# The Defamation Act 2013: A free speech retrospective

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**Subject:** Defamation law. **Other related subject:** Human Rights

**Keywords:** Defamation; Libel reform; Freedom of Expression

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.[1] Lord Lester, introducing his Defamation Bill, said the following:

> 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.[2]

It is now almost six years later, and time to gauge the effect of the reforms wrought by this act on the free speech concerns it was designed to address. This article presents a broad-brush review of the Defamation Act 2013 from a pro- free speech perspective.

## Reasons to protect freedom of speech

Today freedom of expression 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. 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, Professor Barendt quite rightly remarks that free speech is prized by liberals for reasons that they may not understand.[4] But, in deciding how to weigh up competing interests the normative value of

[1] 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) Ent.LR 25; Mullis, A, and Scott, A, 'Reframing libel: taking (all) rights seriously and where it leads' NILQ 63(1) 5; Weaver, RL, 'British Defamation reform: an American perspective' (2012) NILQ 63(1) 97.

[2] Lord Lester of Herne Hill, 'These disgraceful libel laws must be torn up', *The Times*, 15 March 2011.

[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] Barendt, E. Freedom of Speech (Oxford, Oxford University Press, 2005), 1.

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.[5]

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. [6] A good place to start is John Stuart Mill's classic essay 'Of the Liberty of Thought and Discussion', in his seminal treatise on democratic freedom, *On Liberty*.[7] 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 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.[8] 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.

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.[9] 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.[10] Of course the liberal notion of individual autonomy also includes the speaker's right to determine the content of their speech.[11] 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.[12] The categorisation of the right as being a societal good is clear.

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[5] For an excellent explanation of these theories, see Barendt, ibid, chapter 1 ('Why Protect Free Speech?').

[6] Ibid.

[7] John Stuart Mill, On Liberty (London, Longman, Roberts & Green, 1869, originally published 1859).

[8] Ibid.

[9] Meiklejohn, A. Political Freedom (New York, Harper Collins, 1960) 64

[10] Scanlon, T. 'A Theory of Freedom of Expression' (1972) 1 Philosophy and Public Affairs 204.

[11] See Dworkin, R. Philosophy of Law (Oxford, Oxford University Press, 1977) Introduction.

[12] 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.

## 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. [13] 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.[14] 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. 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.[15] 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.[16]

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.[17] The modern conception of 'honour' arguably relates more to 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 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.[18]

The common denominator in reputation as property and as honour is the involvement of society, 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.'[19] This clearly differentiates reputation from self-esteem, which is the esteem a person has for themselves. It is submitted, therefore, that reputation as the focus of defamation law is a societal construct that seeks to mediate the relationship between

[13] Post, R.C. 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) *74* California LR 691. See also McNamara, L. Reputation and Defamation (OUP, Oxford 2007)

[14] Milo, D. Defamation and Freedom of Speech (OUP, Oxford 2008).

[15] *Jameel v Wall Street Journal Europe SPRL (No.3)* [2006] UKHL 44 at 91.

[16] Milo, n14, 30.

[17] Holdsworth, W.S. A History of English Law (1948) Vol VIII, 336.

[18] Milo, n14 30. See also Brown, R.E. The Law of Defamation in Canada (1994) vol 1, 17.

[19] Weir, T. An Introduction to Tort Law (2nd edn Clarendon Press, Oxford 2006) 175.

individuals and the society in which they exist. 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. [20]

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

## Rebalancing speech and reputation

Societal interests in free speech and reputation can therefore be brought squarely into Mill's argument from truth, and the Defamation Act 2013 can now be evaluated from this perspective. First, as pointed out at the start, it must be repeated that one of the main drivers of legal reform was the chilling effect of the common law of defamation on free speech. It is submitted 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 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. [21] 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.[22]

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',[23] which combined to place a de facto reverse burden of proof on the defamation defendant.

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[20] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 p.201D with Lord Cooke of Thorndon and Lord Hobhouse of Woodborough concurring.

[21] See Singh, H. 'The libel survivor' (2011) Legal Week 13(32) 20-21.

[22] *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.

[23] Milo, note 14 p. 11.

If one accepts that there is no inherent reason to accord such advantage to the defamation defendant, 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 need to be removed. A level playing field needs to be ensured in the defamation trial. Now the Defamation Act 2013 itself must be scrutinised to see whether and to what extent it succeeds in restoring the balance between defamation claimants and defendants.

## The Defamation Act 2013

A good starting point is to examine whether and to what extent the 2013 reforms addressed Milo's 'potent trilogy': the assumptions of falsity, harm and strict liability.

At the debates for the Defamation Act 1996, 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,[24] 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 such a change in the Defamation Bill because 'proving a negative is always difficult'.[25] 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 succeed in proving their case on the balance of probabilities, they would then have done so like any other civil litigation claimant.[26] 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, for instance, Jimmy Savile, for whom cross-examination may well have been too much of a risk.

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. 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. 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,*[28] a case which concerned serious allegations made in British newspapers against the claimant by his ex-wife. The 'meaning hearing' was relatively straightforward, with the statements relied on by Mr Lachaux found to be defamatory.

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[24] *Hansard* HL Deb 2 Apr 1996: Col 242.

[25] Ministry of Justice, *Draft Defamation Bill* Consultation Paper CP3/11, March 2011, para. 144: '…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.'

[26] Robertson, G. QC, 'Put burden of libel proof on claimants', *The Guardian*, 25 February 2013, available at <https://www.theguardian.com/law/2013/feb/25/libel-laws-speech-uk-expensive>, last accessed 02/04/2019.

[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: '(2) 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 W.L.R. 437.

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)'.[29] 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).[30] The Court of Appeal agreed with the reasoning of Tugendhat J in *Thornton v Telegraph Media Group Ltd*,[31] 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.[32] Following this judgment, some commentators rightly observed: '…it seems fair to say that reports of the death of the libel writ have been greatly exaggerated'.[33]

The Supreme Court, however, disagreed with the Appeal Court's interpretation of this section.[34] It argued that 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 would have been achieved – and the Act is clear that it intended in section 1 to make a significant amendment to the common law.[35] 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.[36] The focus therefore is not only on the meaning of the words but on their actual or likely impact.[37] 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.[38]

The significance of this decision is 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.'[39]

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[29] 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.

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

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

[32] *Lachaux* Appeal note 30 para 44.

[33] 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, available at 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/ (last accessed 3 April 2019). For further discussion of the Appeal Court's decision see Bennett, T.D.C. 'Why so serious? Lachaux and the threshold of "serious harm" in section 1 Defamation Act 2013' JML 2018, 10(1), 1-16 and case comment, 'Proof of serious harm' CL 2015, 20(3), 100-102.

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

[35] Ibid, para 13.

[36] Ibid, para 12.

[37] Ibid, para 14.

[38] Ibid, para 15.

[39] Canneti, R. 'Rewriting the Defamation Act?' 169 NLJ 7845, 7. For another comment on the case see Dobson, N. 'Defamation & 'serious harm' post Lachaux' 169 NLJ 7848, 13.

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.[40] The main contention in favour of such restriction relate to the chilling effect that the common law libel laws had on free speech, the 'McLibel' litigation[41] being 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 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.[42] Section 1(2) also gave rise to interpretational difficulties.

Following the lead of the Appeal Court's decision in *Lachaux*, it was not surprising that the court in *Burki v Seventy Thirty Ltd*[43] 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). 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. This followed the lead of the Appeal Court in *Lachaux* in upholding the legal inference of damage. 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.'[44] The Supreme Court's decision in *Lachaux* has now surely toppled this 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.

The presumption of falsity next needs to be addressed. Under the common law, upon proof by the claimant that a defamatory statement of fact[45] 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.[46] 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.'[47]

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[40] 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.

[41] Supra note 22.

[42] Section 1(2).

[43] [2018] EWHC 2151 (QB); [2018] 8 WLUK 144 (QBD).

[44] Bennett, T.D.C. 'An inferential house of cards – serious financial loss under section 1(2) Defamation Act 2013: Burki v Seventy Thirty Ltd & Ors' (2019) CL 24(1), 34-37.

[45] 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.

[46] Parkes, R., Mullis, A., Busuttil, G. *et al*, *Gatley on libel and slander* (12th edn, incorporating Second Supplement, Sweet & Maxwell 2017) para. 11.4.

[47] *Hansard* HL Deb col 240 (2 April 1996). 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.

However, policymakers, jurists and the commentariat proved to be remarkably resistant to the idea of abolishing this presumption, and it remains firmly entrenched. Both the Faulks Committee[48] and the Neil Committee[49] rejected changing it. The Court of Appeal in *Jameel (Mohammed) v Wall Street Journal Europe SPRL (No.3)*[50] remarked obiter that suggesting a reversal of this reverse burden of proof was going too far, as it would require a major change in the law of defamation.[51] Even the European Court of Human Rights has 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 of the European Convention on Human Rights, which protects freedom of speech.[52] Thus policymakers decided that the presumption should be retained. 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 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. [53]

It is 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.[54] 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.[55] Therefore an individual's reputation is determined as a matter of objective fact.[56] 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 Milo identified as being problematic in the common law of defamation clearly remain fundamentally unaltered by the Act. 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

[48] Report of the Faulks Committee on Defamation (Cmnd 5909) (1975). This committee on defamation was appointed in June 1971 to consider whether, in the light of the working of the Defamation Act 1952, any changes were desirable in the law, practice and procedure relating to actions for defamation.

[49] UK Supreme Court Procedure Committee *Working Group on Practice and Procedure in Defamation* (1991). The findings of this committee were instrumental to the promulgation of the Defamation Act 1996.

[50] [2005] EWCA Civ 74; [2005] Q.B. 904 para 57. (For the appeal to the HL on other issues, see [2006] UKHL 44; [2007] 1 A.C. 359).

[51] Ibid. para 55.

[52] *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.

[53] Ibid.

[54] *McPherson v Daniels* (1829) 10 B & C 263 at 272. *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772; [2003] E.M.L.R. 218 para 33.

[55] Milo, note 14 p. 30. See also Brown, R.E. The Law of Defamation in Canada (1994) vol 1, p. 17.

[56] Parkes *et al* note 46 para. 11.1.

perspective, overall the Act still amended the law in a piecemeal rather than a revolutionary fashion. This 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. Descheemaeker argues that there is no reason why the tort of negligence could not prima facie extend the scope of its protection to reputation.[57] In fact, he points out that '…contemporary legal history has witnessed the constant infiltration of the law of defamation by negligence.'[58] The reason for this relates to his observations that fault, having been absented from the elements of defamation more or less because of the vagaries of the tort's peculiar history,[59] is increasingly evident in defamation, in some or other form. 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. In this way, according to Descheemaeker, 'responsible journalism' in the defence may or may not be synonymous with the taking of reasonable care, but it is clear that it cannot be very different.[60] Put another way: 'The standard of liability is strict, but defeated by a *culpa*-shaped defence.'[61] 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 court of the defendant and not the claimant.

A brief sojourn to the United States is informative in this regard. 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. The rule was stated in *New York Times v Sullivan* 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. [62]

The 'actual malice' requirement was later extended to public figures as well,[63] and although claimants who are neither public officials nor public 'figures', do not have to prove actual malice, they still need to prove fault.[64] If the claimant can only prove carelessness, they can only claim special damages, and will have to prove actual loss;[65] 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. [66] In brief, defamation law in the United States provides a

[57] Descheemaeker, E. 'Protecting Reputation: Defamation and Negligence' (2009) 29 OJLS 603-641.

[58] Ibid, 604.

[59] Ibid, 625-626.

[60] Ibid, 639.

[61] Ibid.

[62] 376 US 254 (1964), 279-280.

[63] *Curtis Publishing Company v Butts* (*conjoined with Associated Press v Walker*) 388 U.S. 130 (1967).

[64] *Gertz v Robert Welch* 418 U.S. 323 (1974).

[65] Albeit this can include for example emotional distress caused, job loss etc.

[66] *Gertz note* 64 348-349.

paradigm for fault-based liability, where the burden of proof is firmly on the claimant and damages are calculated in a clearly defined manner. The US example clearly illustrates what a true commitment to the protection of free speech entails vis-à-vis defamation law. From a free speech perspective it is unfortunate that defamation remains a tort of strict liability.

Given that the fundamental structure of the common law of defamation was left intact by the Act, the next question is whether the changes that are in fact promulgated go far enough to address the issues that led to the legislative reform. Certain effects may be very difficult to gauge– how exactly does one measure the impact on freedom of speech, for example? Others may be easier as empirical 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.

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*.[67] The issue before the court was purely that of meaning, namely of the words' [h]e tried to strangle me' written by the defendant Mrs Stocker to her ex-husband's new partner in 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'.[68] The Supreme Court disagreed. Affirming the single meaning rule, the court held that the words had to be taken together so as to determine what the ordinary reasonable reader would understand them to mean.[69] Taking into account the particular context in which the statement was made,[70] the Court held that the ordinary reader of the Facebook post would have interpreted it 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 (substantial truth) should succeed.[71]

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. From a number of cases decided by Nicklin J it is clear that, in accordance with the overriding objective of the Civil Procedure Rules, a hearing to determine meaning

[67] [2019] UKSC 17.

[68] Ibid, para 16.

[69] Ibid, paras 23-26.

[70] Ibid, paras 34-38.

[71] Ibid, paras 61-62.

should be held at an early stage and before service of the Defence.[72] What is more, failure to do so could entail costs penalties. [73]

Not using a jury is in itself already a cost saving measure.[74] Furthermore, one of the issues that drove libel reform was the occurrence of several high awards by juries, which subsequently had to be reduced on appeal.[75] In *Sutcliffe v. Pressdram*[76] Lord Donaldson M.R. and Nourse L.J explained why the *quantum* of libel damages has historically been on a vastly different scale to awards made in, for instance, 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'. Although the remedies in defamation include injunctions, published corrections, apologies or statements in open court under the Civil Procedure Rules,[77] the main remedy remains an award of damages.[78] But libel damages are now subject to a notional ceiling which rises with inflation,[79] with the current ceiling in the order of £275,000.[80] This combined with the demise of the libel jury should substantially lower damages awards.

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

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.[81] 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 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.'[82]

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[72] *Morgan v Associated Newspapers Ltd* [2018] EWHC 1850 (QB), *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB).

[73] *Poroshenko v BBC* [2019] EWHC 213 (QB) para 51. The judge awarded costs against the claimant for unduly obstructing an early resolution of meaning.

[74] Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill: Consultation* (2011), p. 3. See also Ministry of Justice, *Draft Defamation Bill: Consultation* (2011) para 95.

[75] For example, in *John v Mirror Group Newspapers* [1996] 2 All ER 35 the jury awarded Elton John a total of £350,000 in damages. The Court of Appeal later reduced this to £75,000. In *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152 the European Court of Human Rights held that an award of £1.5 million made by a jury against the defendant was an infringement of Article 10 of the European Convention on Human Rights.

[76] [1990] 1 All ER. 269, per Lord Donaldson M.R. para 281.

[77] Para.6, Civil Procedure Rules 1998/3132, Practice Direction 53.

[78] *Cairns v Modi* [2012] EWCA Civ 1382; [2013] 1 WLR. 1015.

[79] Note 77 para 6.1. 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).

[80] This amount was announced in *Simmons v Castle* [2012] EWCA Civ 1039 by the Court of Appeal as from April 1, 2013 as forming the proper level of general damages in all civil claims (including defamation and misuse of private information) for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit or (v) mental distress.

[81] Mullis, A. and Scott, A., 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) MLR 87.

[82] Ibid, 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).[83] CFAs provide for success fees as a 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. Take for instance the 2017 Supreme Court case *Times Newspapers Ltd v Flood.*[84] The central question was whether the claimants were entitled to recover their entire costs (some £1.6 million comprising base costs and the additional liabilities by way of success fee and ATE premium), which far outstripped their damages awards of £60,000.[85] What is more, these were awarded even though the defendants had largely succeeded with their respective defences. It was contended that the costs order infringed the publishers' rights under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[86]

Here we should note that there were governmental proposals for costs reforms [87] designed to give effect to Lord Justice Jackson's recommendations on civil litigation funding and costs,[88] and to try and achieve parity with the implementation of qualified one way costs shifting measures introduced for personal injury claims in terms 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 opponents, a transitional order preserved the pre-LASPO position in specific categories of litigation, including publication cases such as privacy and defamation cases.

Lord Neuberger interpreted the Strasbourg Court's decision in *MGN v UK*[89] as meaning that, although 'article 10 is [not] automatically infringed in every case,'[90] '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'.[91] 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.[92] However, 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.[93] It also found that amending the costs order would infringe another Convention right, namely the right to property under Article 1 of the

[83] 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.

[84] [2017] UKSC 33; [2017] 1 WLR. 1415.

[85] Ibid.

[86] Ibid, para 1 per Lord Neuberger.

[87] Ministry of Justice, *Costs protection in defamation and privacy claims: the Government's proposals* (2013) 4.

[88] Jackson Report, supra note 79.

[89] (2011) 53 EHRR 5.

[90] *Flood* note 84 para 34.

[91] Ibid, para 42.

[92] Ibid, paras 42 and 45.

[93] Ibid, paras 46-48.

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.[94] This decision reflected the uneasy situation with the continuing application of the 1999 Act regime,[95] permitting the recovery of additional liabilities in publication cases.[96]

In the end, following consultation, the government decided not to proceed with the costs protection proposals as set out in the consultation.[97] But, in terms of Part 2 of LASPO 'success fees' are, from 6 April 2019 no longer recoverable for new defamation and privacy 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, ATE insurance premiums 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.[98]

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. As to costs, the effect of the demise of CFA's can only be lauded from a free speech perspective. 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.

In short, the changes made by the 2013 Act as they impact defamation defendants can be summarized as shrinking the potential pool of defendants, 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) and high costs, even after the abolition of CFAs, remain 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 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, actionable per se with 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.

What is more, the Act 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 being that in enlarging protection for free speech, the standard for liability should more closely approximate that of negligence.[99] It is also argued that, as far as the chilling of free speech is concerned, the drafters of the legislation should have taken into

[94] Ibid, paras 54 and 56.

[95] By operation of the LASPO (Commencement No. 5 and Saving Provision) Order 2013.

[96] Wills, A. 'Flood v Times Newspapers, CFA appeals dismissed, future of the scheme left open' 20 April 2017, available at https://inforrm.org/2017/04/20/case-law-flood-v-times-newspapers-cfa-appeals-dismissed-future-of-the-scheme-left-open-aidan-wills/, last accessed 4 April 2019.

[97] Ministry of Justice, *Costs protection in defamation and privacy claims: the Government's proposals, The Government Response* (29 November 2018).

[98] 'Conditional fee agreements to be abolished in defamation cases' (2019) CL 24(1), 4-5.

[99] Descheemaeker, E. 'Protecting Reputation: Defamation and Negligence' (2009) 29 OJLS 603-641.

account the impact of privacy law and data protection law,[100] as well as areas such as the law on public interest disclosures, or 'whistleblowing'.[101] Concerns are also raised that the Defamation Act 2013 lags behind developments in information technology and the concomitant speech implications of, for example, user-generated platforms.[102]

Against this background, and especially given the fact that the law does not change the key issue of the reverse burden of proof, the Act's treatment of the defamation defendant now merits attention.

## Defences

The burden of proof still lies mostly with the defendant, and the larger part of the Act deals with defences, reflecting the common law position. The question therefore is: did changes to defences relevant to this discussion succeed in levelling the playing field between defamation claimants and defendants? How far do they redress the balance in favour of the robust exercise of free speech? Although the Act states that it abolished the three main common law defences, in reality it did no more than repackaging each of them with a statutory variant that amended the defences to varying degrees.

The common law defence of 'justification', and its successor remain 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.[103] Section 2 of the Act, the defence of truth, is a faithful codification of the prior position. The same critique levelled against the common law defence of justification can be raised against this defence, namely: Why should the burden 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. It has already been shown above how US law in this regard presents an entirely workable solution.

Section 3 of the Act replaces the common law defence of 'fair comment' (or 'honest comment'[104]), 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 least implicitly. 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

[100] 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.

[101] Lewis, D, 'Whistleblowing and the law of defamation: does the law strike a fair balance between the rights of whistle-blowers, the media, and alleged wrongdoers?' (2018) Ind.LJ 339.

[102] 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 & Gillies, L. E. (eds), *The Legal Challenges of Social Media* (Edward Elgar 2017), Ch. 10; Lewis, D. note 101.

[103] Defamation Act 1952, section 5.

[104] *Joseph v Spiller* [2010] UKSC 53.

factually incorrect statements. The common law defence of honest comment was therefore clearly important in terms of freedom of speech. In essence it allowed as a defence that the statement was a piece of criticism or opinion *based upon true facts*. Honest opinion as a defence related mostly to editorial comments, etc. It had to be an opinion, and not a statement of fact, and had to indicate in either general or specific terms, what the basis for the opinion was. Further, it had to be an opinion capable of being held by an honest person. Under the common law this defence was defeated if it could be shows that the defendant was acting with malice. Section 3(5) instead states that the defence is defeated if it can be shown that the defendant did not actually hold the opinion. Section 3 further differs from the common law in three important respects, which also indicate a significant liberalisation of the defence:[105] It does not require the opinion to be on a matter of public interest; 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; and 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 they were apprised at the time of the statement.

The Act's extension of the defence of privilege is also significant. One of the most serious points of criticism against the common law of defamation was that it stifled academic and scientific debate. Take as an example the case of Simon Singh, a scientist who was found at first instance[106] to have defamed the British Chiropractic Association (BCA) when he criticised claims regarding its treatments in an article in the Guardian. Although Dr Singh's appeal against this decision succeeded,[107] the point was 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 by powerful lobbies such as the BCA to stifle criticism. [108] It is therefore a very welcome development that the 2013 Act by section 6 introduced a defence for the publication of peer-reviewed statements, and reviews of such statements, in scientific or academic journals. To date no major cases relying on this defence have been reported – a fact which may be interpreted either way vis-à-vis the efficacy of section 6.

Another important is to be found in section 10 which replaces the common law defence of 'innocent publication' aimed at those who do not have any editorial control over the material they handle. It removes the jurisdiction of courts in England and Wales to hear defamation actions against secondary publishers of defamatory statements, or as it clarifies in subsection 1: '…a person who was not the author, editor or publisher of the statement complained of'. The important proviso is that this is unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. 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, and online publications who at common law, were deemed to be publishers and as such potentially liable. 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) 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. 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

[105] Mullis and Scott 2014 note 81 pp. 92-95.

[106] *British Chiropractic Association v Singh* [2009] EWHC Civ 350.

[107] Ibid, para 33.

[108] For a first-hand account of Dr Singh's experience of the censoring effect of libel actions, see Singh, H, 'The libel survivor' (2011) LW 13(32) 20-21. See also Barendt, E, 'Science Commentary and the Defence of Fair Comment to Libel Proceedings' (2010) 2(1) JML 43-47.

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[109] or common law defences of innocent dissemination.[110]

This brings us to the observation that instead of promoting free speech, some of the protections created by the Act may actually work in such a way as to inhibit it. Section 5, a new defence introduced specifically to provide a defence to operators of websites, is a case in point: Should an internet intermediary be sued in defamation, it can raise the defence of averring that the statement was not posted by itself but by another.[111] However, the defence is defeated if the claimant shows that he could not identify the person who posted the statement,[112] he gave a notice of complaint regarding the statement to the website operator,[113] and the operator then failed to respond to such notice in accordance with the Defamation (Operators of Websites) Regulations 2013.[114] 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;[115] 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 that 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.[116]

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 s. 15 is that the matter reported must be of public interest – which brings us to the next defence namely Section 4 of the 2013 Act, '*Publication on a matter of public interest*'.

Section 4 abolishes and replaces the common law specialised 'responsible journalism' defence, commonly known as the 'Reynolds defence', which arose from the case with the same name.[117] The

[109] Defamation Act 1996, section 1.

[110] 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), [2011] 1 WLR 1743, 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.

[111] Section 5(2).

[112] Section 5(3)(a).

[113] Section 5(3)(b).

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

[115] 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.

[116] Jones, note 100.

[117] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 (hereafter '*Reynolds'*).

question was raised whether there should be a generic category for media reports covering political information and debate. The House of Lords by Lord Nicholls stated:

> …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.[118]

The Court formulated ten factors to be taken into account when assessing whether the defence should succeed, such as the seriousness of the allegation, whether the subject matter was of public concern, the source of the information, steps taken to verify the information, whether comment was sought from the plaintiff, etc.[119] Subsequently in *Jameel v Wall Street Journal SPRL (No.3)*[120] 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 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.[121] It is important to note that both of these tests were objective, and furthermore 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.[122]

Section 4 of the 2013 Act abolishes the Reynolds defence. It states that the defendant can raise as a defence that the statement complained of was, or formed part of, a statement on a matter of public interest; and that the defendant reasonably believed that publishing the statement complained of was in the public interest.[123] When 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.[124]

In effect the section replaces the 'responsible journalism' criterion (as measured by the ten factors outlined in *Reynolds*) with that of 'reasonableness of belief'. But, does this entail any substantive change? In the light of relevant case law, the answer seems to be both yes and no.[125] 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.[126] This was evident from both the first instance and appeal cases of *Economou v de Freitas:*[127] Lady Justice Sharp in the Appeal

[118] Ibid, para 205.

[119] Ibid, paras 204-205.

[120] [2006] UKHL 44; [2007] 1 AC 359, paras 48-49.

[121] Ibid, para 55.

[122] Ibid, para 56.

[123] Section 4(1).

[124] Section 4(4).

[125] Barendt, E, 'Reynolds revived and replaced', (2017) 9(1) JML, 1-13.

[126] Ibid.

[127] *Economou v De Freitas* [2016] EWHC 1853 (QB); [2017] EMLR 4.

Court[128] stated that the correct approach is to proceed '…on the 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'.[129]

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.[130] 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.[131] 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 correctly state that 'circumspection in the levelling of allegations made is a marker of responsibility'.[132] 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.[133] From subsequent case law, however, it 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 resolved, 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.

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.[134] 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.[135] In both courts it was agreed that '…there has been no monopoly of misery in relation to these events or their outcome'.[136] The claimant de Freitas complained to the police 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 his accuser, Ms Economou, for perverting the course of justice, which upon review was taken over by the CPS. Before the matter could come to trial, Ms Economou, who suffered from bipolar disorder, committed suicide. In seven subsequent news publications her father, the defendant, was highly critical of the CPS and their decision to prosecute his daughter. Although the claimant was not directly named, it was

[128] *Economou v de Freitas* [2018] EWCA Civ 2591, para. 75.

[129] 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 35*9* and *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273.

[130] (2014) 95.

[131] [2001] 2 AC 127, 201 and 193-195, *per* Lord Nicholls, and 237-238, *per* Lord Hobhouse.

[132] (2014) 96.

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

[134] 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 Ent.LR 16.

[135] 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, available at https://inforrm.org/2018/12/05/case-law-economou-v-de-freitas-court-of-appeal-guidance-on-public-interest-defence-dominic-garner/, last accessed 4 April 2019.

[136] Supra note 127 para 3.

relatively easy to identify him as the person who'd been accused of the alleged rape. The defendant relied upon the public interest defence in 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.[137] 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. So, 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,[138] according to *Economou*, section 4 now requires a three-stage enquiry comprising both an objective and subjective element. These questions are: Was the statement complained of, or did it form part of, a statement on a matter of public interest? If so, did the defendant believe that publishing the statement complained of was in the public interest? If so, was that belief reasonable?[139] Clearly, the second question adds a subjective element.

## Conclusion

This article attempted to gauge whether the 2013 Act delivers on the promises of redressing the balance between speech and reputation, primarily by levelling the playing field between defamation claimants and defendants. 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 common law on 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 article 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

[137] 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: supra note 127, para 249.

[138] *Reynolds* note 117 para 55.

[139] *Economou* note 128 para 87.

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.