



JUDICIARY OF
ENGLAND AND WALES

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PRIVACY AND THE PRESS: WHERE ARE WE NOW?

“JUSTICE” CONFERENCE

1 DECEMBER 2009

I suppose that when you are asked to say a few words by way of a “keynote speech” it is rather important that you don’t start in the wrong key or hit a bum note. But when I saw the programme one item did rather catch my eye. I am obviously keen not to put the cat among the pigeons. But, speaking for myself, I see no evidence of a current storm – let alone one of which I am at the centre. There may have been a certain amount of activity between 2004 and 2008 (say between *Campbell v MGN* [2004] 2 AC 457 and *Mosley v News Group Newspapers* [2008] EWHC 1777). But things seem to me to have quietened down considerably: I have had no experience, for example, of any contested privacy matters for well over a year.

It is true that there are a number of outstanding issues of principle which are going to need clarification in the near future. It is probably appropriate for me to say a word or two about those and the options they present. Before I do, however, it might be worth just pausing to reflect where we are now and how we arrived at this position. There is, after all, no doubt that there have been very significant changes over privacy and the press since the enactment of the Human Rights Act and the exposition of the law in the *Naomi Campbell* case.

When the question is asked whether we now have a law of privacy, it always seems to me that the natural point of comparison has to be the era that we can now look back on as a bit of a desert on the Article 8 front – namely the 1980s and early 90s.

On 23 April of this year, a *Daily Mail* representative gave evidence before the Parliamentary Select Committee on Culture, Media and Sport which was then looking into press standards and is about to report in the next few weeks. He appeared to acknowledge that this had been a period in which there was such a level of tabloid intrusion into private lives that it gave rise to legitimate public disquiet. Yet he was clearly of the view that things had improved significantly in the interim period.

As you know, the then Home Secretary, in July 1989, set up a committee as a result of this disquiet under the chairmanship of the late David Calcutt QC, with its own premises and staff, to investigate the evidence. As it turned out, this took nearly a year and the report was presented to the next Home Secretary in June 1990.

The immediate recommendation contained in the report was not for legislation at that juncture, because not all the members were in favour of it. What was proposed was the abolition of the ailing Press Council and to give self-regulation a further (supposedly final) chance by setting up the Press Complaints Commission. Nevertheless, it was acknowledged

that legislation for the protection of privacy by means of a statutory tort would be possible. The view was not taken, as many had been suggesting up to that time, that these values were too vague to reduce into legislative drafting.

The two lawyers on the committee (in addition to the Chairman) were John Spencer of Cambridge and myself. We worked out a possible statutory tort that would, if it proved necessary, be workable in practice. It obviously provided for a public interest defence, along similar lines to that contained in the draft PCC Code, attached to the report. That was broadly adopted by the PCC when it came into existence in January 1991.

The statutory tort would in some ways have been less restrictive of the media than the law of privacy as it has subsequently developed. For example, it would have excluded anything touching on the conduct of a business, trade or profession, and it would have been directed purely at the protection of personal life. The idea was obviously to try to prevent any such law being abused to cover up corporate or financial wrongdoing. It would also have excluded anything occurring in a public place. All this now seems rather old-fashioned and simplistic, after two more decades of Strasbourg jurisprudence, in which no such clear cut boundaries are drawn. We were, rather naively perhaps, attempting to achieve certainty and predictability.

Anyway, that was not adopted by the legislature. Instead, ministers were heard to say at the time, on more than one occasion, that it was best to trust an independent judiciary to develop the common law by reference to Articles 8 and 10 of the European Convention. Indeed, that was expressly recognized a few years later by Lord Irvine LC on 24 November 1997, when the Human Rights bill was being debated in Parliament. He said that any privacy law developed by the judges would be a better law because they, after what he described as the “incorporation of the Convention”, would have to balance and have regard to both Articles 8 and 10.

That is not a view one hears voiced these days in political or media circles, since in certain quarters the process is thought to have gone too far. It has become fashionable to label judges, not as independent, but rather as “unaccountable” and as hostile to freedom of speech. Following representations from the *Daily Mail*, the Justice Secretary earlier this year announced that something called a statutory “nudge” may after all be required.

It was suggested last April, by Antony White QC at a conference in London, that, if there is indeed to be such a “nudge”, it may be a good idea to bring the law of privacy into line with the new defence to be inserted by way of amendment into s.55 of the Data Protection Act 1998. This affords protection against criminal liability for a journalist who acts “... in the reasonable belief that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest”: see s.78 of the Criminal Justice and Immigration Act 2008. That is to say, any public interest defence would have to be judged by reference to the perceptions of a reasonable person standing in the journalist’s shoes, as at the time of publication, rather than (as appears to be the case at present) being assessed *ex post facto* by the judge. That is one issue that merits closer consideration

But back for a moment to the early 1990s. What ministers meant, at the time, was of course that judges should develop the existing law of confidence as largely defined by *Coco v Clark* [1969] RPC 41 and, more recently, in the *Spycatcher* case in the House of Lords: *Att. Gen. v Guardian (No 2)* [1990] 1 AC 109, in which Lord Goff, in particular, had referred to what he called the “limiting principles”, whereby obligations of confidence could be overridden if, for example, the public interest required it, or the relevant information was so far into the public domain that there was nothing confidential left to protect, or where the information was so trivial as not to justify the intervention of the law.

For the next decade or so, any such development was rather confined by the traditional perception that duties of confidence could only be enforced in the context of a pre-existing relationship, recognized either in equity or in contract.

The law did extend so far as to acknowledge that, if confidential information was leaked to a journalist by someone who was subject to such a duty, then the journalist too could be regarded by extension as similarly constrained. But there were some who argued that, e.g. in a case like that of Gordon Kaye, a corresponding duty should be imposed where it was obvious just from the intimate nature of the information itself, or from the circumstances in which it was purloined, that there should be such a duty. In other words, it was artificial to insist upon the requirement for a pre-existing relationship.

But we remained at an impasse and any judicial development, although contemplated and rather encouraged by ministers at the time, had at that point hit the buffers.

It is probably fair to say that little happened on the domestic front until after the Human Rights Act came into effect in 2000 and, in particular, until May 2004 when the House of Lords addressed the facts of the Naomi Campbell case (decided 3-2 on the actual result): *Campbell v MGN Ltd* [2004] 2 AC 457. We should not, however, lose sight of the stimulus given by the Council of Europe's 1998 resolution 1165, which made two crucial points.

First, it was said that "... the Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value". We notice there, incidentally, a rather different emphasis to that generally adopted in the United States under the influence of the First Amendment. Secondly, the Resolution expressly recognized that remedies for infringements of rights under Article 8 should be available to individual citizens directly against private persons or bodies, *including the mass media*, and not merely when it could be shown that a particular Member State had fallen down in its responsibility to provide effective remedies.

Both these principles were reflected a few years later in the House of Lords' decision in the *Naomi Campbell* case. It is necessary also to recall, as part of the important international context, Article 17(1) of the International Covenant on Civil and Political Rights of 1996, to the effect that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

Note there the linking of honour and reputation with privacy – rather as we have seen in later cases in Strasbourg, such as *Radio France v France* (2005) 40 EHRR 29 and *Pfeifer v Austria* (2009) 48 EHRR 8.

What proved to be of special significance in the *Campbell* case was the recognition of two principles in particular. First, that the law might enforce a citizen's reasonable expectation of privacy in respect simply of personal information (i.e. regardless of any pre-existing relationship of confidence). Second, such a right could be enforced horizontally by reference to Article 8, as between citizens. There was opened up the possibility of claims by an individual citizen against a newspaper or media group. That clearly had the potential to make a significant difference, although it was not spotted at the time by most editors just how significant.

Their Lordships sanctioned in that case, and a year later in *Re S (A Child)* [2005] 1 AC 593, what was called the "new methodology" for resolving conflicts between competing Convention rights. This is not so much "judge made" law. It merely provides the framework

within which to achieve Parliament's intentions, as identified in the HRA, and to provide for some form of consistency in so doing. The scale of this innovation was reflected for a time in the outrage voiced in media commentaries.

The methodology has the following consequences:

- (1) No one Convention right can take automatic precedence over another (so that freedom of speech, for example, is not accorded the overwhelming priority that the common law had given to it hitherto in the so-called rule in *Bonnard v Perryman* [1891] 2 Ch 269). That reflects the principle spelt out in Council of Europe's Resolution No. 1165 of 1998.
- (2) It is for judges to weigh up the competing interests, on the particular facts of the case, and to decide if there is a reasonable expectation on the part of the individual claimant in respect of the particular information, and, if there is, to carry out the "ultimate balancing exercise" to decide whether there is nonetheless an overriding public interest in according priority to someone else's freedom of speech.
- (3) This obviously means that generalities will never provide a complete answer, e.g. that the particular claimant is a "public figure" or a "role model" and can therefore expect little or no privacy or, again, that he or she has sought publicity in the past and is therefore to be regarded as fair game by the media.
- (4) This will often involve the judge investigating the defendant's motive for using the right of free speech and grading those motives (as between at one extreme e.g. "political speech" and at the other what has been called in the House of Lords "tittle tattle"). This is a fundamental shift in our approach to free speech, but one expressly acknowledged at the highest level in our jurisdiction..
- (5) The new methodology involved, and particularly at first, a degree of uncertainty in the law and in an editor's ability to judge the likely lawfulness or otherwise of a proposed course of conduct.
- (6) To add insult to injury, it has been said several times that the balancing exercise is one in which the Court of Appeal is unlikely to interfere if the judge has asked himself or herself the right questions – and, let us face it, the questions to be asked are so straightforward that it would be quite difficult to get them wrong.
- (7) So, there being little opportunity for an appeal, the media have nowhere to vent their frustrations other than through personal abuse of the particular judge who happens to have made the decision. Certain individual judges, of course, have been singled out for the treatment – much to the innocent amusement of colleagues and friends. That is easier than going by way of appeal. One in particular has been accused of "moral and social nihilism", "arrogance", "immorality" and, for good measure, also "amorality". Only last April, in his evidence to the Parliamentary Select Committee, the Daily Mail representative told them, for reasons that remain completely obscure, that I had set myself above the legislature. He also reaffirmed the charges of "arrogance and amorality" against me. (He was good enough to add, however, that this was not intended to be anything personal.) This is natural, if there is no other way of letting off steam. I think it simply has to be recognized as an inevitable consequence of adopting the balancing approach and the "intense focus" on the particular facts of the case.

Actually, this *ad hominem* approach does absolutely nothing to further the debate. What would be more constructive would be for those who do not like the way things have gone to challenge the balancing role given to judges by Parliament, in the way expressly foreshadowed all those years ago by Lord Irvine, and to say what they would put in its place. After all, it is tolerably clear that they cannot simply say, "Let's ignore Article 8". Citizens in the UK have been entitled for years to have those rights enforced and protected. Between 1966 and 2000, they had to go to Strasbourg to achieve that. Now, at least for the time being, they can have resort to domestic courts. To put Article 8 into abeyance would simply mean that they would have once again to enforce their remedies elsewhere.

When he was before the Select Committee in April, the man from the *Daily Mail* was asked by one of its members, “If you don’t like how the judges are interpreting the Human Rights Act, would you favour a statutory law of privacy?” His response was that he did not want a law of privacy at all. The logical conclusion of that argument is surely that neither judges nor legislators should give effect to Article 8. Yet that is, as I have suggested, hardly a realistic option. If what he calls “the wretched Human Rights Act” were repealed, we should just be back in the position where individuals would have to go to Strasbourg to vindicate their rights rather than obtain relief in their own courts. It is perhaps worth watching and listening to the session for 23 April on Parliament Live, so that you can make up your own minds as to the quality of the debate.

Another suggestion made was that the law should be “re-calibrated” to give more weight to freedom of speech over personal privacy. No doubt others would agree. But if “re-calibration” is to be attempted, it would be necessary to effect a reconciliation between that exercise and the principle expounded by the Council of Europe, to which I referred earlier, that these two rights are to be regarded as neither absolute nor in any particular pecking order, since they of equal value and status. That has since been endorsed in this jurisdiction on the highest authority in, for example, *Re S (A Child)*.

It always seemed natural to me that if a law of individual privacy were to be adopted and enforced, that should be by way of the legislature. In fact it has happened at one remove as an inevitable consequence of the enactment of the Human Rights Act. Yet even if Parliament had legislated more specifically, whether for the protection of privacy or to give a “nudge” in the opposite direction, the law could only be expressed in general terms, such as contemplated e.g. in the Calcutt Report, or by simply setting Article 8 values alongside those of Article 10. It would be hopeless to try to get down to the level of micro-management and try to anticipate every situation that is likely to come before the courts. One never ceases to be amazed by the extraordinary range of scenarios that present themselves. No legislator could possibly think them up in advance. So, however it is done, there is no other practical way of developing a means of protecting Article 8 rights than by leaving judges to weigh up the competing interests of the parties concerned.

It is true that there remain some important uncertainties of principle confronting courts and journalists at the moment. For example, will the rule in *Bonnard v Perryman* survive scrutiny in the light of the Strasbourg jurisprudence, given that its effect is to build in an automatic priority for Article 10? Is it justifiable to have one test for interlocutory injunctions in a privacy context, governed by s.12(3) of the Human Rights Act, and another for libel cases, governed by *Bonnard v Perryman*? Each of these rules is concerned to afford the appropriate degree of recognition for rights now regarded, apparently, as being under the protection of Article 8.

Again, what is the position in this jurisdiction about photographs taken of celebrities in public places? Is the Princess Caroline case to be taken at face value? Will it only be permitted if it makes a contribution to a public debate? The outcome could have a far-reaching impact on paparazzi and tabloid culture following the Court of Appeal’s inevitably tentative pre-trial decision in *Murray v Big Pictures (UK) Ltd* [2008] EMLR 12 (the J K Rowling case).

A possible view is that, in the UK, the Protection from Harassment Act 1997 goes far enough to protect paparazzi targets in public places. I accept that on its face the Princess Caroline case would appear to go much further, since as Patten J pointed out in *Murray* at first instance, it was not expressed merely in terms of protecting the Princess from physical harassment. It seemed to be the taking of photographs, even from a distance, which would be prohibited – however unremarkable. Of course, I would not suggest that intrusive

photographs taken from a public place of nude sunbathing on private property should be regarded as anything other than an infringement of Article 8. But it may be excessive to render unlawful (say) snapshots of a fully clothed actress strolling down the road for a new tube of sun lotion.

Another topical issue which will no doubt be dealt with sooner or later in Strasbourg is the argument raised in Max Mosley's application to Europe – to the effect that there should be an enforceable right to prior notification to the subject when it is contemplated that there is to be a publication infringing his or her personal privacy. It is an important issue of public policy on which feelings no doubt run high on both sides, but meanwhile it is worth reading the article on the subject by Professor Gavin Phillipson in the first issue of the *Journal of Media Law*. It is entitled *Max Mosley goes to Strasbourg*.

Then there is Antony White's point about bringing in an element of consideration for a journalist's assessment of the public interest. After all, that has to be the test, presumably, when the matter is being assessed by the court prospectively, for the purposes of granting or not granting an interim injunction. Should it be different after the event?

On the other hand, in an amazingly short space of time, a whole raft of sub-principles has begun to emerge from the relatively few cases decided over the last four years. Such unusual situations have presented themselves to the courts, with so many facets in each, that quite a lot of uncertainties have already been ironed out. There is only time for a few examples:

- (1) First, in the context of personal information, it will not necessarily be an answer to say that it is trivial, or that it would fail Sir Robert Megarry's *Coco v Clark* test of having about it the "necessary quality of confidence". If it is intimate and personal, it may still be protected, as the Court of Appeal has confirmed even in relation to the furnishing and domestic hygiene arrangements of Ms Loreena McKennitt in *McKennitt v Ash* [2008] QB 73.
- (2) The fact that you have given interviews or otherwise gone public about aspects of your private life does not mean, in itself, that the relevant "zone" of your personal life is therefore up for grabs generally by others who may wish to explore it or speculate upon it. You can to an extent choose how far to lift the veil: see *Douglas v Hello! (No 6)* [2006] QB 125 and *McKennitt v Ash*, in which Buxton LJ said: "If information is my private property, it is for me to decide how much of it should be published".
- (3) It soon became established in *McKennitt* and in *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, also in the Court of Appeal, that a remedy will lie in respect of intrusive information irrespective of whether it is true or false. It follows that a claimant is not forced to go through an article about (say) his or her sex life or state of health, in order to reveal that some aspects are true and others false. That would defeat the object of the exercise and involve even greater intrusion. Any speculation or factual assertions on private matters, whether true or false, can give rise to a cause of action.
- (4) Where the subject-matter is inherently private, such as sexual behaviour, it is not for judges to refuse a remedy on grounds of distaste or moral disapproval, or to accord protection on a graduated basis, according to how conventional or unconventional the sexual activity may be. This is quite a recent development. There is no logic to the stance taken a few years ago (in *A v B Plc* [2003] QB 195) that marital relations are entitled to greater privacy protection than a footballer's one night stand.
- (5) Another argument that succeeded in that case was that the two young women concerned should be allowed to exercise their Article 10 rights so as to tell their story (albeit "salacious"). The case of *A v B Plc* has subsequently been described in the Court of Appeal as being in certain respects incompatible with the Princess Caroline case. It will not now necessarily avail a defendant to say "I am only recounting my own life story and so I can mention the claimant because he or she is part of it". It was an argument that was tried and failed in *McKennitt v Ash*. In those

circumstances, it is still necessary to carry out the balancing exercise between competing interests. One person's life story cannot be uninhibitedly told if it encroaches, to an unacceptable degree, on another person's reasonable expectation of privacy. This clearly has implications for kiss and tell stories.

(6) One significant difference between privacy and libel is that it would seem that punitive (or exemplary) damages will not be recoverable in privacy claims (although so far that is based only on first instance authority). Moreover, the editors of the latest edition of *McGregor on Damages* are of opinion that such damages could be recovered, largely because (rightly or wrongly) they classify these privacy claims as tortious in character. By contrast, the editors of *Clerk & Lindsell* take the view that they spring from an equitable duty of confidence.

(7) I will give just one more example. I cite it partly because it has proved to be of practical significance and partly because the name of the case has a certain ring to it: *X & Y v Persons Unknown* [2007] HRLR 4. It has become quite common for celebrities to seek an injunction urgently of the John Doe variety – against persons unknown. Typically, they will have got wind from a journalist of a story in the offing, based on revelations by an unidentified friend or acquaintance. If his John Doe injunction is then served on any newspaper he suspects of involvement, that can be an effective way of spiking the plans of the unknown culprit. That is because of the *Spycatcher* doctrine, whereby even though the newspaper is not a party, it can still be liable for criminal contempt if it publishes the story knowing of the prohibition against the “persons unknown”. In *X v Y* a procedure was worked out of giving notice to potential media respondents to give them a chance to be heard on the scope of the order. That is appropriate because their Article 10 rights are potentially involved. They are notified of the information which is to be the subject of protection by means of a confidential schedule attached to the order or draft order. So far that seems to be working pretty well.

Things now seem to be settling down remarkably quickly. One media commentator, at the beginning of the year, was already claiming that he had seen one Sunday tabloid “turning the corner” and “cleaning up its act”. He thought the editor showed signs (for whatever reason) of moving away from sleazy stories originating in the bedroom. Whether he is right or not we shall see. A similar conclusion was reached by the recent report published by the Reuters Institute for the Study of Journalism, based in Oxford. Its authors, Stephen Whittle and Glenda Cooper, decided that the only “chilling effect” had been upon those in the business of “kiss and tell”. They went on to make the following observation:

“Seeking to balance competing freedoms can never be easy. Better by far, though, if those decisions are called correctly in newsrooms or editorial offices in the first instance. The courts are making it clear that they require media responsibility. They have given their steer. They should now be the place of last resort”.

From the coal face, however, it does seem that there are now very few privacy cases being contested. Often when there is the notification and the threat of an injunction, the journalists and in house lawyers will give an undertaking, because they are able to spot very quickly (especially in the light of the Strasbourg approach) what is and what is not within bounds. The rarity of contested claims is largely because there are so few stories where there is any hope of a public interest defence (as was argued, with at least partial success, in *Lord Browne of Madingley*).

So we have come quite a long way in a short space of time. Gordon Kaye would now be able to obtain a remedy easily and the newspapers would know that such conduct was out of bounds – without even having to ask a lawyer.

It is right to point out that it is not only in this jurisdiction that there has been concern about rights of personal privacy. The issue is a matter of current discussion in Ireland, New Zealand and Australia. It would seem to be part of a much wider consciousness in modern societies that something has to be done to protect what is (in Lord Hoffmann's words) "an aspect of human autonomy and dignity".

When I was asked to say a few words, I understood that the theme of the conference was privacy and all that. But when I glanced at the programme for the day's activities, I noticed that libel tourism is also on the menu. So I wonder if I could go *a la carte* for the last course.

There is obviously a huge amount of publicity about this in the press and a large juggernaut of a campaign in progress based on the premise that "libel tourism" has recently become a pressing problem which requires urgent attention. It would naturally be bad form to suggest otherwise. But those of us who are in the front line, the judges who deal with media law week in and week out, only know what we read in the papers. It is not a phenomenon that we actually come across in our daily lives. So we need therefore to try to understand exactly what is the nature of this urgent problem. It is not always spelt out as clearly as it might be. Several issues seem to blend into one another and to be pushed under the same umbrella.

I believe the suggestion is that there is a large queue of people, loosely classified as "foreigners", waiting to clog up our courts with libel actions that are without merit and which have nothing to do with our jurisdiction. As I say, we do not encounter this problem with any regularity but, if it is to be deemed to exist and to require urgent reform, it may be worth addressing some of the considerations that would need to be taken into account by those formulating any statutory proposals. It is not for judges to enter into controversial debates about public policy, but it may be legitimate to try to identify some of the practicalities. After all, if this is a real problem and the solution to it is easy, one would expect it to have been implemented already.

As time is limited, may I just mention ten?

- (1) It is already the law that a claim which does not relate to a "real and substantial tort" can be struck out as an abuse of process. The jurisdiction was given a shot in the arm by the Court of Appeal in *Yousef Jameel v Dow Jones* [2005] QB 946, in which it was made clear that the *Duke of Brunswick* case (1849) 14 QB 185 should no longer be followed. That, as you know, related to a merely technical publication.
- (2) But, if someone is falsely accused in this jurisdiction of (say) murder, terrorism or child abuse, there is a fair chance that this will be classified as a real and substantial tort.
- (3) We are bound by the decision of the European Court of Justice in *Shevill v Presse Alliance* [1995] 2 AC 218, which had been referred by the House of Lords three years earlier, to the effect that any citizen of the European Union can sue for libel in any jurisdiction (including multiple jurisdictions) where his or her reputation has been damaged. Any reform would need to be compatible with that principle.
- (4) One explanation offered for "libel tourism" is the level of damages in this jurisdiction. The truth is that, these days, people do not normally bring libel actions to make money. After a contested trial, you would be extremely lucky to make a profit after a detailed assessment of costs. As we know, since *John v MGN* [1997] QB 586 more than a decade ago, the level of libel damages has effectively been pegged to that of general damages in personal injury cases – and that level is reserved for the very worst libels. The only example of one going to the top of the bracket that I know of is *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600. (I accept that there may be a potential blackmail element in the CFA regime, but that is probably going to be changed anyway – quite independently of the supposed problem of "libel tourism".)

- (5) I know that we (and some people in particular) have incurred the wrath of the Americans over our system of defamation law and it is said that we should have a more effective “public interest” defence, going beyond that of fair comment. It is sometimes worth reflecting, however, whether the significant distinctions in our approach on this side of the Atlantic might not be attributable, at least in part, to long standing cultural differences rather than mere backwardness on our part. The first amendment of course gives a particular degree of sanctification to freedom of speech, whereas our law (and that of many other jurisdictions) has a different ordering of priorities. It seeks to give a significant degree of counterbalancing weight to the important concepts of truth and reputation. There is after all at least some element of public interest in knowing the truth – particularly so perhaps when serious allegations of wrongdoing have been made. Why is it self-evidently in the public interest, in such circumstances, to have the law so structured that there is no mechanism for establishing the truth – as opposed merely to establishing that the journalists in question were not dishonest? That may help the journalist, of course, but it is of precious little use to either the victim or the public at large. As Lord Hobhouse famously observed in *Reynolds v Times Newspapers* [2001] 2 AC 127, 238A-B, there is no particular public interest in the dissemination of misinformation. Bear in mind also in this context the provisions of Article 17 of the International Covenant on Civil and Political Rights to which I referred earlier and also the principle emphasised by the Council of Europe declaration to the effect that Article 8 and Article 10 are to be treated as being of equal value. This has perhaps a greater resonance in the context of libel now, since it would appear that protection of reputation is being embraced as an aspect of Article 8: see e.g. *Pfeifer v Austria*, cited above. That is hardly compatible with the US approach, but after all we are part of Europe and need to bear that in mind, in so far as we may be tempted to readjust the balance off our own bat.
- (6) It is sometimes said that this queue of non-residents has formed because we follow the traditional common law practice of treating the defence of justification (or “truth”) as a matter to be established by the defendant (as tends to be the case with defences in civil law generally, such as consent or self-defence). In this respect we are hardly unique in the common law world: see e.g. Canada, New Zealand and Australia. Is there any evidence that anyone has come here, rather than to some alternative jurisdiction, for the reason that its law places the burden on the claimant to prove that the words are false? And which jurisdiction would that be? What is the evidence that this has proved to be the magnet which has drawn these foreign claimants to these shores? If there is no such evidence, then there can be no reason to suppose that this pressing problem will be solved by reversing the burden of proof.
- (7) There may be other reasons for reversing the burden of proof, unrelated to “libel tourism”. One can well see a certain attraction in a rule which says that everything a journalist writes is presumed to be true. But the question would need to be asked, “Would that have any effect on journalistic standards of accuracy and, if so, would that effect be in the public interest or not?”
- (8) If such a change were made, would it have much effect in practice? How many libel actions turn upon the burden of proof? I have been trying to recall one and have drawn a blank. Perhaps some of you can give an example. What would happen, if the burden were to be reversed? The claimant would, at stage one, set out the words complained of, identify the respects in which they are said to be false and plead the defamatory meanings they are supposed to bear – so nothing new there. The defendant would be required at the next stage to say whether he or she accepted that or not; if not, obviously it would become necessary, in accordance with the rules, to narrow the issues in the case – and, in particular, to say in which respects it was claimed that the words were true. That sounds a bit like particulars of justification to me. Disclosure of documents would take place in the usual way and then, if the case was one of the very few that actually proceeded to trial, the claimant would go into

the witness box and state that the words were untrue, as happens anyway, and go on to give an account of the relevant facts. There would be the usual opportunity to cross-examine, of course, but you would be rather unwise to count on the claimant breaking down in tears and admitting that, after all, it was all true. The defendant would, therefore, be left rather naked if no evidence was available to be called in rebuttal of the claimant's case. So it would seem that very little had changed. The legislature might have laboured only to bring forth a mouse.

- (9) Suppose then that the jury find themselves in difficulty and ask the judge to give them further assistance. In a criminal context, one is quite used to hearing a judge in such circumstances say to the jury, "If there's a doubt, then you acquit". How comfortable would we be, in a libel action about police corruption or sexual abuse by a teacher or nursery nurse, if the judge were required by law to say in comparable circumstances, "Well, if there's a doubt, members of the jury, just find the claimant guilty of corruption [or sex abuse, as the case may be]"? That is unlikely to arise in practice, since cases in reality do not turn on the burden of proof. (In any event, let us remember the limited scale of this scenario. There were only four libel jury trials last year, and four this year – one being a retrial following a disagreement last year. To the best of my recollection, none of these could be categorised as a "libel tourism" case in any event.)
- (10) Turning from the practicalities, to the matter of principle. How compatible would the proposal be with Article 6 of the European Convention? If you are accused of murder, terrorism, corruption or child abuse, you are entitled to a fair hearing before an unbiased tribunal. It needs to be carefully considered whether a tribunal could be classified as unbiased if required by law to presume that you are guilty. Would it be right for (say) the claimants Lillie and Reed or the McCanns to face such a presumption?

These are all fundamentally important issues in a modern democratic society and they deserve the most careful consideration. It is good to see that they are being discussed by those with knowledge and experience in the field. I just thought I would throw those random thoughts into the pot and I hope that you have a stimulating and productive debate.

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