The UK Defamation Bill 2010: A Review

Jason Bosland examines proposals for amendment of UK libel law.*

Introduction

Over the past year there has been growing scrutiny of the operation of libel law in the United Kingdom. This scrutiny has been driven, at least in part, by the national press and by two freedom of speech lobby groups, Index on Censorship and English PEN, who have led an effective campaign to position English libel law as having a disproportionate and anti-democratic burden on freedom of speech. This campaign has led to a published report calling for substantial reform to the existing libel regime.[1]

The most frequent criticisms directed towards English libel law relate to the cause of action – in particular, its 'burden of proof' – and what are considered to be inadequate defences

The topic of libel reform has also been the subject of a number of recent official inquiries and consultations – in particular, a wide-ranging inquiry into press standards by the House of Commons Select Committee on Culture, Media and Sport,[2] and two separate consultations by the Ministry of Justice.[3] The reform recommendations from these various inquiries were considered by a Working Group on Libel Reform, established by former Lord Chancellor Jack Straw.[4] The Working Group's preferred options, in turn, effectively formed the basis of the previous UK government's commitment to libel reform[5] – a commitment which, at least in principle, the new coalition government has agreed to continue.[6]

On the 26 May 2010, Liberal Democrat peer Lord Lester introduced the Defamation Bill 2010 into the House of Lords in an attempt to deal with the more substantive shortcomings of libel law in the UK. While the new coalition government has not yet expressed public support for the Bill, it is certain to provide a starting point for further development and rigorous debate. This article canvasses the perceived problems with the current law and comments on the solutions proposed in Lord Lester's Bill.

Background – Perceived 'Problems' with English Libel Law

The debate over libel reform has centred around three perceived 'problems' with current English libel law,[7] each of which is said to cause a stifling of freedom of speech: the substance of the law (the cause of action and defences); the prevalence of 'libel tourism'; and, the costs associated with libel litigation. A legislative amendment to deal with the specific issue of costs in libel litigation was attempted earlier this year but was defeated at the committee stage in the House of Lords.[8] It remains unclear, considering the strong criticisms directed at the proposed amendment,[9] whether the coalition will seek to resuscitate this reform initiative in its current form. This article will not consider the costs issue further.

Cause of action and inadequate defences

The most frequent criticisms directed towards English libel law relate to the cause of action – in particular, its 'burden of proof' – and what are considered to be inadequate defences.

Libel is complete as soon as the defamatory allegations concerning the claimant are published. This means that a claimant is not required to prove that the published allegations are false[10] and general damages are presumed. Rather the burden is on the publisher to rebut the 'presumption of falsity' by proving that the allegations are true (otherwise known as the defence of 'justification').[11] Truth, however, will sometimes be difficult, if not impossible, to prove.[12] Moreover, even where truth can be established it will often lead to protracted and expensive litigation. Absent any other defence, these evidentiary burdens are said to have, as it is often called, a 'chilling effect' on speech.[13] Due to this chilling effect, it has frequently been argued that this burden of proof needs to be reversed.[14]

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* This article was written prior to the release of the Explanatory Notes to the Defamation Bill (available at http://inforrm.files.wordpress.com/2010/06/defamation-bill-2010-_explanatory-notes_.pdf). The Explanatory Notes, however, do not alter the author's interpretation and opinion of the Bill.

1 English PEN and Index on Censorship, *Free Speech is Not For Sale* (2009), available at < http://libelreform.org/reports/LibelDoc_LowRes.pdf> (last accessed 11 June 2010).

2 House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>.

3 Ministry of Justice, *Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Response to Consultation* (24 September 2009)
available at <https://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf>; Ministry of Justice, *Defamation and the Internet: The Multiple Publication Rule* (23 March 2010), available at <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>.

4 Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), available at <http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>.

5 Jack Straw, 'Reform of Libel Laws will Protect Freedom of Expression', *Guardian Online*, 23 March 2010, available at <http://www.guardian.co.uk/media/2010/mar/23/jack-straw-libel-reform> (last accessed 4 June 2010).

6 See *The Coalition: Our Programme for Government*, available at <http://www.libdems.org.uk/siteFiles/resources/PDF/Government/Coalition-Programme.pdf>.

7 It should be noted that these perceived problems do not necessarily represent the views of the author.

8 See *The Conditional Fee Agreements (Amendment) Order 2010*, available at <http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111496510_en_1>. This amendment was introduced following a Ministry of Justice consultation into cost issues in libel litigation: see Ministry of Justice, *Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Consultation Paper*, (24 February 2009) available at <http://www.justice.gov.uk/about/docs/costs-defamation-proceedings-consultation.pdf>; Ministry of Justice, 'Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Response to Consultation', (24 September)
available at <https://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf>.

9 See House of Lords, *Merits of Statutory Instruments Committee – Fourteenth Report* (16 March 2010), available at < http://www.publications.parliament.uk/pa/ld200910/ldselect/ldmerit/94/9408.htm>.

10 See *Belt v Lawes* (1882) 51 LJQB 359, 361; *Reynolds v Times Newspapers* [2001] 2 AC 127, 192.

11 Ibid.

12 On the particular difficulties of proving truth in defamation actions, see G Robertson and A Nicol, *Media Law* (London: Penguin Books, 5th ed, 2008), 145-147.

13 See E Barendt, L Lustgarten, K Norrie and H Stephenson, *Libel and the Media: The Chilling Effect* (Clarendon Press: 1997); A T Kenyon, '*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice' (2004) 28 MULR 406, 407.

14 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 39-40.

In addition to the difficulties faced in establishing truth, it is argued that other defences to defamation also fall short in providing adequate safeguards for freedom of expression. The fair comment defence, for example, will often encounter the same difficulties as the justification defence, with the defendant having to prove the truth of the material upon which the fair comment is based.[15] A particular concern in this regard is the potential stifling effect that this may have on academic and scientific literature and debate.[16] Indeed, the recent litigation against Simon Singh over his criticism of the British Chiropractic Association[17] has drawn attention to what is claimed to be a 'narrow' approach to the fair comment defence.[18]

The main criticism in relation to defences, however, relates to the perception that there is no effective 'public interest' defence to defamation.[19] In 1999, the *House of Lords in Reynolds v Times Newspapers Pty Ltd*[20] expanded traditional common law qualified privilege to provide a 'public interest'/'responsible journalism' defence (called '*Reynolds* privilege'). The defence, however, has been criticised on the basis that the lower courts have frustrated its potential by applying it restrictively. This criticism has continued even following *Jameel v Wall Street Journal Europe Sprl*,[21] where the House of Lords endorsed a broad and flexible approach to the privilege.[22] In addition to concerns over its availability, newspapers and defence lawyers have claimed that the costs associated with complying with and litigating *Reynolds* privilege make it much less useful than it might otherwise be.[23]

Multiple publication rule and internet publication

What is known as the 'multiple publication rule' is also said to present significant problems, especially in relation to internet publications. This rule provides that each separate publication (copy or communication) of material forms a new cause of action.[24] Applying this rule, the courts have confirmed that the one year limitation period will begin to run each time the same article is accessed (downloaded) via the internet.[25] This means that an article, for example, could be the subject of a defamation action many years after its original publication date – perhaps even indefinitely. Obvious difficulties, therefore, arise in relation to the liability for publicly available digital archives and the possibility of having to defend material that was created many years earlier.[26]

Two possible solutions have been advocated as alternatives to the multiple publication rule. The first is to adopt a 'single publication rule', under which only one cause of action can ever arise in respect of *all* copies of defamatory material.[27] Another solution is to impose a one-year limitation period from the date that the material is first published or first appeared on the internet.[28]

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Libel tourism

A further problem identified with English libel law is said to be the phenomenon of 'libel tourism'. Libel tourism describes the situation where a non-English libel claimant seeks relief in the English courts against a non-English defendant for a publication which has not originated in England but which has been published there to at least some extent (ie incidental publication). This arises due to the multiple publication rule and the supposed willingness of the English courts to accept jurisdiction over foreign publications.[29] Thus, the multiple publication rule operates such that an English tort will be committed with each individual publication of defamatory matter *in England*, even where it has originated elsewhere. In turn, English courts will generally accept jurisdiction[30] where a 'real and substantial tort' has been committed in England,[31] judged by reference to the claimant's reputation within the jurisdiction and the extent of publication. This test, according to critics, is currently all too easy to satisfy, allowing foreign claimants with minimal local reputations to seek redress for publications where only a fraction of the total number have occurred in England.

The particular concerns over libel tourism are twofold. The first is a purely domestic concern – that foreign claimants who have suffered more harm in another jurisdiction should not be able to bring their actions in England. The second concerns the chilling effect that libel tourism is said to cause internationally – in particular, that publishers in every other country in the world are currently required to consider the threat of being sued in England for the 'incidental' publication of material that might take place there. This is claimed to have the practical effect of exporting 'draconian' English libel laws to the rest of the world, irrespective of the balance struck between libel and free speech in jurisdictions where publications originate. Indeed, some states in the US, where freedom of speech receives much greater protection than in the UK, have responded to the specific threat of libel tour-

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15 *Lyon v Daily Telegraph Ltd* [1943] KB 746 (CA).

16 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 41.

17 *British Chiropractic Association v Singh* [2010] EWCA Civ 350.

18 See English PEN and Index on Censorship, *Free Speech is Not For Sale* (2009), available at < http://libelreform.org/reports/LibelDoc_LowRes.pdf> (last accessed 11 June 2010), 9.

19 Ibid; House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 41-45.

20 [2001] 2 AC 127 (HL).

21 [2006] UKHL 44.

22 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 41-45
(in particular the summary of submissions).

23 Ibid.

24 This rule was established in the *Duke of Brunswick v Harmer* [1849] 14 QB 185.

25 See *Loutchansky v Times Newspapers Pty Ltd* [2001] EWCA Civ 1805, [73]-[76]. It should be noted that an appeal to the European Court of Human Rights did not find that the publication rule amounted to a breach of Article 10 (freedom of expression) of the European Convention on Human Rights and Fundamental Freedoms: see *Times Newspapers Ltd v United Kingdom* (App no 3002/03 and 26373/03, 10 March 2009).

26 Ministry of Justice, *Defamation and the Internet: The Multiple Publication Rule* (23 March 2010), available at <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>.

27 Ibid, 22 (where this solution was recommended).

28 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 59 (where this solution was recommended).

29 For a recent academic discussion, see R Garnett and M Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5(3) *Journal of Private International Law* 471

30 Either by granting leave to serve outside of the jurisdiction or by rejected an application to stay proceedings on the basis of *forum non conveniens*: see, eg, *Berezovsky v Michaels* [2000] UKHL 25; *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.

31 See, eg, *Berezovsky v Michaels* [2000] UKHL 25.

ism by enacting legislation to prevent the enforcement of foreign libel judgments.[32]

Main features of the Defamation Bill 2010

The Defamation Bill purports to respond to the above shortcomings by limiting the availability of the cause of action and by enhancing the scope of the defences.

Cause of action

Multiple publication

Clause 10 provides a solution to the problems raised by the multiple publication rule. It applies to any publication which (1) is published by the same person on multiple occasions and (2) on each occasion, has the same, or substantially the same, content. It provides that the date of each publication is deemed to be the date of the first publication (clause 10(1)(a)) and that any cause of action is to be treated as having accrued on that date (clause 10(1)(b)). It does not, as suggested elsewhere,[33] reverse the common law rule that each new publication gives rise to a new cause of action. Rather, subsequent publications will form a new cause of action but such cause of action will be said to accrue on the date of the original publication. The practical effect, of course, is that the claimant will be unable to rely on such cause of action for publications which occur after the limitation period.

This is a significant proposal and is likely to resolve many of the difficulties faced by internet publishers and those in control of archives. One potential limitation of the proposal, however, relates to the requirement that the publications be made by 'the same person'. This would appear to exclude, for example, the owners of third party archives and online databases to which material is licensed. The scope of this aspect of the Bill might warrant expansion and should be subject to further scrutiny as to its practical operation.

Bodies corporate

Clause 11 provides that a body corporate must show, in order to pursue an action, that the publication "has caused, or is likely to cause, substantial financial loss to the body corporate". This measure is a response to the concern that corporations can use the threat of defamation litigation to silence critics and stifle freedom of speech.[34]

It should be noted, however, that unlike the changes introduced in Australia in 2005,[35] the proposal does not impose a blanket ban on the ability for corporations to sue. It simply requires that corporations prove the likelihood of financial harm before the court will allow a corporate claimant to pursue an action. One potential issue with this 'hurdle' approach, already raised elsewhere,[36] is that it is likely to lead to increased pre-trial hearings and an increase in litigation cost.

Another concern – and one that needs to be subject to further scrutiny – is that the proposal contains no exception, as in the Australian legislation,[37] which would allow non-government organisations or smaller corporations to sue. This is significant because smaller corporations and especially NGOs are likely to find it much more difficult to prove actual or likely financial loss, yet may nevertheless be rightly seen as deserving claimants.

Substantial harm

Clause 12 provides a mandatory 'strike out' mechanism which would *require* that an action for defamation be struck out unless the *claimant* can show that:

1. the publication has caused substantial harm to the claimant's reputation; or
2. it is likely that such harm will be caused to the claimant's reputation by the publication.

The aim of this provision is to avoid the 'presumption of damage' under the common law. There are, however, two issues with this provision. First, it might be questioned whether this amendment is really necessary considering the existing grounds available to the court to strike out a claimant's case. Thus, on the application of a defendant a court already has the power to strike out a case as an abuse of process where a 'real and substantial tort' has not been committed.[38] Indeed, it is difficult to see how the test of 'substantial harm' would differ from a 'real and substantial tort'. It would appear that the only difference would be that the proposed provision makes strike out mandatory. This leads to the second problem. If strike out is mandatory, it appears that the claimant would have to prove substantial harm prior to going to trial. This will inevitably lead to an increase in pre-trial hearings and an increase in litigation costs. Considering this, it would appear much more sensible to leave the law as it currently stands – where it is incumbent upon the defendant to raise the issue under abuse of process – and reject this proposal.

Multi-jurisdictional publications

Clause 13 attempts to introduce a solution to libel tourism. It provides that where the court is satisfied that the publication has also been published outside of the jurisdiction:

> *no harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of the publication elsewhere.*

A number of questions hang over the operation of this proposal. The first is that it is unclear how looking at the extent of publication *outside* the jurisdiction could sensibly inform the court's assessment of the harm cause by a tort committed *within* the jurisdiction. Rather, it appears that the provision seeks to achieve its aim of combating libel tourism by requiring the court to make a false or fabricated assessment of local harm – false in the sense that the court is put in the absurd position of having to look at 'apples' (extent of foreign publication) under the pretext of assessing 'oranges' (local harm). Surely, pretending that local harm has not been suffered, or has not been suffered to its true extent, is an unsatisfactory way of dealing with the real 'problem' – that is, the ability for foreign litigants to seek redress for that harm.

The second question relates to the compatibility of the provision with Council Regulation 44/2001 (known as the Judgment Regulation), which governs jurisdiction issues in civil litigation in the European Union. The Judgment Regulation states that a person domiciled in a Member State shall be sued in the courts of that state[39] or in the

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32 For a discussion of this, see House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 53. This was prompted largely by the case involving Dr Rachel Ehrenfeld and the action brought by Khalid Bin Mahfouz regarding allegations made in Ehrenfeld's book *Funding Evil: How Terrorism is Financed and How to Stop It*.

33 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>.

34 See, House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < http://www.publications.parliament.uk/pa/cm/cmcumeds.htm>, 46-48.

35 See, eg, *Defamation Act 2005* (NSW), s 9.

36 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>.

37 *Defamation Act 2005* (NSW), s 9.

38 See *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.

39 *Council Regulation 44/2001*, article 2(1).

courts of each Member State where the 'harmful event' occurred.[40] The European Court of Justice in *Shevill v Presse Alliance*[41] held that where a person is sued in the court of the Member State in which he or she is domiciled, the court ***must*** accept jurisdiction and that court has jurisdiction to award damages for all harm caused by the publication. Alternatively, where a claimant seeks to sue a defendant in a Member State in which the defendant is not domiciled, the court of the Member State can award only damage for harm caused by a 'harmful event' in that Member State.

It has been suggested that clause 13 of the Bill, if it were to become law, would be in breach of these rules.[42] This, however, is not the case. Clause 13 does not say anything about the court's jurisdiction; rather, it is directed to whether or not a harmful event has occurred in the UK. A UK court will still be required to accept jurisdiction where the defendant is domiciled in the UK. However, the operation of clause 13 may mean that there is no case to answer in relation to any publication that has occurred in the UK, even if there ***is*** a case to answer for the publication of the defamatory matter elsewhere. ***Shevill v Press Alliance*** makes it clear that this is not inconsistent with the Convention – "the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute… . It is does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim."[43]

Defences

Part 1 of the Bill deals with the defences of truth, honest opinion and responsible publication. Apart from a couple of exceptions, this aspect of the Bill is unlikely to have the intended effect of granting significantly enhanced protection to freedom of speech. This is because many of the proposed provisions simply restate defences already available at common law or repeat defences currently provided for in other statutes.

Truth

Clause 4 of the Bill provides that the common law defence of 'justification' is to be renamed 'truth'. Clause 5, outlining what is required to establish the defence of truth, reiterates the requirement at common law that the matter complained of must be substantially true. In order to establish substantial truth, a defendant may show that the meaning (or meanings) alleged ***by the claimant*** are substantially true (clause 5(2)(a)) – again, a reiteration of the common law. Alternatively, clause 5(2)(b) provides that a defendant can assert that the matter or words complained of have a less serious meaning(s) and that such meaning is substantially true. This, however, would already be available at common law under a *Lucas-Box* plea.[44]

Clause 5(4) simply repeats the justification defence currently available under section 5 of the ***Defamation Act 1952*** (UK). This provision provides that where matter complained of contains two or more distinct allegations and the defendant cannot prove the substantial truth of each allegation, the truth defence will not fail where the allegations that cannot be proved to be true do not materially injure the claimant's reputation having regard to the allegations that ***can*** be proved true.

Clause 5(3), however, contains an amendment to the truth defence that has the potential to have a significant impact on the extant law, depending on how it is interpreted. It provides that:

> *A defence of justification does not fail only because a particular meaning alleged by the claimant is not shown as being substantially true, if that meaning would not materially injury the claimant's reputation having regard to the truth of what the defendant has shown to be substantially true.*

The ambit of this 'exception' to proving the substantial truth of the claimant's meaning is uncertain on the face of the proposed provision. There are at least two possible general approaches that could be taken. The first approach – the broad approach – is to treat clause 5(3) as allowing a defendant to ***admit*** evidence of additional true material in order to show that the claimant's pleaded meaning does not cause further material injury to his or her reputation, even in circumstances where that additional true material is not contained within the matter and, as is required by clause 5(4), does not go towards establishing the substantial truth of a separate allegation complained of by the claimant. It is unclear how the courts would (if, indeed, they would) limit the types of additional material that could be taken into account. One possibility is that it might be confined to material that is currently admissible in mitigation of damages in defamation cases – for example, the claimant's general bad character as it relates to the allegation[45] or facts relevant to the circumstances in which the defamatory allegations were made.[46]

The narrow interpretation, on the other hand, would confine the additional true material to facts the evidence of which has been admitted in reliance of an ***unsuccessful*** justification plea. Clause 5(4) (currently section 5 of the ***Defamation Act 1952*** (UK) already does this in relation to 'partial justification'. At common law, where a claimant alleges that two separate and distinct allegations arise from a publication, a defendant may be able justify one allegation (partial justification) but not the other. However, rather than using partial justification to mitigate damages, as allowed at common law, clause 5(4) provides a complete defence provided that the undefended allegations do not materially damage the claimant's reputation in light of the true allegations. Clause 5(3) would have the effect of extending this beyond 'partial justification' to include all instances where evidence is admitted in support of a truth defence – for example, where evidence is admitted in order to prove the substantial truth of the claimant's meaning or the defendant's meaning under a *Lucas Box* or *Polly Peck* justification plea.[47] Unlike under a broad interpretation, however, it is likely that clause 5(3) could not be used to support the ***admission*** of evidence that was not already admitted in support of a legitimate truth defence. This interpretation might be said to be confirmed by the language of the provision, which requires that regard be had to the "truth of what the defendant ***has*** shown to be substantially true."

Responsible publication

Clause 1 of the Act provides a defence for 'responsible publication on matters of public interest'. This provision requires that the defendant prove:

(a) that the words or matters complained of were published for the purposes of, or otherwise in connection with, the discussion of a matter of public interest; and

(b) the defendant acted responsibly in making the publication.

In deciding whether the defendant acted responsibly, all the circumstances of the case are relevant (clause 1(3)). Sub-clause (4) sets out a list of factors that may be taken in to account, many of which have a counterpart in the list of factors enunciated by Lord Nicholls under existing *Reynolds* privilege. Moreover, it is difficult to see how this defence materially differs from *Reynolds* privilege and why the courts would apply it any less restrictively.

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40 *Council Regulation 44/2001*, article 5(3).

41 *Shevill v Presse Alliance* [1995] 2 AC 18 (Case C-68/93).

42 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>.

43 *Shevill v Presse Alliance* [1995] 2 AC 18 (Case C-68/93), [37]-[38].

44 See *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147.

45 See *Scott v Sampson* (1882) 8 QBD 491.

46 See *Burstein v Times Newspapers* [2001] 1 WLR 579, [41]-[42]; *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540.

47 For a useful discussion of these pleas, see: AT Kenyon, *Defamation: Comparative Law and Practice* (London: UCL Press, 2006), 80-87.

Sub-clause (5) specifies that one of the factors that may be considered when considering whether the defendant acted responsibly is "whether a publication reports accurately and impartially on a pre-existing matter (for example, that there is a dispute between two parties)…". This provision, in effect, provides a statutory recasting of the 'doctrine of reportage' which has recently emerged under the common law as a particular application of *Reynolds* privilege. This doctrine protects the neutral reporting (republication) of allegations originally made by a participant to a dispute or controversy of public interest, provided that such report has the effect of reporting the fact that the allegations were made and not their truth.[49]

Honest opinion

Clause 2 changes the name of the common law defence of fair comment to 'honest opinion', while clause 3 defines its scope. This name change is unlikely to have a significant effect on the scope of the defence, considering the prevailing opinion that the label 'fair comment' is largely a misnomer[50] – something that the Court of Appeal recently confirmed in the case of *British Chiropractic Association v Singh*.[51] Assuming, then, that 'comment' and 'opinion' are treated as roughly synonymous, clause 3 amounts to little more than a restatement of the common law. Thus, as under the common law, the honest opinion defence will be established under clause 3 where the following conditions are satisfied:

- the words or matters complained of relate to a matter of public interest (clause 3(2));
- that the ordinary person would consider the words or matter to be expressions of opinion (clause 3(3)); and
- that an honest person could form the opinion on the basis of proper material (clauses 3(4) and (5)).

Clause 3(6)(c) confirms that the material forming the basis of the opinion need not be referred to in the publication itself, which is consistent with the dominant view of the English common law.[52] Clause 6(b), however, does modify the common law in one important respect: it provides that the honest opinion may be based on facts learned by the defendant *after* the publication of the opinion.[53]

Clause 3(8) deals with the republication of opinion material. It provides, in much the same way as the common law,[54] that a defendant cannot rely on the honest opinion defence if (a) he or she knew that the original author did not in fact hold the opinion or (b) the defendant had reason to believe that the original author did not in fact hold the opinion and published it without further inquiry.

Responsibility for publication

Generally speaking, under the current law – common law[55] and under section 1 of the *Defamation Act 1996* – mere disseminators of material, with the exception of internet service providers and caching services,[56] have the onus of showing that they were not at fault in the dissemination of defamatory material in order to avail themselves of a defence (for example, by showing that they did not have actual knowledge of the defamatory material, did not exercise editorial control or were not negligent as to the content of the publication).

The Bill repeals the section 1 of the *Defamation Act 1996* and replaces it with clause 9(1)(a), which effectively removes the burden on 'facilitators' to prove lack of fault. 'Facilitator' is defined as 'a person who is concerned only with the transmission or storage of the content of the publication and has no other influence or control over it' (clause 9(6)). Significantly, it would appear to provide a defence even where a facilitator has *actual knowledge* of the defamatory matter. The most obvious impact of this proposal relates to internet hosts. Currently, under the *Electronic Commerce (EC Directive) Regulations 2002*, internet content hosts are only protected from liability where they (1) do not have actual knowledge, are not aware of facts or circumstances from which the existence of the matter would have been apparent, or (2) remove content when they become aware of its existence.[57]

Clause 9(1)(b) provides a specific defence for broadcasters of live programmes in circumstances in which it was not reasonably foreseeable that the defamatory words or matters would be published.

Perhaps the most important provision, however, is clause 9(2). It establishes a 'notice and take-down' defence for *any* person, apart from the primary publisher, who is responsible for the publication of defamatory matter. Under this 'notice and take-down' defence, a defendant will have a defence *unless* it can be shown *by the claimant* that:

1. the notice requirements under clause 9(3) have been complied with;
2. the notice period (14 days or such other period as the court may specify) has expired; and
3. the words or matters complained of have not been removed from the publication.

'Primary publisher' is defined as an "author, editor or a person who exercises effective control of an author or editor" (clause 9(6)). Again, the provision allows a defendant to avoid the burden of proving absence of fault at common law by placing the burden on the claimant but it appears that the defence will only be of practical use to those who do not fall within the definition of facilitator under clause 9(1) (which provides a complete defence).

Conclusion

Having provided a short review of the main provisions of Lord Lester's Bill, it is apparent that it does not respond to the perceived problems that plague libel law by undertaking radical or wholesale reform. Rather, it tweaks what already exists. Some of the proposals, as I have indicated, are eminently sensible – for example, the amendment to the truth defence under clause 5(3), the 'notice and take-down' defence and the multiple publication provision. Unfortunately, most of the 'reforms' to the defences simply repeat existing statutory defences or codify those already available at common law, and a number of the proposals – such as the mandatory strike-out mechanism under clause 12 and the measure to deal with libel tourism – heavily miss the mark and must be rejected. Despite its shortcomings, however, the Bill has only received one reading in the House of Lords and has the potential to develop significantly as it proceeds through various stages of debate and redrafting.

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48 For a discussion of this defence, see J Bosland, 'Republication of Defamation Under the Doctrine of Reportage – The Development of Common Law Qualified Privilege in England and Wales' (2011) *Oxford Journal of Legal Studies* (forthcoming), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619735>.

49 See, eg, D Butler and S Rodrick, *Australian Media Law* (Pyrmont: Thompson, 3rd ed, 2007) 85.

50 [2010] EWCA Civ 350, [36].

51 See *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB).

52 For the common law position, see *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916, 918.

53 See P Milmo and WVH Rogers, *Gatley on Libel and Slander* (London: Sweet & Maxwell, 11th ed, 2008) 362, relying on *Lyon v Daily Telegraph* [1943] KB 746 (CA).

54 See the general principles set out in *Vizetelly v Mundie's Library* [1900] 2 QB 170 (CA); *Goldsmith v Sperrings* [1977] 1 WLR 478

55 See *Electronic Commerce (EC Directive) Regulations 2002*, rr 17 and 18.

56 *Electronic Commerce (EC Directive) Regulations 2002*, r 22.