

**WHISTLEBLOWING AND THE LAW OF DEFAMATION: DOES THE LAW STRIKE A
FAIR BALANCE BETWEEN THE RIGHTS OF WHISTLEBLOWERS, THE MEDIA
AND ALLEGED WRONGDOERS?**

David Lewis *

ABSTRACT

The Public Interest Disclosure Act only gives rights to workers and makes no mention of any connection with existing defamation provisions. However, whistleblowers and the media may have cause to fear the use alleged wrongdoers could make of the Defamation Act 2013. Having considered the human rights context, this article examines in detail whether or not current legislation strikes a reasonable balance between the rights of whistleblowers, alleged wrongdoers and the media. The author concludes that it is in society's interest that the balance should be tilted in favour of those who make and disseminate honest allegations even if they turn out to be unfounded. Since the media play an important role in pressing for investigations of concerns that are raised and publicising the fact that wrongdoing has occurred, they too should be protected unless malice can be established.

1 INTRODUCTION

The relationship between defamation and whistleblowing laws in the UK seems to be under-researched. In many ways this is unsurprising as the whistleblowing statute (the Public Interest Disclosure Act 1998) ¹ only gives rights to workers ² and makes no mention of any

*Professor of Employment Law, Middlesex University. The author would like to thank John and Maureen Spencer for their valuable contributions and the anonymous reviewers for their comments on a previous draft.

connection with existing defamation provisions. Indeed, since whistleblowers were given no special protection from libel or slander, the normal defences to such actions were assumed to apply (these are discussed below). However, defamation laws can have a considerable impact on alleged wrongdoers, actual and potential whistleblowers as well as the media. Whistleblowing and defamation both concern the right to freedom of expression/speech and how this can be balanced with the right to protect reputation and privacy.

Coincidentally, in 2013 both types of statute introduced a public interest test. In the case of whistleblowing, this test must be satisfied if a 'qualifying disclosure' is to be protected³ and in relation to defamation, the public interest can now be used as a specific statutory defence⁴. Having considered the human rights context in the next paragraph, the rest of the article will examine in detail whether or not current legislation now strikes a reasonable balance between the rights of whistleblowers, alleged wrongdoers and the media.

Subject to Article 10 (2) which specifically mentions the protection of others,⁵ Article 10 (1) of the European Convention of Human Rights guarantees everyone 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority....'. Section 3 (1) of the Human Rights Act 1998, states that 'so far as it is possible

¹ The Public Interest Disclosure Act 1998 (henceforward PIDA 1998) inserted a new Part IVA into the Employment Rights Act 1996 (henceforward ERA 1996).

² 'Worker' is broadly defined in ERA 1996 s 43K.

³ ERA 1996 s43B defines 'qualifying disclosures'. ERA 1996 s 43A states that a 'protected disclosure' is a 'qualifying disclosure...which is made by a worker in accordance with any of sections 43C to 43H'.

⁴ Defamation Act 2013 s 4.

⁵ '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'.

to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Although the Defamation Act 2013 was primarily aimed at protecting journalists rather than whistleblowers and citizens generally, it can be argued that there is no public interest in self-censorship where wrongdoing is suspected. Indeed, in the case of *Reynolds v Times Newspapers Ltd*,⁶ Lord Bingham C.J. acknowledged that 'the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it...'. He used the expression 'public life' widely so as to include matters such as the governance of public bodies, institutions and companies as well as the conduct of government and public administration. There can be no doubt today that both the Court of Appeal and the Supreme Court appreciate the 'chilling effect' the threat of defamation proceedings may have on freedom of expression. What is missing is any recognition of this in the whistleblowing legislation itself.

2. WHAT IS WHISTLEBLOWING AND WHY MIGHT IT LEAD TO DEFAMATORY STATEMENTS?

In order to have a meaningful discussion about the impact of defamation laws on the whistleblowing process we need to outline what we mean by whistleblowing. There is no universally recognised definition but researchers have frequently relied on the following: 'The disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that

⁶ [2001] AC 127.

may be able to effect action'.⁷ It can be observed that this covers anonymous reporting and the use of both internal and external channels of communication. However, this formulation does not match statutory definitions in the UK or elsewhere. The stated aim of the PIDA 1998 is 'to protect individuals who make certain disclosures of information in the public interest'. It sets out the type of disclosure⁸ which can give rise to protection (a 'qualifying disclosure'); the circumstances in which a 'qualifying disclosure' will be protected (a 'protected disclosure'); and the workers to whom the protection applies.⁹ Section 43B of the ERA 1996 lists a wide range of matters that could give rise to a 'qualifying disclosure' but for workers to be protected they must reasonably believe that the disclosure is made 'in the public interest'.¹⁰ The public interest is undefined and is left open in the same way as in the common law defence to an alleged breach of the duty of confidentiality.¹¹

For those who suspect that wrongdoing is being committed, the most obvious mechanism for avoiding defamation proceedings is to remain silent! Yet not everyone can exercise this option because a duty to report can be imposed by statute¹² or contract. Indeed, the common law implies that senior employees and those with fiduciary duties

⁷ J. Near and M. Miceli, 'Organisation dissidence: the case of whistleblowing.' (1985) 4 *Journal of Business Ethics*.1.

⁸ 'Disclosure' is not defined for these purposes but it covers both oral and written communications. See: *Kraus v Penna plc* [2004] IRLR 260.

⁹ ERA 1996 ss 43B -43H. See J. Ashton, '15 years of whistleblowing protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 *Industrial Law Journal* 29.

¹⁰ The public interest test was inserted by Enterprise and Regulatory Reform Act 2013 s 17.

¹¹ For an example of the application of the public interest defence at common law see: *Initial Services v Putterill* [1968] 1 QB 396.

¹² For example, under Criminal Justice Act 1993 s93A (money laundering) or anti-terrorism legislation.

should report wrongdoing,¹³ and there is nothing to prevent express terms being inserted to compel all employees to make disclosures.¹⁴ One consequence of people being required to disclose information where they have a reasonable suspicion is that it can lead to false allegations being made inadvertently and thus possible defamation proceedings. As we discuss below, defences will often be available but neither defamation nor whistleblowing legislation will protect those who knowingly supply false information. In the next two sections, we will examine in detail the chances of those who believe that they have been defamed bringing proceedings and the possible defences available to whistleblowers, employers and the media.

3 WHAT CONSTITUTES DEFAMATION?

In essence, a claimant must establish that the words complained about were defamatory and caused (or were likely to cause) serious harm to the reputation of him or her, that they referred to him or her and were published by the defendant. A person's reputation is harmed where there is a statement which tends 'to lower the plaintiff in the estimation of right-thinking members of society generally'.¹⁵ In theory this is an objective standard and the judge will decide both what the words used are capable of meaning and what they actually mean. In practice the courts have tended to use a reasonable person test to identify what right-thinking people might believe.¹⁶ A particularly pertinent example here is the

¹³ See *Item Software v Fassihi* [2004] IRLR 928.

¹⁴ To the author's knowledge this is not uncommon in both the financial and social care sectors.

¹⁵ *Sim v Stretch* [1936] 2 All E. R. 237. The Defamation Act 2013 s 15 defines a 'statement' as 'words, pictures, visual images, gestures or any other method of signifying meaning'.

¹⁶ *Lewis v Daily Telegraph* [1964] AC 234.

case of *Byrne v Deane*.¹⁷ Byrne was a golf club member who alleged that a verse on a noticeboard implied that he had informed the police about the presence of illegal gambling machines on the premises. The Court of Appeal ruled that an allegation that Byrne reported a crime to the police could not be regarded as lowering his reputation in the eyes of a 'good and worthy subject of the King'. This decision has been criticised for giving little weight to the imputation of disloyalty and improperly reflecting the general standards of society at the time. Since the meaning of words must be seen in the light of the existing circumstances, there can be little doubt that a court today would reject the argument that being labelled a whistleblower necessarily damaged a person's reputation. One consequence is that a whistleblower who was identified when he or she wished to remain anonymous would have to sue for breach of confidence rather than defamation.¹⁸

Context will be highly relevant where a person complains about words used in the process of whistleblowing. As mentioned above, workers may have a statutory or contractual duty to report where they reasonably suspect that somebody is involved in wrongdoing. Indeed, there may well be a procedure for raising concerns which prescribes how this should be done and explains that defamatory statements must be avoided. Much will hinge on the particular meaning attributed to the words used. For example, did they mean that the claimant was guilty of wrongdoing; that there are reasonable grounds to suspect him or her of wrongdoing or that there are grounds for investigating the claimant. These three possible interpretations are in descending order of seriousness. Indeed, in

¹⁷ [1937] 1 KB 818.

¹⁸ Many whistleblowing procedures in both the public and private sector and some statutes in other countries expressly permit anonymous reporting. On the content of whistleblowing procedures generally see D.Lewis, 'The contents of whistleblowing/confidential reporting procedures in the UK: some lessons from empirical research'. (2006) 28 *Employee Relations* 76.

relation to the third, a defendant might argue that any harm caused would be negated by an investigation which exonerated the claimant. It must be noted here that, although a whistleblower might argue that his or her intention was not to defame but to use the employer's procedure to ensure that a suspicion of wrongdoing was investigated, in defamation cases intention is only relevant to defences or damages.

In relation to the need for the defamatory material to refer to the claimant, it is well established that the claimant need not be named if reasonable people would understand that he or she was involved, for example, through mention of a job title. Equally, where defamatory words refer to more than one person, a court will have to determine whether there is something in them or the circumstances (for example, the group size) that indicates a particular claimant. Nevertheless, if there is a very specific allegation against an entire group, each group member might be able to claim.¹⁹ Finally, allegations about the behaviour of an organisation may imply that there has been wrongdoing by its directors or senior executives and vice versa.²⁰

As regards publication, all that is needed is for there to be communication of the relevant material to one person other than the claimant. Thus a defamatory allegation of wrongdoing made by a whistleblower to his or her employer would suffice, although it might be difficult for the claimant to establish that damage is caused. For example, if the concern is investigated and thought to be unfounded the employer might not even inform the suspect of the fact that it was raised. One side effect of an employer complying with the

¹⁹ Knuppfer v London Express Newspaper Ltd [1944]AC 116.

²⁰ See Aspro Travel Ltd v Owners Abroad Group [1966] 1 WLR 132 and Jameel v Times Newspapers Ltd [2004] EMLR 31.

implied duty of trust and confidence - which requires allegations of wrongdoing to be sifted to ensure that employees do not suffer unnecessary stress²¹ – would be to prevent some people from knowing that a defamatory statement had been made about them. A further consequence of employers engaging in the process of filtering allegations is that whistleblowers may be protected from defamation proceedings. Section 1 of the Defamation Act 2013 has also made life more difficult for alleged wrongdoers to sue because they are now required to show that ‘publication caused or is likely to cause serious harm to the reputation of the claimant’. Thus a potential defendant can argue that if an employer concludes that a defamatory allegation made by a whistleblower is not worth investigating or, if an investigation clears the subject of the allegation of any wrongdoing, no serious harm has incurred. Importantly, the case of *Lewis v Daily Telegraph*²² provides some support for the proposition that right –thinking people would not believe that whenever an employer holds an investigation there is guilt. Although companies can sue for damage to their business reputation if a whistleblower makes a defamatory statement,²³ section 1 of the Defamation Act 2013 requires ‘serious financial loss’ to be shown. The obvious rationale for requiring serious harm to be demonstrated is that to allow a person to sue where there is minimal damage to reputation would undermine the right to freedom of expression.

4 DOES IT MATTER IF THERE IS SLANDER RATHER THAN LIBEL?

²¹ See *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112.

²² [1964] AC 234.

²³ See *McDonald’s Corp v Steel (No.4)* [1995] 3 All E.R 615. However, trading bodies cannot get damages for injury to feelings.

Traditionally libels are identified by their permanent form (e.g. in writing) while slander is temporary (for example, oral statements). Although the distinction between libel and slander is not always clear it is still relevant today. This is because if libel occurs damage is presumed, whereas slander often requires proof of special loss.²⁴ One exception to the need to establish special damage is where there is an imputation that a criminal offence has been committed which is punishable by imprisonment. However, importantly from a whistleblower's perspective, an allegation that a person is suspected of a crime has been held to be insufficient.²⁵ Another common law exception is where there is criticism of a person's professional competence. This was extended by section 2 of the Defamation Act 1952 to cover 'words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him'.

In relation to whistleblowing, an interesting question arises about the remoteness of any special damage that is suffered. In a scenario mirroring the facts in *Vicars v Wilcocks*,²⁶ what if a whistleblower slandered an alleged wrongdoer and this resulted in the latter's wrongful or unfair dismissal? In the light of the approach taken by Lord Wensleydale in *Lynch v Knight*,²⁷ it would appear that the chain of causation is not necessarily severed by an unlawful dismissal: 'To make the words actionable by reason of special damage, the consequences must be such as, taking human nature as it is, with its infirmities and having regard to the relationship of the parties concerned, might fairly and

²⁴ However, as pointed out by an anonymous reviewer, it is arguable that the distinction has been 'severely eroded' by the fact that the Defamation Act s 1 requires 'serious harm' to be demonstrated (see above).

²⁵ See *Simmons v Mitchell* (1880) 6 A C 156.

²⁶ [1806] East 1.

²⁷ [1861] 9 H. L. C. 597 at 600.

reasonably have been anticipated and feared would follow from the speaking of the words'. Thus, although it might be tempting to argue that a whistleblower's oral allegations of wrongdoing are less likely to result in proceedings for defamation, for example, because it might be more difficult to establish that they were published, it would seem that whistleblowers cannot necessarily protect themselves by refusing to put their concerns in writing. This situation is helpful to employers who are likely to prefer detailed allegations to be fully and clearly documented so that they can be investigated properly.

5 WHAT DEFENCES ARE AVAILABLE?

A. Consent or voluntary assumption of risk

Potential defendants might try to argue that the existence of a whistleblowing procedure (contractual or otherwise) at the workplace means that staff covered by it expressly or impliedly consent (or assume the risk) that the publication of concerns about alleged wrongdoing might be defamatory. However, in the author's opinion this would be wishful thinking since the courts are likely to conclude that any consent or assumption of risk relates to the raising of concerns in a non-defamatory way. Nevertheless, it is worth noting the case of *Friend v Civil Aviation Authority*²⁸, where it was held that there was consent to republication. In this case a number of senior employees had written memoranda which were highly critical of the claimant. Amongst other matters, it was alleged that he was incapable of doing his job and had made improper or fraudulent expenses claims. These statements formed the basis of formal disciplinary proceedings against him. Having failed to obtain compensation for unfair dismissal, Captain Friend issued writs for defamation against

²⁸ [1998] IRLR 253.

both his employer and the authors of the memoranda. Because the limitation period in respect of the original publication of the memoranda had expired,²⁹ Friend sought to rely on their republication to the members of the internal disciplinary and appeals panels. According to the Court of Appeal, inquiries cannot be conducted without access to documents, so employees who accept a disciplinary code as part of their contract of employment consent to the republication of an accusation as part of that process. This is so even if the accusations were false or malicious since it is the purpose of investigations to determine whether allegations are true or not. However, it was only the republication which was covered by the employee's consent. Thus it would seem that, in principle, workers can sue when a whistleblower's allegations are defamatory but cannot complain that they are repeated during the process of investigation if that was part of an agreed procedure. Inevitably, this adds weight to the argument that whistleblowing procedures should be introduced, publicised and made contractually binding.³⁰

B. Privilege

The principle of privilege was introduced to advance the public interest, which is a concept that now has a statutory manifestation as a result of section 4 of the Defamation Act 2013 (see below). The rationale for *absolute* privilege is that in some circumstances people will only speak out if they are assured that even if what they say turns out to be false they will be immune from defamation suits. In order to encourage the reporting of alleged wrongdoing, some jurisdictions have afforded such privilege to whistleblowers who report

²⁹ The normal limitation period is one year: Defamation Act 1996 ss 5 and 6.

³⁰ D.Lewis, 'Ten years of public interest disclosure legislation in the UK: are whistleblowers adequately protected?'. (2008) 82 *Journal of Business Ethics* 497.

in accordance with the provisions of the relevant legislation. Thus alleged wrongdoers are likely to be denied redress unless statements prove both false and malicious.³¹ Indeed, such statements can give rise to both criminal and civil liability.³² In the UK, absolute privilege applies to statements made in either of the Houses of Parliament³³ and judicial proceedings.³⁴ This covers employment tribunal hearings where whistleblowing cases are initially heard³⁵ and will extend to witnesses who give evidence as well as the parties and their representatives. Inevitably, it will be the role of the judge to ensure that people do not abuse the trial situation to engage in gratuitous defamatory remarks. Witness statements in preparation for proceedings are also covered but again the material must be relevant to the nature of the hearing.³⁶ For similar reasons, lawyer - client communications might attract both legal professional privilege³⁷ and be privileged for defamation purposes. However, the Court of Appeal has suggested that qualified privilege might suffice in non-contentious matters.³⁸ In relation to whistleblowing, it is important to note the case of *Mahon v Rahn (No. 2)*³⁹ where absolute privilege was applied to a document created by a financial

³¹ See, for example, the Public Interest Disclosure Act 2013 (Commonwealth of Australia) s 10(2) which offers absolute privilege to those who make a public interest disclosure. However, s11 makes it clear that people will be liable to civil, criminal or administrative proceedings if they knowingly make 'a statement that is false or misleading'.

³² The possibility of bring a claim for malicious falsehood is discussed below.

³³ See the Bill of Rights 1688.

³⁴ The Defamation Act 1996 s 14 (as amended) confirms that absolute privilege applies to all fair and accurate contemporaneous reports of public proceedings in any court.

³⁵ See *Wilson v Westney* [2001] EWCA Civ 239.

³⁶ *Iqbal v Mansoor* [2013] EWCA Civ 149.

³⁷ ERA 1996 s 43D protects disclosures made in the course of obtaining legal advice.

³⁸ *Waple v Surrey CC* [1998] 1 WLR 860.

³⁹ [2000] 4 AER 41.

regulator as part of an investigation.⁴⁰ In this case there is explicit recognition that the threat of defamation proceedings could have an inhibiting effect on the flow of information from potential reporters of alleged wrongdoing.

Turning to *qualified* privilege under statute, the effect of section 15 and Schedule 1 of the Defamation Act 1996 is to make certain statements 'privileged subject to explanation or contradiction'.⁴¹ However, this will not apply 'to the publication to the public, or a section of the public, of a matter which is not of public concern and the publication of which is not for the public benefit'.⁴² As regards whistleblowing, paragraphs 11A, 12 & 13 of Schedule 1 to this Act may be particularly relevant. The first two paragraphs cover the 'fair and accurate report of proceedings' at press conferences and public meetings anywhere in the world⁴³ for the discussion of matters of public interest, while the last refers to 'a general meeting of a UK listed company' and copies and extracts from any document circulated to members of a listed company. These provisions may provide whistleblowers with suitable opportunities to make allegations of wrongdoing but, as with common law qualified privilege, such statutory privilege is forfeited if the publication is shown to have been made with malice (see below).

⁴⁰ ERA 1996 s 43F can protect workers who make qualifying disclosures to the persons prescribed in the Public Interest Disclosure (Prescribed Persons) Order 2014 SI 2014/2418. Such people include industry regulators.

⁴¹ i.e. this defence is not available if the plaintiff requested the defendant to publish a letter or statement by way of explanation or contradiction and the defendant refused or neglected to do so: Defamation Act 1996 s 15(2).

⁴² Defamation Act 1996 s15(3) 'Section of the public' is also mentioned in Defamation Act 2013 s8(1) and is an emerging issue in the case law on whistleblowing (see below).

⁴³ 'whether admission to the meeting is general or restricted'.

In *Adam v Ward*⁴⁴ a privileged occasion at common law was described as: ‘an occasion where the person who makes a 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’.⁴⁵ Clearly, workers in the same organisation have a common interest in the business of the employer and this will entitle them to disclose information about the conduct of fellow staff.⁴⁶ Indeed, as a result of the introduction of whistleblowing legislation it is easy to assert that workers generally (if not citizens) have a social or moral if not a legal duty to disclose information about suspected wrongdoing. Equally, all those designated in Part IVA of the ERA 1996 as potential recipients of concerns might be deemed to have an interest in receiving relevant information within their remit. One lacuna is where defamatory information is sent that is outside the remit of the recipient, for example when material is sent to an inappropriate industry regulator. In these circumstances a claimant’s assertion that the recipient had no relevant duty or interest might be reinforced by the fact that Part IVA of the ERA 1996 does not oblige regulators to pass on information to an appropriate person. Another potential legal problem area is when a worker chooses to make a disclosure of information which is defamatory to his or her employer about wrongdoing that it is not occurring at the workplace, for example, environmental pollution in another country over which the employer has no control . This could well be a protected disclosure under Part IVA of the ERA 1996 , but, if it was contended that the employer had no interest in receiving it, a judge would have to decide whether or not a social or moral duty existed.

⁴⁴ [1917] AC 309.

⁴⁵ Media qualified privilege (the ‘responsible journalism’ test) is discussed below.

⁴⁶ See *Watt v Longsdon* [1930] 1 KB 130.

However, the very fact that the disclosure was protected under Part IVA of the ERA 1996 might influence the outcome.⁴⁷ It almost goes without saying that qualified privilege would be available (subject to malice) if the same concern was received by a person who did have such an interest, for example, the Environmental Agency, an MP or news media.

Despite the possible problem areas alluded to above, it is true to say that in many situations both persons disclosing information about alleged wrongdoing and the most likely recipients of a concern (for example, employers, industry regulators, police, MPs or news media) will satisfy the duty/interest test. However, it might be more difficult to establish that the requirement of reciprocity is met where information is simply posted on the web or disseminated via social media (we return to disclosures via the internet later) . It is also worth observing that, in deciding whether or not qualified privilege applies, the courts will be influenced by whether what is reported are suspicions or verified allegations and whether any defamatory statements include material which is irrelevant to the particular concern raised. In this respect it is worth mentioning employment references. These would normally attract qualified privilege because both the provider of the reference and the recipient will satisfy the duty/interest. The subject of the reference, who has a separate interest, will want to ensure that the best possible testimonial is supplied and, if and when he or she sees the document, may object to any negative aspects. However, employers who take reasonable care not to give misleading information cannot be guilty of negligence⁴⁸ and can rely on qualified privilege as a defence to defamation unless malice is shown. One interesting question here is whether it is malicious for an employer to state that

⁴⁷ As discussed below, for a disclosure to be protected the worker must reasonably believe that the disclosure is in the public interest.

⁴⁸ *Kidd v Axa Equity* [2000] IRLR 301.

an allegation of wrongdoing by the subject of the reference has been received but fail to indicate that the individual was exonerated or that no investigation was thought to be necessary?

For malice to be established it has to be shown that the defendant did not have an honest belief in the truth of what was stated, had an improper motive or acted out of spite. Thus malice exists if the defendant knew what he or she was publishing was untrue or was reckless about the truth.⁴⁹ Motives are difficult to establish and may be mixed⁵⁰ so the tendency has been to focus on the predominant purpose. Perhaps more difficult is where the defendant honestly believes that what was said was true but appears to have an improper motive. In *Horrocks v Lowe*⁵¹ the House of Lords reversed the Court of Appeal and ruled that honest belief was sufficient even if it could be established that the defendant was personally prejudiced against the claimant. In relation to whistleblowing, while it might be argued that the particular language used when a concern was raised was indicative of an improper motive, there might be more mileage in examining the mode of publication. For example, a confidential report to an employer using an internally designated whistleblowing procedure is more likely to be regarded as benign than an unnecessarily public disclosure.⁵²

⁴⁹ *Halpin v Brookes University* [1995] EWCA Civ 1130 [unreported].

⁵⁰ This is one of the arguments that led to the removal of 'good faith' as a necessary ingredient for a disclosure to be protected under ERA 1996 Part IVA. However, it is still relevant to the assessment of compensation where detriment or dismissal is proved.

⁵¹ [1975] AC 135.

⁵² Amongst other requirements, external public disclosures have to pass a test of reasonableness under ERA 1996 ss 43G and H in order to be protected.

Those affected by a false but non-defamatory allegation of wrongdoing may try to sue for malicious falsehood. This is a tort that seeks to protect financial interests rather than personal reputation and there is no defence of qualified privilege available. It has to be proved that a false statement was made maliciously to a person other than the claimant. This will cover situations where the defendant does not care whether the statement is true or false but negligence itself does not amount to malice. The damage suffered may simply be the way in which other people act towards the claimant and, according to section 3(1) of the Defamation Act 1952 it is sufficient for a claimant to show that what was published in writing was 'calculated to cause pecuniary damage'. Thus an aggrieved individual might bring an action if it can be demonstrated that a whistleblower maliciously made a false allegation of wrongdoing with the aim of causing the plaintiff to lose money as a result of transfer, demotion, dismissal etc. Malicious falsehood actions may be particularly attractive to companies since, unlike in defamation cases, there is no need to show that serious financial loss has been inflicted.⁵³

C Substantial truth

Section 2 of the Defamation Act 2013 removed the common law defence of justification and replaced it by substantial truth. The underlying principle is that the dissemination of the truth is in the public interest and this outweighs any private interest in concealing information. Significantly, section 2(3) makes it clear that if one or more imputation is not substantially true the defence is still available if 'having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially

⁵³ Defamation Act 2013 s1(2) applies to 'bodies that trade for profit'.

true do not seriously harm the claimant's reputation'. The burden is on the defendant to show that statements made were substantially true but he or she does not have to be aware of that fact at the time the statements were made. Thus it would seem that this defence is an attractive one for those who make allegations of wrongdoing, especially when motive is not treated as relevant here. By way of comparison, sections 43F -43H of the ERA 1996 all require that 'the worker reasonably believes that the information disclosed, and any allegations contained in it, are substantially true'.⁵⁴ Thus it is critical for both defamation and whistleblowing purposes to know at what point a departure from the literal truth will undermine the argument that a statement or allegation was substantially true.

While access to supporting evidence may be difficult for defendants in defamation proceedings, searching for it can deprive whistleblowers of the protection afforded by the ERA 1996. It would seem that, although whistleblowers must reasonably believe that their information 'tends to show' a particular type of wrongdoing,⁵⁵ workers who suffer a detriment for trying to investigate or prove certain facts can fall outside the scope of Part IVA of the ERA 1996. Thus in *Bolton School v Evans*⁵⁶ the employer successfully argued that the claimant was dismissed for conducting his own inquiries about computer security and not for disclosing information about its deficiencies. According to Elias, J. in the Employment Appeal Tribunal (EAT): 'It (the Act) does not protect the actions of the employee which are directed to establishing or confirming the reasonableness of that

⁵⁴ In *Korashi v Abertawe University Health Board* [2012] IRLR 4 the EAT held that it was insufficient to 'show that the matter complained of was believed to be substantially true when a number of allegations were not so believed'.

⁵⁵ ERA 1996 s 43B (1)(a) –(f) list six types of wrongdoing.

⁵⁶ [2007] IRLR 140.

belief. The protection is for the whistleblower who reasonably believes .. that something is wrong, not the investigator who seeks either to establish that it is wrong or to show that his concerns are reasonable'.⁵⁷ The unfortunate effect of drawing a distinction between dismissal because of acts *related to* disclosure (unprotected) rather than *because of* the disclosure itself (protected) may well be to deter attempts at verification aimed at establishing reasonable grounds for a belief and thus safeguarding the worker's employment rights. The consequence in defamation proceedings may be that a defendant lacks the evidence to demonstrate truth even though the allegations are not in fact false. In these circumstances, it will be necessary to turn to some other defence.

D Honest opinion

Section 3 of the Defamation Act 2013 removed the common law defence of fair comment and replaced it by honest opinion. For this to be available there must be a statement of the opinion that the defendant holds,⁵⁸ an indication of the basis for it and 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'. Although the statement must be recognisable as comment, the distinction between fact and opinion may be difficult to draw. While an inference from facts may constitute a form of opinion,⁵⁹ the defence will not apply to statements of fact which are capable of objective proof. For example, where a person asserts that there are reasonable grounds to suspect that the claimant is guilty of a crime.⁶⁰

⁵⁷ Bolton School v Evans [2006] IRLR 500 at p 507. See also Panayiotou v Chief Constable of Hampshire [2014] IRLR 500.

⁵⁸ Whether the defendant holds the opinion is a subjective test: Defamation Act 2013, Explanatory Notes para 26.

⁵⁹ See British Chiropractic Association v Singh [2011] 1 WLR 133.

⁶⁰ See Hamilton v Clifford [2004] EWCA Civ. 1407.

Nevertheless, paragraph 28 of the Explanatory Notes to this Act provides some comfort for whistleblowers by stating that a defendant should be able to satisfy the conditions set out in section 3 'without needing to prove the truth of every single allegation of fact relevant to the statement complained of'. In addition, section 3(6) of the Defamation Act 2013 may have consequences for employers who do not carefully scrutinise concerns raised in the whistleblowing process because it makes a person liable for republication 'if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion'.

In relation to the distinction between fact and opinion there would appear to be a clear parallel with the statutory whistleblowing provisions. Whereas sections 43C –E of the ERA 1996 are based solely on disclosures of information which tend to show wrongdoing (facts), sections 43F-H refer to 'any allegation contained in it'" (opinion). In *Cavendish Munro Professional Risks Management Ltd v Geduld*⁶¹ Slade, J gave the following hypothetical example in relation to a hospital: 'Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday sharps were left lying around". Contrasted with that would be a statement that "you are not complying with health and safety requirements". In our view this would be an allegation not information.'

Another interesting comparison is that of the 'honest person could have held' test in section 3(4) of the Defamation Act 2013 and the 'reasonable belief of the worker' test in section 43B of the ERA 1996. In theory, it might be argued that the latter has both a subjective and objective element whereas the former requires a purely objective approach. However, an employment tribunal might well equate a reasonable belief with an 'honest belief on

⁶¹ [2010] IRLR 38.

reasonable grounds' so the tests may not be distinct in practice. Indeed, there may be some virtue in applying the same test in both types of case.

E Public interest

For the defence of honest opinion to apply the statement does not have to be about a matter of public interest. However, for section 4 of the Defamation Act 2013 to apply the defendant must show not only that 'the statement complained of was, or formed part of, a statement on a matter of public interest' but also that he or she reasonably believed that publishing it was in the public interest. The defence applies whether the statement is one of fact or opinion⁶² and, in adjudicating on the public interest, 'the court must have regard to all the circumstances of the case'. Although the defence is available to all those who have made a false statement, section 4(4) provides that 'the court must make such allowance for editorial judgment as it considers appropriate'.

Inevitably the absence of a statutory definition of 'public interest' creates uncertainty.⁶³ However, it is clearly designed to replace the defence created in *Reynolds v Times Newspapers*⁶⁴ so the principles established there and in subsequent cases are likely to be taken into account.⁶⁵ In the *Reynolds* case, a former Prime Minister of the Irish Republic claimed that there had been defamatory statements about his handling of political

⁶² The Reynolds defence (see below) only applied to statements of fact.

⁶³ According to the Defamation Act 2013 Explanatory Notes para 30 : '.....[the public interest] is a concept which is well-established in the English common law. It is made clear that the defence applies if the statement complained of "was, or formed part of, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.'

⁶⁴ [2001] 2 AC 127. The Defamation Act 2013 s 4(6) states that the ..'the Reynolds defence is abolished'.

⁶⁵ See Defamation Act 2013 Explanatory Notes para 35.

matters. The House of Lords refused to accept that the common law should recognise ‘political information’ as a species of the qualified privilege defence. As we have seen above, for qualified privilege to be available there must be both a duty to disseminate the information and an interest in receiving it. The relevant interest here is that of freedom of expression and, in developing a “responsible journalism” approach, Lord Nicholls identified ten non-exhaustive factors to be taken into account (see below). Although the House of Lords accepted in this case that the subject was of public interest, it concluded that the newspaper was unprotected because it had failed to mention the claimant’s explanation of the events which was available to it.

In the subsequent case of *Flood v Times Newspapers*,⁶⁶ the Supreme Court held that an article about police corruption was of considerable public interest and that, where there was strong circumstantial evidence against Flood, it was sufficient that the author believed in the truth of the allegations and held a reasonable belief based on a reasonable investigation. Indeed, publication had the aim of getting allegations investigated in circumstances where it was reasonable to believe that this was not occurring. Similarly, in *Hunt v Times Newspapers*,⁶⁷ the defence was applied to a journalist who used reliable sources, honestly believed the allegations that the claimant was a ‘crime lord’, and behaved fairly in acquiring the information. For the purposes of this article, it is important to note that the ‘responsible journalism’ approach applied to the publication by anybody of public interest information and was thus generally available to those raising concerns about wrongdoing.

⁶⁶ [2012] 2 AC 273.

⁶⁷ [2013] All E.R. 89.

For there to be a 'qualifying disclosure', section 43B of the ERA 1996 states that a worker making a disclosure of information must reasonably believe that it 'is made in the public interest'. The leading judgment to date was given by the EAT in *Chesterton Global Ltd v Nurmohammed*,⁶⁸ where the claimant maintained that he was one of a hundred senior managers whose bonuses were affected by the employer's alleged accounts manipulation. Superstone, J. accepted that 'a relatively small group may be sufficient to satisfy the public interest test. What is sufficient is necessarily fact sensitive'. It remains to be seen how far the courts will go in finding that there is a qualifying disclosure where a concern relates only to a section of the public. Nevertheless, in principle, it would seem that a disclosure of information about a breaches of contracts of employment can satisfy the public interest test. For example, where it is alleged that an employer has applied a policy that infringes the Equality Act 2010.⁶⁹

In our discussion of the concept of public interest, it is appropriate to examine the extent to which the European Court of Human Rights has relied on it in deciding cases based on Article 10 of the Convention and comparing it with the approach taken to "responsible journalism" in defamation law. Article 10 (2) of the ECHR does not provide a public interest defence to infringements of the right to freedom of expression but does use the words 'necessary in a democratic society'⁷⁰. However, when we examine the principles utilised to interpret these words we see that a public interest test is expressly

⁶⁸ [2015] IRLR 614. An appeal against this decision was due to be heard by the Court of Appeal in June 2017.

⁶⁹ According to Superstone, J. at para 36: 'The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public implications'.

⁷⁰ See note 3 above.

included.⁷¹ There is a clear parallel here with the factors Lord Nicholls suggested should be taken into account in ascertaining whether there had been 'responsible journalism'. Indeed, explicit mention is made of 'the nature of the information, and the extent to which the subject-matter is a matter of public concern'.⁷² In the conclusion, it will be argued that statutory guidance on the meaning of the public interest would be valuable in assisting potential litigants and the judiciary in interpreting both the defamation and whistleblowing legislation.

F Other defences

Before discussing some practical issues related to the bringing of defamation proceedings we will briefly consider offers to make amends, the defence of innocent dissemination and its specific application to internet service providers (ISP). According to section 2(5) of the Defamation Act 1996 an offer to make amends cannot be made after serving a defence⁷³ and, if it is accepted, this will end the proceedings. Section 2 (3) & (4) provide that the offer of amends must be: in writing and indicate that it is made under section 2; to make a

⁷¹ In *Heinisch v Germany* [2011] IRLR 922 the following criteria were applied when assessing the proportionality of the interference in relation to the legitimate aim pursued: (i) the public interest in the disclosed information; (ii) whether the applicant had alternative channels for making the disclosure; (iii) the authenticity of the disclosed information; (iv) whether the applicant acted in good faith; (v) the detriment to the employer; (v) the severity of the sanction.

⁷² The other criteria are: (i) 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; (ii) the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories; (iii) the steps taken to verify the information; (iv) the status of the information. The allegation may have already been the subject of an investigation which commands respect; (v) the urgency of the matter. News is often a perishable commodity; (vi) whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary; (vii) Whether the article contained the gist of the plaintiff's side of the story. (viii) the tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact; (ix) the circumstances of the publication, including the timing.

⁷³ This would not prevent a person offering to settle a claim in the usual way during proceedings.

‘suitable correction’ and ‘sufficient apology’ and to publish them ‘in a manner that is reasonable and practicable in the circumstances’; and ‘to pay to the aggrieved party such compensation (if any) and such costs, as may be agreed or determined to be payable’.⁷⁴ From a whistleblower’s perspective, an offer of amends would be appropriate in a case of mistaken identity but sections 2 -4 the Defamation Act 1996 might also prove useful in that they provide for a qualified offer to be made. Thus, to use the example given in *Winfield and Jolowicz*⁷⁵ if it is alleged that a director’s conduct has resulted in a company having financial difficulties ‘the defendant might concede that this imputed incompetence and make an offer in respect of that meaning’. The main drawback of making an offer of amends is that, if it is relied on as a defence, it cannot be used in conjunction with any other defence.⁷⁶ As we have seen in this article, whistleblowers are likely to have several other effective defences open to them.

Turning to innocent dissemination, section 1 (1) of the Defamation Act 1996 provides a defence if it is shown that (i) the person was not the author, editor or publisher of the statement; (ii) that reasonable care was taken in relation to its publication; and (iii) ‘he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.’ In determining whether or not (iii) is applicable, section 1(5) states that ‘regard shall be had to - (a) the extent of his responsibility for the content of the statement or the decision to publish it, (b) the nature or circumstances of the publication, and (c) the previous conduct or character of the author, editor or publisher’.

⁷⁴ S 3 deals with acceptance of an offer to make amends and s 4 deals with a failure to do so.

⁷⁵ *Winfield and Jolowicz on Tort*. 2014. Page 405

⁷⁶ Defamation Act 1996 s 4(4).

Thus, in addition to other defences, section 1 will often be available to managers and organisations which publish a whistleblower's allegations. However, if a whistleblower has a history of making unwarranted accusations those who publish further material would be advised to check whether it has any defamatory content.

Section 1 (2) of the Defamation Act 2013 defines 'author', 'editor' and 'publisher' but section 1(3) excludes those who are 'only involved –(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control'. In *Godfrey v Demon Internet Ltd*⁷⁷ the plaintiff claimed that a posting to a newsgroup was defamatory and requested that the defendants remove it from their server. They failed to do so and Morland J. found them liable because they had not taken reasonable care and could not show that they did not know that what they did caused or contributed to the publication of a defamatory statement. It would seem that an ISP will only avoid liability if its role is entirely passive.⁷⁸ Those who blow the whistle via the internet are unlikely to be covered by Part IVA of the ERA 1996 since the conditions for protecting such disclosures are stringent.⁷⁹ However, where such widespread publication of allegations does occur it is probably in a desperate attempt to get them investigated when attempts to report within the organisation or to a regulator have failed.⁸⁰ Thus it would be most unfortunate if an ISP adopted a policy of automatically withdrawing a posting if anybody suggested that it was

⁷⁷ [2001] QB 201.

⁷⁸ See *Tamiz v Google Inc* [2013] 1 WLR 2151.

⁷⁹ See ERA 1996 ss 43G and 43H.

⁸⁰ S 43F deals with disclosures to 'prescribed persons'. See note 40 above.

defamatory. Since such a situation might stop material being published even if it was true or in the public interest, questions arise about compatibility with Article 10 of ECHR. Section 5(2) of the Defamation Act 2013 now offers protection where an ‘operator of a website’⁸¹ can show that it did not post the statement. This defence is defeated by malice⁸² or ‘if the claimant shows that— (a) it was not possible for the claimant to identify the person who posted the statement; (b) the claimant gave the operator a notice of complaint in relation to the statement; and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations’.⁸³

6 WHAT REMEDIES ARE AVAILABLE FOR DEFAMATION AND HOW CAN THEY BE OBTAINED?

It is frequently observed that the purpose of bringing defamation proceedings cannot be to re-establish one’s reputation since the courts have no power to order a retraction or that a correction is published. Nevertheless, section 13 of the Defamation Act 2013 enables a plaintiff to prevent further harm by seeking an order that a website operator removes a defamatory statement or that ‘any person who was not the author, editor or publisher of the defamatory statement’ ceases distributing it. Injunctive relief is unlikely to be available in whistleblowing situations as claimants are unlikely to have prior notice of the publication of defamatory material. Even if a claimant was forewarned, an injunction will not be granted if the defendant can offer a defence or if a court is persuaded that the section 12 of the Human Rights Act 1998 applies. Section 12 (1) and (4) provide that ‘if a court is considering

⁸¹ This term is not defined.

⁸² Defamation Act 2013 s 5(11).

⁸³ See Defamation Act 2013 s5(3) and the Defamation (Operators of Websites) Regulations 2013. SI 2013/3028. Regulation 3 and the Schedule provide for the steps which a website operator must take on receiving a valid notice of complaint in order to benefit from the defence provided by s 5.

whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression' the court 'must have particular regard to the importance of this right.

The primary remedy would appear to be damages aimed at restoring the claimant's reputation, vindicating the claimant's name and compensating for the distress caused.⁸⁴ Thus the value of a claim against a whistleblower or anyone else publishing his or her allegations will depend on the extent to which the plaintiff's character has been impugned and the breadth of the publication. It follows that in some cases it will be difficult to establish either serious harm or substantial loss, for example, where the defamatory statement does not suggest that a person is guilty of serious wrongdoing and the publication was solely internal to the claimant's employer. Where grave personal misconduct is alleged, aggravated damages may be available but exemplary damages are unlikely to be awarded because whistleblowers rarely make statements with a view to making a profit which outweighs the likely financial penalties for defamation. However, it should be remembered that businesses which are defamed are also entitled to damages, although they cannot be compensated for hurt feelings!

Turning now to the potential claimants, we are aware that both people and businesses can sue.⁸⁵ The most obvious problem for an individual wishing to bring a legal action is that defamation cases can be extremely expensive and legal aid is unavailable. Any lack of financial resources is only partly alleviated by the "no win, no fee" or conditional fee

⁸⁴ See *Cairns v Modi* [2013] 1 WLR 1015 where the Court of Appeal suggested that a ceiling equivalent to the maximum level of damages for pain and suffering in personal injury cases would normally be appropriate.

⁸⁵ Although central and local government bodies cannot sue for defamation, individuals employed by them can sue in their own right: *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534. Government bodies can sue for malicious falsehood.

system which requires potential claimants to take out insurance against losing. However, claimants may be assisted by the availability of summary judgment “if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.”⁸⁶ A less obvious difficulty is identifying the potential defendant. In *A v Company B Ltd*⁸⁷, the High Court granted an order for discovery against a company which summarily dismissed a senior employee for gross misconduct following allegations made by an external third party informant, without disclosing either the specific allegations made against the employee or the identity of the informant. The Vice-Chancellor held that disclosure was necessary to enable the employee to bring an action for defamation and/or malicious falsehood against the informant in order to clear his name. The decision has been criticised for failing to acknowledge how important it is for employers to be able to both offer and maintain confidentiality where people have information about suspected wrongdoing.⁸⁸ Put simply, if those thinking of raising a concern believe that there is a risk of being identified and sued for defamation, they might opt to remain silent or report anonymously.⁸⁹ This case provides a vivid illustration of the clash of interests that can occur in such situations. The employer and informant have the

⁸⁶ Defamation Act 1996s8(3). According to s 9, summary relief may include: a statement that the statement was false and defamatory; and order that the defendant publish a suitable correction and apology; damages of up to £10,000; and an order preventing further publication of the matter complained of.

⁸⁷ [1997] IRLR 405.

⁸⁸ D.Lewis, ‘A v Company B Ltd’. (1998). 27 *Industrial Law Journal* 64.

⁸⁹ Anonymous disclosures are problematic for a variety of reasons. From a whistleblower’s perspective, they may be identifiable because of the nature or circumstances of the disclosure. From an employer’s point of view, anonymity can make investigations difficult to conduct and the information supplied is treated with more suspicion.

private interest of maintaining confidentiality;⁹⁰ the alleged wrongdoer has the private interest of restoring his or her reputation and there is the public interest in encouraging the raising of concerns about wrongdoing. It is asserted that the interests of the alleged wrongdoer should not be paramount in such situations. This position is reinforced by the fact that in practice the chances of him or her succeeding in a defamation or malicious falsehood action are fairly slim unless the whistleblower has knowingly supplied false information. Thus in *A v Company B Ltd* qualified privilege would have been available if the informant could establish that he or she had a duty to communicate the allegations and Company B had an interest in receiving them. As we have seen above, more extensive defences have become available since 2013.

Where companies suffer damage to their business reputation they may sue for malicious falsehood or defamation. However, as regards the latter, we have seen above that ‘a body that trades for profit’ can only sue if there is ‘serious financial loss’. One salutary effect of this relatively new requirement is that threats by employers to bring defamation actions against those who raise concerns about their organisation’s wrongdoing will be less credible. Nevertheless, there can little doubt that many people remain ignorant about defamation law and will be deterred from making allegations if they cannot prove that what they contain is true.

⁹⁰ Indeed, if the informant in this case had been an employee who had been given an undertaking about confidentiality if he or she offered evidence, the revelation of his or her identity would have amounted to a fundamental breach of their contract of employment: see, for example, *Buckland v Bournemouth University* [2010] IRLR 445.

As regards potential defendants, from the claimant's perspective the most obvious issue is whether the person is worth suing for damages.⁹¹ From the defendant's point of view the question is whether they can afford to defend an action for defamation and, if not, whether they are entitled to legal aid. Significantly, the European Court of Human Rights held in *Steel & Morris v UK*⁹² that the denial of legal aid to two environmental campaigners constituted breaches of both Article 6 (right to a fair hearing) and Article 10. Where an employee whistleblower has made defamatory statements it would clearly be preferable in most cases if the claimant was able to sue the whistleblower's employer. The argument that the allegations were merely being repeated will not constitute a defence⁹³ and *Slipper v BBC*⁹⁴ provides authority for the proposition that expressing doubt about the truth of the allegations will not affect liability for repetition. Even if another person is liable for repetition of a whistleblower's allegations, the latter will remain liable if he or she requested or authorised publication; intended the statement to be repeated; or where repetition is the natural and probable result of the original publication.⁹⁵

7 CONCLUSION

It can be seen from the discussion above that actions for defamation are unlikely to be successful so long as a whistleblower does not raise concerns maliciously. First, an

⁹¹ See *McDonalds Corp v Steel (No.4)* [[1995] 3 AER 615 where the plaintiff was awarded £76,000 against two unwaged people.

⁹² [2005] EMLR 15.

⁹³ See *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772. Indeed, if the defamatory statement was not repeated by the employer the plaintiff would probably not have heard of them!

⁹⁴ [1991] 1 QB 283.

⁹⁵ See *Slipper v BBC* [1991] 1 QB 283.

allegation may not be regarded as defamatory and, second, even if it is, a claimant must show that serious harm has been suffered. Lastly, in addition to qualified privilege at common law, there are the statutory defences of substantial truth, honest opinion and the public interest. In these circumstances it might be asked why do whistleblowers need more protection from defamation suits? In the author's view the answer lies in society's interest in having wrongdoing exposed and dealt with. It is not appropriate here to rehearse all the arguments for encouraging whistleblowing, suffice it to say that speaking up is a valuable tool for countering corruption and can both directly and indirectly save lives.⁹⁶

Research across the world confirms that the two main reasons people are reluctant to report perceived wrongdoing is the fear that no corrective action will be taken and that they will suffer consequences for raising concerns.⁹⁷ Even if there is no real prospect that a potential whistleblower will be sued for defamation they may still believe that to be the case and choose to remain silent.⁹⁸ In the author's opinion, more certainty about protection could be achieved by amending both Part IVA ERA 1996 and the Defamation Act 2013. One solution might be to adopt the Australian approach of incorporating the defence of absolute privilege into the UK statutory whistleblowing provisions.⁹⁹ Slightly less desirable -because it would not be so concrete or visible to

⁹⁶ See I. Carr and D. Lewis, 'Combating Corruption through Employment Law and Whistleblower Protection'. (2010) 39 *Industrial Law Journal* 52

⁹⁷ See D. Lewis, A. Brown, and R. Moberly, 'Whistleblowing, its importance and the state of research.' in A. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds), *The International Whistleblowing Research Handbook* 2014. Cheltenham: Edward Elgar.

⁹⁸ There is much anecdotal evidence that organisations threaten to sue whistleblowers if they cannot prove the truth of their allegations.

⁹⁹ See footnote 31 above.

potential whistleblowers - would be to include a special defence in the Defamation Act 2013.¹⁰⁰ Finally, in order to provide more clarity for potential litigants, advisers and adjudicators, it would be useful if criteria for determining the public interest were enacted by Parliament in relation to both defamation and whistleblowing. We now turn to this issue.

Currently there is no legislative guidance or statutory code of practice on the interpretation of the public interest in these contexts. Such an approach would be consistent with that taken to the public interest test under both the data protection and freedom of information legislation which themselves deal with the issues of privacy and access to information. Thus section 32 (1) (b) of the Data Protection Act 1998 mentions the ‘special importance of the public interest in freedom of expression’ and section 32(3) goes on to state that ‘In considering ...whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which –(a) is relevant to the publication in question, and (b) is designated by the Secretary of State..’¹⁰¹ Similarly, in exempting authorities from complying with duties to confirm or deny and to communicate information, a public interest test is used in section 2(1)(b) and section 2(2)(b) of the Freedom of Information Act 2000.¹⁰²

¹⁰⁰ Perhaps analogous the special defence contained in the Defamation Act 2013 s6 for peer-reviewed statements in scientific or academic journals.

¹⁰¹ To date five codes have been designated in the Schedule to the Data Protection (Designated Codes of Practice) (No 2) Order 2000.SI 2000/1864.

¹⁰² S 2(1): ‘Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either— (a) the provision confers absolute exemption, or (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply’. S2(2): ‘In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that— (a) the information is exempt information by virtue of a provision conferring absolute exemption, or (b) in all the circumstances of

An applicant can appeal to the Information Commissioner against a decision to refuse access to information and this person has prepared guidance to the interpretation of the public interest test.

It is not appropriate here to be prescriptive about the precise contents of any guidance on the meaning of 'public interest' that might be offered for the purposes of the defamation and the whistleblowing legislation. Nevertheless, by way of general approach, full weight should be given to the principles of transparency and accountability that are so vital in both the public and private sectors¹⁰³ and to democracy generally. Thus in resolving the inevitable conflicts that will arise between the human rights to freedom of speech and privacy,¹⁰⁴ the author believes that the private interest in safeguarding a personal or business reputation should give way to the private interest of whistleblowers and the public interest of citizens in freedom of expression. One view would be that all speech or disclosures of information should be protected unless the person making them knows them to be false.¹⁰⁵ No doubt some will argue that the result of relegating the interests of alleged wrongdoers will be that more people will suffer untrue defamatory statements without redress. However, such an argument must be seen in the light of the fact that, in reality, most people will not be able to sue anyway owing to lack of resources and the uncertainties in the current law.

the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

¹⁰³ The author believes that there are considerable difficulties in drawing a meaningful line between these two sectors in 2017.

¹⁰⁴ Article 8 of the European Convention on Human Rights deals with respect for private and family life.

¹⁰⁵ In which case an action for malicious falsehood might be brought.

The author's answer to the question posed in the title of this article is that it is in society's interest that the balance should be tilted in favour of those who make and disseminate honest allegations even if they turn out to be unfounded. Since the media play an important role in pressing for investigations of concerns that are raised and publicising the fact that wrongdoing has occurred, it too should be protected unless malice can be established. Indeed, it is to be hoped that the introduction of the public interest test into defamation law will encourage the media to publicise whistleblower stories and give confidence to those who are reluctant to raise concerns. In the writer's opinion, the UK will only comply fully with the spirit of Article 10 of ECHR if it ensures that defamation law does not inhibit whistleblowing. By definition, a protected disclosure must satisfy the public interest test in section 43B of the ERA 1996 so there can be no objection to inserting another section into Part IVA of the ERA 1996 which states that protected disclosures will not result in defamation proceedings. However, what is really needed is a more general acceptance that where there are conflicting human rights, society's interest in openness and transparency will take precedence over the private interests of alleged wrongdoers. In the employment context, protection for the alleged wrongdoer will come from the duty on employers to scrutinise allegations and to ensure that those which are unfounded are published no further.