

INTRODUCTION

Freedom of speech is one of the almost universally accepted cornerstones of liberal democracy. However, its status as a cornerstone never quite seems assured, for it so often clashes with a variety of other rights and interests. These range from the ancient, such as the right not to have your reputation unlawfully besmirched, to more recent, such as the right to privacy and personal data protection. The English common law protecting reputation metastasized into such a restraining influence on freedom of speech that around ten years ago, the UK legislator found it necessary to attempt comprehensive reform by enacting the Defamation Act 2013.

Free speech advocates had long argued that the UK's common law on defamation was too claimant friendly and as such either potentially or actually chilled free speech. The phenomenon of libel tourism to the UK, illustrated by several high-profile cases and arguably the result of the claimant friendly tilt of the law, served to prompt various actors including the United States Federal Government, the European Parliament and the UK Government itself, to call for reform. This culminated in Parliament's ambitious attempt to fundamentally transform libel law in the UK: The Defamation Act, 2013 (*'the Act'*). A decade hence and significant case law on the Act mean that it is now possible to analyse the success of this attempt. Specifically, the question may be asked whether the Act succeeds in redressing the balance between the protection of reputation and freedom of speech,¹ one of the stated aims of the legislative reform.

To answer this question an examination of the Defamation Act 2013 itself, and the case law it has engendered is the obvious starting point. In addition, a comparative analysis of other jurisdictions is not only useful in this analysis but arguably imperative: Transnational pressures played a significant role in prompting the local calls for reform that culminated in the Act. Furthermore, in an increasingly globalised and interconnected world reputation rights and freedom of speech are both issues that transcend borders. National and international courts continue to grapple with how, and how far, to protect personality rights such as privacy, dignity and reputation and freedom of speech, and how to balance them when they so often conflict with each other. Many lessons can therefore be learned from key jurisdictions.

¹ Throughout the book, the terms 'freedom of expression', 'free speech' and 'freedom of speech' are used synonymously.

Much has been written about the disparate topics covered in this research, i.e. defamation and freedom of speech, broadly speaking. This book offers a comparative analysis of select jurisdictions, chosen for their differing stances, which assist in shedding light on the way in which the Defamation Act 2013 has so far been, and may be developed and interpreted in order to truly redress the balance in favour of freedom of expression in England and Wales.²

GENERAL BACKGROUND

A wealth of information exists about both the right to freedom of speech and defamation,³ and much has also been said about the cross-boundary implications of differential national treatment of (especially) libel and freedom of speech.⁴ However, it had been argued for some time that the English common law was inordinately biased in favour of defamation claimants – England was routinely referred to as the world’s defamation capital,⁵ and the European Parliament, for example, in May 2012 termed England and Wales ‘the most claimant-friendly in the world’.⁶ These factors combined to have a chilling effect on freedom of expression, in that the mere threat of a libel action could serve as a deterrent to fearless expression.⁷ Since such a chilling effect is in reality a form of self-censorship, it is particularly difficult to gauge. Nevertheless, as will become clear from the discussion in chapters 1 and 2, there was compelling evidence of this chilling effect – enough concern was raised both internationally and locally to more or less lead to the very enactment of the Defamation Act 2013. This has also led to concerns about ‘libel tourism’ - the practice of forum-shopping for a jurisdiction favourable to libel claimants. This term referred specifically to England and Wales for its relatively generous, jury-driven libel awards. In a way, libel tourism itself could be viewed as merely a symptom of the bigger problem, namely the chilling effect English common law of defamation had on the right to freedom of speech. One could also approach this problem from the other direction by examining the extent to which the right to freedom of expression itself figures in defamation law. The notion of freedom of expression as a defence is not foreign to UK jurisprudence: Barendt points out that prior

² References to English law throughout this book should be read as the law applicable to England and Wales. Note that Northern Ireland declined to adopt the Defamation Act 2013.

³ Barendt, E *Freedom of Speech* (2nd edn OUP, Oxford 2005), chapter 19 ‘Libel and Invasion of Privacy’, 198-230.

⁴ Jones, M ‘EU Law Relating to Online Infringement of Personality Rights – is EU Law Effective in Preventing Forum Shopping for the Pursuit of Actions Arising from Online Infringement of Personality Rights?’ in Weaver, RL, Gilles, W *et al* (eds), *Privacy in a Digital Age: Perspectives from Two Continents* (Carolina Academic Press, Durham, North Carolina, 2017) pp 47-72.

⁵ Kenyon, Andrew T *Defamation: Comparative Law and Practice* (London: UCL Press (now Routledge) 2006) p 6.

⁶ European Parliament Resolution of 10 May 2012 (2013/C 261 E/03), paras C-E.

⁷ The Chilling Effect in the UK has been proven empirically for as long as twenty years: Barendt, E, Lustgarten, L, Norrie, K and Stephenson, H *Libel Law and the Media: the Chilling Effect* (Clarendon Press 1997) 191.

to its recognition as a fundamental right in the Human Rights Act 1998 (HRA), freedom of expression had ‘mostly been treated as a *defence* or as an *exception* or *qualification* to other well-established legal rights, such as the right to reputation.’⁸ The question is whether the legislative reform in the Defamation Act 2013 sufficiently addresses the inhibitory effect of the common law of defamation on free speech – and to what extent freedom of expression as such play a role in the application of the reformed law.

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

Since the coming into effect of the Defamation Act 2013 several important cases have been decided which signal the direction in which the Act’s impact is heading. But further developments and interpretations may yet signal a change of course. In a newly reformed and developing area of law, it is useful to compare developments in other key jurisdictions. A good place to start is by examining practice and regulation in a jurisdiction where freedom of expression is strongly protected, such as the United States of America.⁹ In addition, given the European Union’s concerns about libel tourism in England and Wales, it is useful to examine also a continental jurisdiction – such as Germany, being a leading EU state. Germany also makes a natural choice as it is a jurisdiction in which freedom of speech and the right to a reputation are constitutionally balanced¹⁰ and therefore German law seems to occupy the middle ground between the perceived primacy of freedom of speech in the USA versus the perceived primacy of defamation in England and Wales (at least, prior to the reforms in 2013). Relevant jurisprudence from the European Court of Human Rights (ECtHR) also deserve scrutiny due to its continuing gravitas in the development of UK law in general and personality rights in particular.

⁸ Barendt, *Freedom of Speech* note 3, 41.

⁹ For example, the First Amendment accords protection against pre-publication censorship or ‘prior restraint’ – see the landmark cases of *Near v Minnesota*, 283 U.S. 697 (1931) and *New York Times Co. v United States*, 403 U.S. 713 (1971).

¹⁰ German Constitution, Article 5.

This book proceeds from the fact that the UK recognised that freedom of speech was being limited in England and Wales through its defamation laws, and acted on that recognition by promulgating the Defamation Act 2013. The question is whether this goes far enough to adequately redress the balance with freedom of expression. Put another way, the question is whether the enactment of the 2013 Act rings the death knell for defamation's chilling effect on free speech in England and Wales. If the number of suits pursued is any indication, the answer may be positive. There has been a pronounced drop in the number of libel suits pursued,¹¹ to such an extent that England and Wales can no longer be termed the 'libel capital of the world'.¹² But does that necessarily translate to a positive effect on free speech in England and Wales?

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

CHAPTER SUMMARIES

The book comprises seven chapters: The first chapter provides a brief synopsis of the central theme, the balance between speech- and reputation rights, and sets the scene for the more detailed discussions in the chapters to follow.

Chapter 2 explains why the UK Parliament deemed a wholesale reform of English defamation law necessary. In the main, there were a few key failings in the pre-reform common law of defamation which, it was argued, skewed the law in favour of defamation claimants at the expense of free speech.

¹¹ For example, in 2016 there were only 37 decisions in defamation proceedings, down from 56 in 2015, and only eight of these cases went to trial; see the Inform blog of 5 September 2017 at <<https://inform.org/2017/09/05/using-data-protection-law-to-defend-your-reputation-what-about-the-new-data-protection-bill-michael-patrick-and-alicia-mendonca/>> accessed 22 November 2017. There were 49 reported defamation cases in the UK over the year to the end of June 2017 that made it to a court hearing, down from 86 three years ago, according to research by Thomson Reuters; see Mayhew, F 'Higher Threshold of Harm Has Seen Number of UK Defamation Cases Drop as Celebs Look to Privacy Actions to Fight Libel' *Press Gazette* (London 23 April 2018) <<https://www.pressgazette.co.uk/higher-defamation-threshold-has-seen-number-of-uk-cases-drop-as-celebs-look-to-privacy-actions-to-fight-libel/>> accessed 25 February 2020.

¹² This prompted Barendt to remark that this dubious distinction 'probably now belongs to Sydney' (in his review of Rolph, D's *Defamation Law* (Thomson Reuters, Sydney 2016) in (2017) 2 *Journal of Media Law* 291).

As such it fuelled the forum-shopping phenomenon that came to be known as 'libel tourism' to England, which in turn became known as the 'libel capital of the world'. This chapter also revisits the reasons for the protection of freedom of expression and of reputation.

Chapter 3 examines the reforms in the Defamation Act 2013, its interpretation in significant cases, and its impact on the way libel actions specifically are pursued in England and Wales. It evaluates the efficacy of its reforms against its stated aims, focusing on whether the overarching goals of addressing the problems of libel tourism and the chilling of free speech have been achieved.

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

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

From there the focus shifts to Germany in Chapter 5: given its constitutional balancing of freedom of speech and 'personal honour', it seems to occupy the middle ground between the perceived extremes exemplified in the USA on the one hand, and on the other the common law of defamation prior to its reform in England and Wales.

Chapter 6 analyses relevant decisions handed down by the European Court of Human Rights. The European Court of Human Rights' jurisprudence is very valuable for its highly developed balancing approach and its general reflection of European legal thinking.

Chapter 7 summarises key conclusions from the preceding chapters and offer some ideas about the likely and/or desirable directions further interpretation of the Defamation Act 2013 may take. Best

practices identified in the comparator jurisdictions are revisited as well as pitfalls to avoid. The chapter also briefly examines other, newer legal threats to the exercise of free speech, such as the rapidly developing law of privacy, data protection, and cybersecurity.

The final chapter ends with conclusions about where the law is, where it is headed and whether it has properly dealt with the problems identified with the English common law of defamation. The chapter includes best practices and lessons from the comparator jurisdictions. A few conclusions are proffered regarding the extent to which the Act achieved significant gains in redressing the balance in favour of free speech in the UK.