property: valuable property, but no more than property. In England and Wales the notion of reputation as a person's abstract 'other', i.e. their honour, survives the legislative reform.

Lord Nicholls in *Reynolds* explained how reputation is important both to the individual concerned and to society more generally:

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many important 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 vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, 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. [1]

Societal interests in free speech and reputation can therefore be brought squarely into Mill's argument from truth, and the scene was therefore set to evaluate the Defamation Act

[1] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 para 201D with Lord Cooke of Thorndon and Lord Hobhouse of Woodborough concurring.

2013 from this perspective. It bears repeating that one of the main drivers of legal reform was the chilling effect of the common law of defamation on free speech. It is argued that the main reason for this was the unequal playing field between defamation claimants and defendants. The structure of defamation law and litigation itself handed an advantage to the claimant for which, it is submitted, there exists no real justification.

Several characteristics of the common law combined to give an unfair advantage to libel claimants. The costs associated with bringing or defending a defamation claim were prohibitive. In the absence of a tribunal or other alternative dispute resolution forum for defamation, court remained the only option for such disputes, with the result that it seemed that only the rich and powerful had unfettered access to legal protection of their reputations. Impecunious defendants, faced with potentially being bankrupted by defending their words in a libel claim, could be bullied into silence by the mere threat of being sued. When McDonalds defamation suit against critics turned into the longest and most expensive civil trial in UK history, the UK defamation law regime was confirmed as being inadequate in terms of access to justice when the matter was adjudicated by the ECtHR.

Furthermore, three principles peculiar to the common law fundamentally favoured defamation claimants: A legal presumption that the allegedly defamatory statement was false, combined with an irrebuttable presumption of damages, and finally the strict liability nature of libel and some slander claims. Milo referred to these as the 'potent trilogy of defamation law', which combined to place a de facto reverse burden of proof on the defamation defendant.

If one accepts that there is no inherent reason to accord such advantage to the defamation claimant, and that tilts the balance in favour of reputation and away from speech, the logical conclusion is that in order to address free speech concerns, the advantage given to defamation claimants needed to be removed. A level playing field needed to be ensured in the defamation trial. This, as well as addressing free speech concerns, were stated reasons for the reform of the defamation law which culminated in the Defamation Act 2013.

4. The Defamation Act 2013

Chapter 3 scrutinised the Defamation Act 2013 and case law subsequent to its coming in force in 2014. The discussion was loosely delimited by examining whether and to what extent the 2013 reforms addressed a particularly potent trilogy of legal presumptions assisting the defamation claimant, namely the presumptions of falsity, harm and strict liability.

At the debates for the Defamation Act 1996, it was suggested that the burden of proof be placed on the claimant to prove that the defamatory words of which they complained were false. However, this idea got no traction, and neither did the notion of abolishing no-fault liability for defamation. It is argued that this was an unfortunate choice, as a true commitment to free speech would have been reflected in aligning the law in this way. Placing the burden of proof on the claimant would have meant that the press, and others, would be free to raise questions about the conduct of people such as, for instance, Jimmy Savile.

The most far-reaching change to the law was effected by the inclusion of the requirement in section 1 of the 2013 Act which states that a statement is not defamatory unless it causes (or is likely to cause) serious harm to the reputation of the claimant. However, the question as to what constitutes serious harm proved to be difficult to resolve, and gave rise to debate about whether or not this section abolished the common law presumption of harm. The issue went all the way to the Supreme Court in the *Lachaux*[2] litigation, as the Court of Appeal had held that section 1 did not abolish the presumption of harm, but merely raised the threshold of harm. Therefore, in the opinion of the Court of Appeal it meant that the presumption of harm was retained and with it the nature of libel as being actionable *per se*? However the Supreme Court held that 'serious harm' within the meaning of section 1(1) cannot be demonstrated only by reference to the inherent tendency of the words themselves, because then no change in the law would have been achieved – and the Act is clear that it intended in section 1 to make a significant amendment to the common law.

[2] *Lachaux v Independent Print Ltd, Lachaux v Evening Standard Ltd, Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB).

The Supreme Court therefore held that not only is the threshold of seriousness raised, but proof is also now required, on the facts, that the impact of the words was to harm the claimant's reputation. The focus therefore is now not only on the meaning of the words but on their actual or likely impact. The court also referred to the fact that section 1(2) requires an actual impact assessment of the statement on the claimant's reputation, and since the two sections must be read together this is a further indication that the lawmaker intended to make a major change rather than just to raise the bar. Since this significantly adds to the evidentiary burden faced by the defamation claimant, it arguably goes a long way towards tilting the field more level with the defamation defendant, and in that way may be seen as a gain for free speech advocates.

In a nod to the impact of the McLibel litigation, for the serious harm threshold in section 1(2), in case of bodies trading for profits, harm is not 'serious' unless it has caused or is likely to cause serious financial loss to the body. Section 1(2) also gave rise to interpretational difficulties, but it is submitted that the Supreme Court's decision in *Lachaux*, even though it did not address the issue of corporate claimants directly, surely provides clarity here too. If the presumption of damage did not survive for section 1(1), surely it cannot survive for section 1(2), as the latter is meant to be a narrower construct than the former.

The presumption of falsity was addressed next. Under the common law, upon proof by the claimant that a defamatory statement of fact identifying the claimant had been published, a presumption arose that the statement was false. The legal burden of proof then shifted to the defendant to prove that the statement was substantially true. Lord Lester, veteran campaigner for libel reform, arguably voiced the frustration of many critics when he stated that '[v]illains can (and frequently do) recover substantial damages in libel without having to show that what has been published about them is false'.[3] However, policymakers, jurists and other commentators proved to be remarkably resistant to the idea of abolishing this presumption, and it remains firmly entrenched. The arguments in favour of retaining the presumption can be summarised as comprising a reluctance to break with longstanding precedent; the notion that reputation deserves to be protected robustly in this way by the

[3] *Hansard* HL Deb col 240 (2 April 1996).

courts; the conviction that the existence of defences such as honest opinion and justification mitigates the harshness of the presumption; and the argument that burdening claimants with proving falsity requires them to prove a negative.

It was submitted that these reasons are unsatisfactory, especially given that the English law of defamation remains committed to the proposition that a claimant is not entitled to recover damages for injury to a (positive) reputation which they do not in fact have. Here it is necessary to pause and reflect again on the concept of reputation, for this is what defamation exists to protect. As stated earlier, all the elements of a cause of action in defamation confirm that reputation is an external conception of image, rather than an internal conception of self and it is the projection of the self to society that the law protects. Therefore an individual's reputation is determined as a matter of objective fact. Nor can the reasons for retaining the presumption of falsity be justified in the light of the societal interests underlying the right to free speech discussed earlier. Surely the argument from truth would be best served if the person who is best placed to know the true facts concerning themselves, that is the claimant, is put to the proof. It is therefore unjust that the truth (or not) of a statement allegedly affecting the claimant's reputation remains a burden that should be borne by the defendant. This is especially so, given that there are other areas of law in which the claimant is required to prove falsity, such as malicious falsehood and negligent misrepresentation.

So, two out of the three main structural issues that were identified as being problematic in the common law of defamation clearly remain fundamentally unaltered by the Defamation Act 2013. The main difference is that now the serious harm threshold falls to be decided on facts rather than on a presumption arising from the import of the words complained of. Whilst this is positive news from a free speech perspective, overall the Act still amended the law in a piecemeal rather than a revolutionary fashion. The procedure faced by parties to a claim of defamation is streamlined and slimmed down, but still remains a daunting prospect. The burden of proof remains largely on the defendant. The conclusion therefore can only be that the playing field has not been fully levelled in favour of defamation defendants.

The 2013 Act shrinks the potential pool of defamation defendants, through sections aimed at preventing libel tourism and curbing the potential liability of intermediaries. Together with other legal changes such as the reform of conditional fee arrangements, it will indubitably reduce costs both in terms of potential damages awards and legal costs. The fact that for all intents and purposes jury trials are now abolished for defamation claims should also keep costs and damages awards down. Despite all this, costs nevertheless remain a very large problem, as legal aid is still not available except for defendants facing a defamation claim by a multinational corporation. Costs and complexity mean that the reformed defamation law of England and Wales can still be criticised from an access to justice perspective. Also, since the costs of defending a defamation claim are still potentially high and prohibitive, it is debatable whether the chilling effect on free speech has been adequately addressed in the reforms.

Prior to the 2013 reforms, calls were made that English defamation law should be developed so that expression on matters of public concern or public interest should receive greater protection than other speech. To a large extent this already happened in the courts in England and Wales. The common law *Reynolds* defence, for example, protected *prima facie* defamatory statements published on matters of public interest. Defamation judges making short shrift of vexatious claims reflect this principle. The inclusion in the Defamation Act 2013 of a defence specifically protecting speech on matters of public interest further sharpens the protection given to this type of speech. So it can be concluded that the tools to be used in according greater protection to 'public speech' are already to be found in the arsenal of English defamation (and privacy) law. But they could always be sharpened – the grey area surrounding public figures could do with more certainty. It could well be argued that public officials and figures who depend upon the trust of the public cannot say that speech that seeks to correct relevant aspects of the private lives they themselves have presented to the public, is private speech. Receptiveness to the ways in which this issue is addressed in other jurisdictions, including in the ECtHR, can only enrich the jurisprudence of England and Wales in this regard.

Finally, however, it is concluded that the Defamation Act 2013, by declining to fundamentally change the structure of the law and choosing instead to mostly codify and making only smaller changes to the common law, may well be a golden opportunity missed,

given that alternatives are available – the entire area could have been more closely aligned with the fault-based regime of negligence, for example. It was argued that there is no reason why the tort of negligence could not *prima facie* extend the scope of its protection to reputation. Fault, having been absented from the elements of defamation more or less because of the vagaries of the tort's peculiar history, is increasingly evident in defamation, in some form or other. This is particularly evident in the defences. For instance, the structure of the *Reynolds* defence is entirely fault-shaped in that the defendant is *prima facie* liable, but will be absolved from liability if he proves that he has been responsible. So, while it could be observed that the standard of liability in defamation is strict, it is defeated by a *culpa*-shaped defence. To extend this reasoning, when examining most of the defences and their importance in defamation law, it is clear that fault does play a role in defamation law. The question remains why this is placed in the evidentiary burden of the defendant and not the claimant. The fact that the Defamation Act 2013 deals primarily with defences reflect the fact that it has not brought about a fundamental change from the common law in this regard.

Although the Act 'abolished' various common law defences, such as justification, fair comment and privilege, it seems that this amounted to no more than repackaging each of them with a statutory variant that amended the defences to varying degrees. In this the courts seem content to interpret the 'new' defences along the same lines as their common law predecessors. A good example of this is the treatment by the courts of the new defence contained in section 4 of the Defamation Act 2013, 'publication on a matter of public interest'. It purports to abolish and replace the very important 'responsible journalism' defence commonly referred to as the *Reynolds* defence, which originated from the case of *Reynolds v Times Newspapers Ltd* [1999][4] in which a list of indicators of responsible journalism standards prior to publication was formulated. Section 4 purports to replace these criteria for responsible journalism with a test of 'reasonableness of belief' in the public interest of the statement published. The section is clearly aimed at recognising the

[4] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, discussed in chapter 4, paragraph 4.3.3.

fact that the lines between individuals and the traditional press have become blurred in modern times and that so-called 'citizen journalists' cannot be kept to the same high standards as professional journalists. This was indeed confirmed by the Court of Appeal in its interpretation of the section in *Economou v de Freitas* (2018).[5] But this is nothing new, and holding the press to a higher standard than individuals is a principle adhered to across all the jurisdictions examined in this thesis with perhaps the exception of the US press as far as public figures are concerned. It is perhaps more significant that far from being buried, *Reynolds* seem to have survived, and its principles are still being applied by courts including the Court of Appeal in the *Economou* case mentioned above.

5. United States

The US arguably places more emphasis on the participatory aspect of public discourse than virtually all other liberal democracies, which goes a long way to explaining why such a high premium is placed on free speech. Dworkin pointed out, 'we might have the power to silence those we despise, but it would be at the cost of political legitimacy, which is more important than they are'.[6] The US example clearly illustrates what a true commitment to the protection of free speech entails vis-à-vis defamation law.

In chapter 4 the way in which the US balances individuals' rights to free speech and reputation in its defamation law was examined. The first difference with the law of England and Wales is the fact that in the US, free speech is given constitutional protection. The First Amendment to the US Constitution states 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.' Where the claimants are public officials, a libel claim cannot succeed unless the claimant can prove clearly that the aggrieving statement was not only false but that the author demonstrably *knew* that the statement was false.

[5] *Economou v de Freitas* [2018] EWCA Civ 2591, discussed in chapter 4, paragraph 4.3.3
[6] Dworkin, R 'Foreword' in Hare, I and Weinstein, J (eds) *Extreme Speech and Democracy* (OUP, Oxford 2009) ix.

The rule was stated in *New York Times v Sullivan* (1964) by Brennan J and imposed as a constitutional safeguard against the possible chilling effect of libel law, as follows:

[A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [7]

The 'actual malice' requirement was later extended from public officials to public figures as well,[8] and although claimants who are neither public officials nor public 'figures', do not have to prove actual malice, they still need to prove fault.[9] If the claimant can only prove carelessness, they can only claim special damages, and will have to prove actual loss;[10] if the claimant can prove actual malice, then they can claim general damages which include presumed damage (which is the common law rule) and punitive damages, without having to prove actual loss.[11] Compared to the law in England and Wales, the US law seems to be almost the exact opposite: Where the defamation claimant in England need not prove fault, the US claimant does, and in most significant cases this would mean actual malice; the claimant in England does not need to prove damages apart from harm to their reputation, whereas this forms a large part of the US claimant's burden of proof; and whereas it is up to the defendant in English courts to prove that the defamatory statement was true, US defamation law requires the claimant to prove that the defamatory statement was false. In brief, defamation law in the US provides a paradigm for fault-based liability, where the burden of proof is firmly on the claimant and damages are calculated in a clearly defined manner.

[7] *New York Times v Sullivan* 376 US 254 (1964), 279-280.
[8] *Curtis Publishing Company v Butts* (*conjoined with Associated Press v Walker*) 388 U.S. 130 (1967).
[9] *Gertz v Robert Welch* 418 U.S. 323 (1974).
[10] Albeit this can include for example emotional distress caused, job loss etc.
[11] *Gertz note* 9 348-349.

6. Germany

Chapter 5 returns to Europe and examines an influential jurisdiction where not only free speech but also reputation as an aspect of individual personality rights are also given constitutional protection. The German law of defamation consists of a mosaic of very disparate rules drawn from civil, criminal and constitutional law. Perhaps the most surprising characteristic of this system, to common law sensibilities, is the retention of criminal defamation. This however is balanced by equally strong protection given to the right to free speech. To this must also be added the overarching due diligence owed in all application of the law to the inviolability of human dignity. The result is a complex and nuanced substantive law. The application of this law is no less complicated: German cases are characterised by a detailed consideration of all relevant factors which are balanced against each other in sensitive ways relating to context, content and, in some cases, the parties concerned.

Although the German Constitutional Court (*Bundesverfassungsgericht* or BVerfG) has formulated guidelines for balancing competing rights, these are not as straightforward as the rules formulated by the US Federal Supreme Court. In essence, the guidelines boil down to the balancing exercise which also features strongly in ECtHR jurisprudence. The complexity arises from the various and varying weights given to relevant factors or rights in a specific situation. For instance, if speech occurs in the context of public discussion, the German courts apply a presumption in favour of freedom of expression. This holds true, even if the defamatory speech was made only incidentally in the course of contributing to public discourse: the statements in *Soldiers are murderers,* for instance, were protected from civil or criminal defamation proceedings in this way.[12] Another example of the differential weighting concerns politicians, political parties and other public figures. German jurisprudence extends the protection given to speech in the context of public discourse, to speech involving its key participants. The reasoning seems to be that by participating in public debate, and given their usually ample opportunities to reply to critique, politicians and political parties forfeit to some extent their right to be protected from insulting and

[12] *Soldiers are murderers* 93 BVerfGE 266 (1995), discussed in chapter 5 para 5.1.

defamatory statements. So, although the contextualised nature of the BVerfG guidelines mean that they are highly adaptable, this comes somewhat at the cost of predictability and certainty.

7. European Court of Human Rights

Chapter 6 examined relevant ECtHR jurisprudence. It should be kept in mind that in terms of the Human Rights Act 1998, English courts are under a duty to develop the law in accordance with the various rights and freedoms contained in the European Convention of Human Rights (ECHR). For this reason alone ECtHR case law on defamation, free speech and privacy is important. UK courts are now enabled, in cases where Convention rights are potentially in conflict with common law principles, to depart from or develop the common law to resolve such conflict to favour rights such as the right to freedom of expression under Article 10. So how does the ECtHR address the key question raised in this thesis namely how to achieve a proper balance between reputation and free speech?

In moving away from treating the right to reputation as a narrowly construed internal exception to Article 10 rights and according it the status of a fully-fledged right to be balanced on equal terms with freedom of expression, it may be queried whether the ECtHR is taking sufficient account of the potential chilling effect on freedom of expression. It could very well be argued that there is currently a Europe wide trend towards restrictions on speech. This is evidenced by both pronouncements such as the *Google Spain* 'Right to be forgotten' cases, as well as tightening of regulation of speech, such as the recently enacted General Data Protection Regulation (GDPR). Given that a balance skewed against free speech is a spectre that the UK only recently tackled with some will in the Defamation Act 2013, it may be of some concern that the ECtHR may be headed in the opposite direction. Nonetheless, out of the comparator jurisdictions examined, the methodology employed by the ECtHR seems to be the best: compared to the US, the competing rights are balanced more fairly as freedom of speech is not given a virtually unassailable status; compared to Germany there is less complexity and therefore the results are more predictable, thus adhering to the virtue of legal certainty. This methodology is the balancing exercise contained in Article 10(2) and which can be summarised as comprising a test of legality, necessity and proportionality. For speech to be lawfully curtailed, there needs to be a valid

legal reason, such as for instance safeguarding other personality rights including the right to privacy and reputation; the curtailment needs to be necessary in the sense that no less restrictive alternative is available; and the restriction needs to be proportionate to the legitimate aim pursued.

This seems the fairest way of balancing competing rights, provided that one keeps in mind that proportionality as such is a relative concept, with the question always remaining: 'relative to what'? The margin of appreciation doctrine is important in this respect, as it allows member states to decide what is necessary in their particular, individual, democratic society. The ECtHR nevertheless does not interpret this as unrestricted, it remains empowered to give the final ruling in cases before it where it is of the opinion that the member state had exceeded what could reasonably be termed its margin of appreciation.

As in the other jurisdictions, the ECtHR differentiates between kinds of speech, according them higher and lower degrees of protection according to where they fit on the spectrum of speech. The highest protection is accorded to political speech and speech that contributes to the public debate. This makes sense, and reflects the position in many other jurisdictions, including those subject to the jurisdiction of the ECtHR.

Out of the three comparator jurisdictions, the example set by ECtHR jurisprudence is the most valuable, workable and practicable in UK courts. Out of the three jurisdictions it is also the only one whose pronouncements carry legal weight in the UK and for that reason alone they remain significant.

8. Conclusion

This thesis attempted to analyse whether the UK Defamation Act 2013 delivers on the promises of redressing the balance between free speech and reputation, primarily by levelling the playing field between defamation claimants and defendants in England and Wales. The relative importance of freedom of speech and reputation were examined, and the societal interests in both were highlighted as instrumental in finding the right balance in case of conflict. The English common law of defamation was unique in several ways: it alone formed a specific interest-shaped tort in order to protect reputation, and furthermore it protected this interest heavily by reversing the burden of proof, and by its nature as a

strict liability tort for the most part actionable *per se*. This thesis argued that there was nothing self-evident about this uniqueness. There is no principled reason for the law to be structured in this way. A comparison of the reasons for protecting speech on the one hand and reputation on the other, would on the contrary suggest that the societal interest in free speech should rank at least equally with the individual interest in reputation. This means that at the very least the clear advantage accorded to reputation by the common law of defamation needed to be rebalanced in favour of free speech. This was indeed one of the stated aims for enacting the Defamation Act 2013.

However, although the balance is tilted more in favour of free speech, the act simply does not go far enough. No major structural changes were made to the common law. The focus is still very much on the defences, and to a very large extent the defendant still shoulders the bulk of the burden of proof in court. The most fundamental change is to be found in section 1, dealing with the serious harm requirement, which was only recently clarified by the Supreme Court in *Lachaux*. While the Court did not go so far as to categorically abolish the presumption of harm, it did state in no uncertain terms that reputational harm can now no longer be gauged just from the words complained of, but must be determined by reference to the actual fact of their impact. This goes further than interpreting the 'serious harm' requirement as a mere threshold, and places the burden of proving damage to their reputation on the claimant.

There are other welcome innovations and changes in the reforms. The demise of the jury trial is not to be regretted, nor the impact of costs and procedural reforms. Still, the issue of costs and complexity could have been addressed in much more detail. Expanding the defence of publication in the public interest, and of protecting opinion, are to be welcomed by free speech advocates, as are the inclusion of protection for academic and scientific publications and internet intermediaries. But it remains unclear to what extent the vexing issue of balancing freedom of speech with the protection of an individual's reputation is really addressed.

To that aim, a bird's eye view of three other jurisdictions were given. For a complete contrast, the law of the United States showed that a fault-based regime for defamation cases would indeed result in more freedom of expression. However, this is indubitably at

the cost of other legitimate interests. The German system may seem Byzantine in its complexity, but also seem to result in balanced outcomes. Its complexity makes it difficult to replicate, and the lack of predictability is a serious shortcoming. Somewhere in the middle we find the balancing approach taken by the European Court of Human Rights. The principles upon which the ECtHR resolve disputes in this area are clear and relatively easy to understand and follow. This is fortunate, given that UK courts are bound to interpret domestic laws in line with Convention rules and thus obligated to keep ECtHR jurisprudence in mind.

In the final analysis, the Defamation Act 2013 does make significant changes to the common law of defamation in England and Wales, but not as far reaching as free speech advocates may have wanted. In interpreting the provisions of the Act, the courts could do worse than continuing to emulate the balancing formula of the ECtHR. It may be a good idea to remember that the tension between speech and reputation is far from new: In the words of Shakespeare's Iago: 'Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; tis something, nothing, 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.' But it should be remembered that he went on to also say: 'Reputation is an idle and most false imposition; oft got without merit and lost without deserving. You have lost no reputation at all, unless you repute yourself such a loser'.[13]

[13] *Othello*, act III, scene iii.

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