

*The Current State of Defamation Law*

*in*

*England and Wales*

Presentation to the European Parliament's  
Committee on Legal Affairs

Hearing on rights relating to personality, in  
particular in relation to defamation, in the  
context of private international law,  
particularly the Rome II Regulation

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1. The law relating to freedom of expression is ultimately governed by Articles 8 and 10 of the European Convention of Human Rights. Article 8 is now generally accepted to provide, at the very least in certain factual situations (where an attack upon a person's reputation is of such an order as to constitute an interference with that person's private life), a right to reputation. Thus English law is driven by the need to determine where the balance falls between freedom of expression and the right to reputation.
2. The law of defamation is largely precedent-based although there have been important statutory provisions, most notably the Defamation Act 1996.
3. In the last fifteen years the law of defamation has been reformed in order to benefit defendants, who will usually be either newspapers or broadcasters.
4. In the last six months there has been a media campaign which has made sweeping statements in support of reform of defamation law. There has not been a debate about these issues in the media; counter-arguments have not received publicity.
5. This paper considers the following assertions made by the media as part of its campaign for reform:
  - 5.1. Defamation law is unfairly biased against the media.
  - 5.2. It is too easy for non-residents to sue foreign-based publications for defamation in the English courts.
  - 5.3. Conditional Fee Agreements ("CFAs"), by which claimants have been able to fund defamation claims, are chilling the exercise of the media's right to freedom of expression.
  - 5.4. The courts ought not to be so ready to grant injunctions which prevent the media or anyone else from reporting the fact of the making of an injunction. Such injunctions have been described by the media as "super injunctions". Contrary to the impression given in the media, this issue only concerns claims for breach of confidence/privacy; it does not concern defamation.
6. This paper:

- 6.1. concludes that the current substantive law of defamation strikes a fair balance between the right to reputation and the right to freedom of speech;
- 6.2. offers no conclusion in regard to the ability of non-residents to sue within the jurisdiction but does summarise the relevant law;
- 6.3. acknowledges that there have been fundamental problems with how CFAs have operated in some defamation actions (in the same way that they have caused problems in other areas of law) and concludes that they must be carefully reformed in order to ensure that the rights of individuals to access to justice are maintained; and
- 6.4. highlights recent moves by the court to restrict the use of injunctions preventing breaches of privacy and confidence which include a provision preventing publication of the fact of their existence (so called “super injunctions”).

#### **(I) DEFAMATION**

7. Only civil claims may be brought for defamation. The standard of proof required is that of the balance of probabilities e.g. a claimant must prove that it was more likely than not that publication of the words complained of to a third party took place.
8. In defamation there is an automatic right to trial by a jury of 12 persons. However, if both parties agree, this can be dispensed with and the action adjudicated upon by a single judge. There are other statutory provisions which permit the court to order that a trial take place by judge alone if the case involves a significant number of documents or complex technical issues.
9. In all civil claims the loser usually pays the winner’s costs.
10. In the majority of defamation claims the claimant will be a private individual and the defendant a newspaper or broadcaster.
11. Defamation law can be summarised<sup>1</sup> thus:
  - 11.1. It is the claimant’s burden to establish the foundation of his case by proving that the words of which he complains have in fact been

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<sup>1</sup> This summary is necessarily short and therefore does not cover the full complexity of the relevant law. By necessity, it simplifies some of the matters in issue.

published to third parties and that those words tend to lower his reputation in the eyes of right thinking people (i.e. that those words have defamed him). If he merely establishes that a technical defamation has been published e.g. a minor allegation which could not have caused any harm, the court might find that the claim was an abuse of the process and therefore not permit it to proceed.

**11.2.**It is then the defendant's burden to prove a defence. The usual defences are: justification; qualified privilege; Reynolds privilege; absolute privilege or fair comment.

### **11.3.Justification**

This is the defence most widely relied upon. In order for this defence to succeed the defendant must prove that the sting of the words complained of is substantially true. It is important to note that the defendant does not have to prove that the literal meaning of the words complained of is true. For instance, if the defendant publishes a statement to the effect that the claimant is dishonest because he did X, the defendant could establish a justification defence if it could prove that the claimant was dishonest by reason of the fact that he committed Y, some other dishonest unconnected act. A defendant is entitled to seek to justify the article complained of in any defamatory meaning which the relevant words are reasonably capable of bearing (i.e. the defendant is not obliged to justify the meaning which the claimant says that the relevant words bear).

### **11.4.Qualified Privilege**

This is a long-established common law defence (i.e. one which is founded upon precedent) which will usually not be available to the media. It enables people in certain relationships or on certain occasions to make defamatory statements without having to prove that those statements are substantially true. The paradigm is a defamatory statement contained within an employment reference. If the defendant proves this defence, the claimant will lose his case unless he can prove that the relevant publication was made maliciously. In this context, this would mean that the claimant would have to prove that the defendant acted with an improper dominant motive (i.e. deliberately to harm the claimant rather than to inform a prospective employer of relevant information). Under English law, it is extremely difficult to prove that a defendant has acted maliciously.

**11.5.** There is also a statutory form of qualified privilege upon which the media will be able to rely in certain specified situations. For instance, under the Defamation Act 1996 there is a qualified privilege defence for the reporting of a number of matters e.g. proceedings in a foreign court.

### **11.6. Reynolds Privilege**

This is a privilege defence upon which the media can rely. It has been recently developed by the court and reinvigorated in order to shift the balance in favour of Article 10 and the media<sup>2</sup>. If the subject matter of an article or broadcast was sufficiently in the public interest and the journalists who had researched and written it behaved responsibly in doing so, the defence will succeed. However, it is not enough for the subject matter to be merely in the public interest; it must be of such public interest that the claimant's right to reputation is deemed to be less important than the right to publish. This defence operates particularly harshly against claimants because its success prevents the claimant from vindicating his reputation. Thus, following the success of the defence at trial, the defendant will be entitled to its costs from a claimant who will have had no opportunity to establish that the allegation should not have been made against him because it was false. Truth will not have been in issue.

### **11.7. Absolute Privilege**

Absolute privilege is a defence by which a defendant cannot be found liable in defamation even if the material in issue was false and even if it was published with malice. This defence applies to fair and accurate contemporaneous reports of domestic court proceedings. There is also an absolute privilege which protects a person who makes a complaint to the police which defames a third party.

### **Fair Comment**

**11.8.** It is extremely important to note that defamation law principally concerns the freedom of expression in relation to statements of fact. Except in very limited circumstances, it will not interfere with the making of a defamatory comment. The fair comment defence permits a defendant to publish material on matters of legitimate public concern which constitute a comment (rather than a statement of fact) which an honest person could make on those matters. The

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<sup>2</sup> *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359

comment can be positively unreasonable (or worse) but so long as it could be made by an honest person, the defence will succeed (there is in fact no requirement, despite the name of the defence, for fairness). A stinging review of a play or criticism of a matter which is in the public domain will be protected. Even if the comment does not concern a matter which has already been aired in public, so long as the article includes true facts from which the comment could be derived, the relevant publication will be protected. This defence can be defeated if the claimant proves that the defendant had no subjective honest belief in the comment being made. There is no known example of such a finding having been made by the court. The Court of Appeal is due to consider the fair comment defence in February in relation to a case brought against the science writer Simon Singh.

### **Interim injunctions**

12. The court has a power to impose an interim injunction. An interim injunction is one which prevents the relevant words from being published by a named defendant in the first place. Such injunctions are almost never awarded in defamation and, in the writer's experience, there is not a single example of an interim injunction preventing the publication of defamatory material being made against the media in the last thirteen years or so. Interim injunctions are almost never awarded in defamation because the claimant bears an almost impossible burden to overcome in order to secure one: he must prove that he would almost certainly win his case at trial. If a defendant asserts that it believes that the allegation in issue is true and gives a witness statement stating that it will advance a justification defence at trial, and there is no reason to conclude that this defence would fail, an interim injunction will not be granted.
13. Neither interim nor final injunctions in defamation bind third parties; they only bind the named defendant. Thus if someone other than the defendant wishes to make the same allegations, perhaps because they have additional evidence, they will not be prevented from doing so by reason of an injunction which has been granted against someone else<sup>3</sup>.

### **Remedies**

14. If a Claimant wins his action he will usually be entitled to a final injunction and damages. Damages are nearly always awarded only

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<sup>3</sup> See *A-G v Newspaper Publishing PLC* [1988] Ch. 333 pages 347/348 (part of the Spycatcher litigation)

on a compensatory basis: for loss of reputation, hurt to feelings and (rarely) for financial loss which has resulted directly from the publication complained of. There are provisions for the award of exemplary/punitive damages but these provisions are hardly ever relied upon successfully. These are designed to mark the court's disapproval of particularly outrageous behaviour, for instance where a defendant has calculated that by publishing the words in issue it will make sufficient money such as to outweigh the cost of losing a defamation action.

15. Compensatory damages regarding loss of reputation and hurt to feelings are capped at around £220,000. This amount is reserved for the most serious libels and where the distress caused to the claimant is at the top end of the scale, for instance, where a life has been ruined by an allegation in a mass circulation newspaper of paedophilia/murder. The cap is linked to the maximum amount recovered by a personal injury victim for distress, which is also roughly £220,000. In general, defamation actions rarely result in general damages awards in excess of £75,000 and generally settle for much lower amounts.
16. If a defendant concedes liability at an early stage of proceedings, before it formally lodges a Defence with the court, further to the offer of amends procedure introduced under the 1996 Defamation Act, it will only have to pay discounted damages to a claimant.
17. For strong policy reasons, the court will not interfere with a newspaper's editorial freedom and therefore will not order the publication of retractions or apologies. The claimant has to rely upon the size of an award of damages as a signal to the world that the allegation complained of was untrue. Although, of course, apologies may be agreed between the parties as part of a negotiated settlement.

### **Current issues**

18. Publicity in the media concerning the substantive law of defamation has been somewhat one-sided<sup>4</sup>. One experienced observer has

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<sup>4</sup> "Given that the debate is about freedom of speech, isn't it just a little bit ironic that the debate is so one-sided? We may be hearing from the press and those who hold a brief for the press, *in the press* [their side of the story]. But where are the voices being heard of those who think, for example, that the current balance between freedom of expression and other countervailing rights and considerations, including privacy and reputation, is being struck, give or take, correctly? And what of those who think that the press have simply too much power without enough responsibility? (Some such people must, I suppose, exist.) Reading recent press reports bearing upon this debate, one might be forgiven for

commented: the media “are conducting a campaign which is totally unbalanced and distorted in order to protect itself from its own excesses in some respects” and the UK government’s favourable reaction to this campaign “smacks of the government trying to curry favour with the media before a General Election, rather than a genuine belief that our libel laws need further change . . .”<sup>5</sup> The latter reference is to the fact that the party of government, which is facing an election within the next few months, has promised the media that it will attempt to rush through reforms to defamation law and the way in which claimants have access to justice via the use of CFAs (see below) before the election takes place. In regard to the latter, a writer for the Law Society Gazette has not unreasonably posed the question: “Why would a struggling government that faces the prospect of a general election in months, and whose actions and policies have been met with increasing criticism by the press, want so urgently to make such a press-pleasing gesture?”<sup>6</sup>

**19.** A paper entitled *Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation* written by Professor Alastair Mullis of the University of East Anglia and Dr Andrew Scott of the London School of economics, published on 27 January 2010, notes:

**19.1.** “We are surprised that the reality of most libel actions – the fact that they involve instances of damaging inaccuracy perpetrated by multinational media corporation defendants and challenged by relatively impoverished claimants – has somehow been lost in the narrative on the need for reform.” (Executive Summary)

**19.2.** “We have become concerned that the public commentary on libel law has been remarkably one-sided and in some respects dangerously over-simplified. (paragraph 4)

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concluding that no one had ever had reasonable cause for complaint about anything published in a newspaper; that the press had never unjustifiably invaded anyone’s privacy or injured anyone’s reputation.” Taken from *Preventing Publication of Private Information* a paper given by Godwin Busuttil, barrister specialising in media law at the *Free Speech v Privacy – The Big Debate* Conference (organised by JUSTICE) on 1 Dec 2009.

Available at <http://www.5rb.co.uk/articles/detail.asp?ArticleID=73>

<sup>5</sup> *Costs are giving everybody a cold, not the libel laws* by Rod Dadak, a specialist libel solicitor, published on the Media Lawyer website on 23 December 2009

<sup>6</sup> *What is the real motive behind defamation costs reform?* by Catherine Baksi, published on 21 January 2010

<http://www.lawgazette.co.uk/blogs/news-blog/what-real-motive-behind-defamation-costs-reform->

- 19.3.**In campaigning against the current law of defamation, “newspapers have subtly aggrandised their own vested interests as a reflection of the public good, and have chosen not to seek to fulfil objectively any conception of their self-assumed role as the “fourth estate”. The fact is that most complaints concerning damaging media inaccuracy and falsehood involve relatively impecunious claimants who face an uneven legal battle against multinational media corporation defendants. Goliath, it seems, is dreaming he is David.” (paragraph 5)
- 20.** As a wise person once said: never pick a fight with someone who buys ink by the barrel.
- 21.** Claimants argue that they ought to be able to vindicate their reputation if the allegation in issue is false. If they sue a newspaper, the newspaper ought only to be able to defeat the claim if it can prove a justification defence i.e. prove that the sting of the words complained of is substantially true. On the other hand, the media, whilst (one would hope) accepting that in an ideal world an individual’s right to reputation ought only to be trespassed upon if the relevant allegation is true, argue that the upholding of this right via the courts (if upheld too vigorously) may have a disproportionate effect upon freedom of expression. Thus the media ought to be permitted to defeat a defamation claim without having to prove that the allegation complained of is substantially true. The media has proposed changes in the law which would (among other things):
- 21.1.**reform the law relating to the defence of justification. The media has proposed that, rather than a defendant having to prove that the allegation which it has chosen to publish is substantially true, a defamation claim should only succeed (assuming no other defence) if the claimant proves that the allegation is false; and
- 21.2.**make it easier to establish media privilege and fair comment defences.
- 22.** The media stress that these innovations are necessary because without them it will be so fearful of being sued in defamation that it will err too much on the side of caution in publishing information and that this caution will have an adverse effect upon society by unduly restricting the flow of information. This has become known as the “chilling effect”. In the huge coverage given by the media to the chilling effect, no newspaper or broadcaster has advanced any

evidence of any decision not to publish information which it had concluded was substantially true.

**23.** To a degree, the chilling effect may be salutary: it will be better for the consumers of information (society) as well as the subject of a story if, prior to making the decision to publish, a newspaper thinks twice, in light of the evidence available to it, before publishing the relevant allegations. One must remember that there is a significant counter-balance to the chilling effect: the commercial imperative to publish newsworthy information which will attract the attention of readers. Will the chilling effect really be of particular significance where a media defendant has properly researched a story and has uncovered evidence that the allegations are true? This is not to say that the chilling effect does not exist (see paragraph 41.1.2 below).

**24.** On any analysis of the substantive law (which does not include costs considerations) it is difficult to see that the chilling effect is so strong that the law ought to be reformed in order to benefit defendants.

**24.1.** In regard to justification, a reversal of the burden of proof would have serious implications for one of the key principles underpinning English and Convention law: the presumption of innocence<sup>7</sup>. If a newspaper chooses, no doubt having researched the evidence in issue, to accuse someone of a crime or other morally reprehensible act, it is difficult to see the justice in obliging that individual to prove his innocence. Put another way: let he who asserts prove. Why should a claimant (who has played no role in the investigation of the story, the determination of its content or the decision to publish it) have to prove his innocence?

**24.2.** Apart from reversing the burden of proof, it is difficult to see what other pro-media relaxation of the defence of justification could be made. The current stipulation that a defendant need only prove that the sting of an allegation is substantially true (without having to prove the literal truth of the content of the article) might be said to be manifestly reasonable.

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<sup>7</sup> In *Re BBC* [2009] 3 WLR 142 §69 Lord Brown stated: "I agree with Lord Hope that the presumption of innocence is of relevance not only under article 6 (in respect of which, as stated above, I conclude D can have no complaint here) but also under Article 8 in so far as it bears on the Defendant's reputation."

**24.3.**In regard to Reynolds privilege, it must be borne in mind that the successful deployment of this defence will mean that a false allegation may be allowed to stand which will mean that society will have been misinformed about important information and the claimant will suffer potentially irreparable damage to his reputation. Where a media privilege defence is put forward the court will not explore the truth or falsity of the allegation in issue. In the House of Lords decision which instituted the Reynolds privilege defence it was recognised that:

*Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.*<sup>8</sup>

**24.4.**The government could not reasonably remove or somehow dilute the requirement of the Reynolds defence that journalists act responsibly or the requirement that the information in issue ought to be of such public interest that the individual's right to reputation has to give way, leaving the claimant with no opportunity to vindicate his reputation. To impose a stipulation that in matters of public interest, a claimant will only be permitted to succeed in bringing an action for defamation where the media defendant has acted maliciously does not appear to be favoured even by the media and would most likely be in contravention of Article 8 of the Convention.

**24.5.**In regard to the fair comment defence (more accurately described as a defence for honest comment), as the law currently stands, comment which is identifiable as comment will be protected so long as it is objectively honest and the maker of the comment has a

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<sup>8</sup> *Reynolds v Times Newspapers Limited* [2001] AC 127, 201.

subjective belief in its truth. There has been significant media coverage critical of a judge's decision in the case brought by the British Chiropractic Association ("BCA") against Simon Singh, a science journalist (who, incidentally has been able to defend his right to freedom of expression by finding lawyers who have been willing to act for him on a CFA basis). This case has not reached trial. Mr Singh relies upon a defence of fair comment. However, at a preliminary hearing, with the agreement of Mr Singh, a judge was asked to conclude whether the words in issue constituted fact or comment; he concluded that they constituted an allegation of fact and that they meant that Mr Singh had accused the BCA of "knowingly promot(ing) bogus treatments". This prevented Mr Singh from further advancing his fair comment defence. The Court of Appeal is due to decide whether, as a matter of fact, this decision was right or wrong. It will further consider what scope ought to be given to a writer in the position of Mr Singh to stay within the realms of the fair comment defence. The Court of Appeal hearing is due to take place in February.

- 24.6.** Another proposal for reform is that the law on damages be altered in order to overturn the compensatory principle i.e. to rule that a claimant cannot be compensated according to the damage caused to him by a false publication. This would be achieved by capping damages for distress and loss of reputation at £10,000. The proposal is that vindication would be obtained because the law would be altered in order to empower the court to order newspapers to make retractions or apologies. However, neither the courts, nor probably the newspapers themselves, would want the courts taking decisions which impinge upon editorial freedom. One must also bear in mind that if damages in defamation were capped at £10,000, not only would claimants often not be adequately compensated for the damage to their reputation and the distress caused to them (which often occurs over a period of years in the lead up to a trial), but also that such a low cap might make newspapers reckless as to what they publish; it would make defamation cheap at the price.

## **(II) JURISDICTION**

- 25.** In a recent House of Lords debate Lord Pannick stated that the current law on jurisdiction needs to be reformed because it permits the bringing of defamation actions "by people who have no connection to this country against publishers who are based abroad, such proceedings being founded on the incidental publication in this

country of a few copies of a newspaper, book or magazine published abroad”.<sup>9</sup> A report published by the Index on Censorship/ PEN asserts that the relevant jurisdictional rules “[expose] the English legal system to abuse by claimants with no reputation to defend in this country”.

26. The law on jurisdiction is complicated and this paper does not seek to give a detailed exposition on it. It is set out comprehensively in *Gatley on Libel & Slander* published by Sweet & Maxwell.
27. In regard to the EU, the English court is bound by the decision of the European Court of Justice in *Shevill v Presse Alliance* [1995] 2 AC 218. Thus a claimant could sue a defendant domiciled in a contracting state other than the UK for libel in the English jurisdiction if his or her reputation has been damaged within it (which will usually mean that the words complained of have been published there) or if the libel had been published in another contracting state but the defendant was domiciled in England or Wales. There would still be a requirement that the libel in issue be substantial if the defendant was not based in the jurisdiction.
28. In order to sue a non-EU based defendant in this jurisdiction a non-EU based claimant must possess a reputation within it (which will usually mean that there is a connection with it), prove that the relevant defamation has been published within the jurisdiction and that there has been a “real and substantial tort”. Additionally the defendant could argue that the claim ought to be tried in a different jurisdiction because that would be more appropriate. This will usually involve a consideration of whether it would be fairer to try the claim under the law which operates where the defendant is domiciled. Damages can only be recovered in order to compensate damage caused within the jurisdiction.
29. It needs to be borne in mind that very often in defamation claims it is quality rather than quantity which counts. For instance, an allegation might be published to a limited number of people but still cause considerable harm. Thus it is sometimes (but no means always) wrong to focus upon the number of publications which have taken place within the jurisdiction rather than their quality.

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<sup>9</sup> 1 December 2009.

30. Regardless of whether the law on jurisdiction is right or wrong, those who work in the field will testify that the number of foreign claimants suing foreign defendants in London is limited (although one wonders whether this might change given the publicity being generated to the effect that foreign claimants will get an easy ride in the London libel courts). The leading judge in this field has pointed out that at present there is not a long queue of such litigants<sup>10</sup>.
31. The criticism of the English court's willingness to accept jurisdiction has been deployed in order to attack the substantive law of defamation. The argument has been to the effect that the English jurisdiction is a magnet for "foreigners" because the law is so claimant-friendly. The English jurisdiction has come under particular criticism from the United States because it does not approach freedom of speech in the same absolutist way; in England (and in fact most EU countries and those countries which are signatories to the European Convention on Human Rights) the law strives to strike a balance between the right to freedom of expression and the right to reputation<sup>11</sup>. The constitution of the United States has no provision for the right to reputation and offers no qualification to the absolute right to freedom of speech. Whilst the focus of the US-based attack has been upon the English law of defamation, the arguments deployed could equally apply in other EU jurisdictions where the law seeks to balance the right to freedom of expression and the right to reputation.

### (III) "SUPER INJUNCTIONS"

32. There are two types of injunction: interim (pre-trial) and final (granted at the conclusion of the claim, usually following a trial). Interim injunctions are granted on the basis that the claimant will

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<sup>10</sup> Eady J. speech to the Privacy v. the Press conference in 2009. Available at: <http://www.judiciary.gov.uk/docs/speeches/eady-j-justice-conf.pdf>

<sup>11</sup> In the United States great attention has been given to *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB). The defendant, Dr Ehrenfeld, wrote *Funding Evil: How Terrorism is Financed* (Bonus Books). In it she identified Bin Mahfouz as a principal sponsor of Al Qaeda and Osama bin Laden. He sued in defamation. At first Dr Ehrenfeld positively wanted to contest the matter in court. She wrote that "despite the enormous cost involved, I have taken it upon myself to challenge Bin Mahfouz and provide the UK court with evidence that he in fact supported Al Qaeda". At no time did she challenge the court's assumption of jurisdiction. She chose not to respond to service of the proceedings upon her and therefore default judgment was obtained against her. It is an adversarial system and because she failed to take a jurisdiction point the court was seized of jurisdiction. Therefore it would be wrong to draw conclusions about the operation of the laws relating to jurisdiction on the back of Dr Ehrenfeld's case. Who know, perhaps if Dr Ehrenfeld had challenged jurisdiction or applied to strike out the claim, she might have succeeded.

take his claim to trial, at which point the evidence in issue will be properly considered.

33. In some cases, the court has found that interim injunctions preventing the publication of private or confidential information might need to include a provision preventing publication of the fact of the injunction in order to avoid defeating the very purpose of the action. This is not a recent innovation. Until recently no one had considered (so far as the writer is aware) whether such a provision might prevent discussion of the fact of such an injunction in Parliament. On the one hand, Parliament ought in principle to have an inalienable right to debate such issues but, on the other, there is clearly a danger that such a debate might defeat the purpose of the injunction (particularly because of the protection given to reports of Parliamentary proceedings). The answer is almost undoubtedly that Parliament does have a right to discuss such issues but that the danger of it thereby undermining an injunction will be avoided because Parliament will voluntarily exercise its right to discuss such a matter carefully and responsibly.
34. There has been considerable public controversy concerning an interim injunction obtained by the corporation Trafigura in regard to the law of breach of confidence (not defamation) against the Guardian newspaper preventing it from publishing an expert's report which had been prepared further to legal proceedings between Trafigura and a third party<sup>12</sup>. The injunction prevented the Guardian from reporting the fact of the injunction. There is some dispute between Trafigura and the Guardian as to how this injunction came to be made but what is not now in dispute is that, applying current law, there ought not to have been a provision preventing the publication of the fact of the injunction. The controversy was further stirred up when it was claimed that by reason of the injunction it was arguable that the fact of its existence could not even be discussed in Parliament.
35. A court undoubtedly has the power to forbid the publication of the fact of an injunction save that this could not outlaw a discussion about the injunction in Parliament (and if it did, Parliament could change the relevant law). However, Mr Justice Tugendhat has recently emphasised that the presumption in such situations will always be in favour of open justice and that any order restricting

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<sup>12</sup> An annotated copy of which is available on the Guardian website at:  
<http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/20/SUPER-INJUNCTION.pdf>

such information ought only to be made in so far as it is necessary and proportionate in the circumstances of the case<sup>13</sup>. Thus such a restriction will only normally be made in order to fulfil the objective of the substantive injunction (or so as to avoid it being undermined). Oddly, only interim injunctions may have super injunction provisions. This is because their basis is to preserve the status quo until all of the issues can be resolved conclusively at trial. It would be regarded as a contempt of court for a third party on notice of the terms of the interim injunction to put the relevant material into the public domain prior to the trial of the matters in issue because such an act would render the main aim of the trial, the decision whether to award a final injunction or not, pointless<sup>14</sup> (because once confidential or private information is put into the public domain the court will not grant an injunction because the “cat will be out of the bag”). If a claimant is awarded a final injunction following trial, that injunction will only bind the named defendant, not third parties. Third parties will not be bound by the final injunction because they would not be in contempt of court if they took steps to publish the information in issue. This would be because the court was no longer seized of the matter and publication would not interfere with its process.

*[Since delivering this paper it has come to my attention that, despite the impression to the contrary in some media reporting of the Trafigura case, it was never suggested by any of the parties that the injunction could have had the effect of preventing any debate within Parliament. The issue in the Trafigura case was whether or not an existing injunction had the unintended effect of preventing the reporting in the media of a written question in Parliament. The parties agreed to vary the injunction to provide that it did not. Some background to the case can be found in evidence given to the Select Committee on Culture Media and Sport, on the Parliamentary website at <http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmcmds/memo/press/ucm14302.htm> The issue of the self-regulation by Parliament of its own debates and the interaction between Parliamentary and Court proceedings is the subject of an interesting discussion in the 1999 First Report of the Joint Committee on Parliamentary Privilege, which can be found at <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm>. I would like to make it clear that the opinion expressed in the paper about whether, under current law, the provision preventing the publication of the fact of the injunction should have been granted, is mine, and not necessarily that of the parties.]*

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<sup>13</sup> *G & G v Wikimedia* [2009] EWHC 3148 (QB)

<sup>14</sup> *Jockey Club v Buffham* [2003] 2 WLR 178 §23 - §27

#### (IV) COSTS

36. Up until the 1990s defamation actions were the preserve of the very wealthy: both claimant and defendant. There was no state funding of litigation and no means of bringing or defending a claim other than paying for it privately.
37. This system was of incalculable commercial benefit to media organisations. Whilst they might have feared with justification the deployment of the pro-claimant regime of defamation law which existed at that time (but which has since been substantially reformed in favour of defendants) by extremely rich individuals or corporations, they had nothing to fear from the less well-off<sup>15</sup>; in regard to defaming such persons there was no chilling effect. The question prior to publication might well have been: “If we publish, could the claimant take us to trial?” It was often the case that someone of modest means brave enough to sue for defamation, no doubt hoping that the defendant might settle the case at an early stage rather than go to trial, would have to give up in the face of delaying tactics. As a lawyer employed by the Daily Express commented in 1989: “If a newspaper were honest I suspect they would admit to drawing actions out in the hope that a (*claimant*) runs up large legal bills, loses heart and settles.”<sup>16</sup>
38. The government began to introduce reforms to the funding of litigation in 1995. These were directed at bringing in a form of litigation whereby a lawyer could operate on a “no win no fee” basis. After 1995 lawyers were permitted to enter into agreements whereby they could be paid normal fees if they won and not paid if they lost. They could claim a success fee from their client but this would be of no benefit if the client was not sufficiently wealthy to pay it. These measures did not provide a meaningful improvement in access to justice because there was not a commercial rationale for a lawyer to take a case on a CFA unless he was almost certain of winning it. There was no compensation to make up for the risk of losing the case and therefore not being paid at all. Similarly, even if litigants could get a lawyer to act on a no win no fee basis the fear of losing and paying the other side’s costs would often prevent them

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<sup>15</sup> As the journalist and author Adam Raphael concluded in his 1989 book, *My Learned Friends: An Insider’s View of the Jeffrey Archer case and Other Notorious Libel Actions* (WH Allen): “You have, in fact, to be not just very rich but also supremely confident to pursue a libel case to the bitter end.”

(p.216)

<sup>16</sup> *My Learned Friends* p.217

from asserting or defending their legal rights (unless they were so poor that they had nothing to lose).

**39.** The government rectified this situation when it enacted the Access to Justice Act 1999.

**40.** In order to enable claimants to bring civil claims and defendants to defend themselves from claims (and no doubt mindful of its obligation under Article 6 of the Convention to make provision for access to justice) the 1999 Act:

**40.1.** enabled lawyers to enter into a new type of CFA with their clients. By these agreements a lawyer could act for a claimant or a defendant without charging that person but stipulate that if the case was won, the lawyer would receive not only his normal fees but also a “success fee” equivalent to up to 100% (depending on the lawyer’s analysis of the relevant risk) of those fees. Both amounts would be recoverable from the losing party subject to the discretion of a costs judge not to permit a successful party to recover costs that had not been reasonably incurred; and

**40.2.** permitted a person who had secured legal representation under a CFA to obtain a policy providing for After the Event (“ATE”) insurance i.e. a policy which would pay the other side’s costs if the CFA-funded party lost his claim. Crucially, the relevant legislation permitted the CFA-funded party to recover the cost of the insurance from an unsuccessful opponent. Policies were then entered into which operated so that the CFA-funded party would have to pay nothing for an ATE policy if he lost and if he won the losing party would pay for it.

**41.** Problems emerged with this new regime. Lord Justice Jackson recently completed his *Review of Civil Litigation Costs*. Over 557 pages he analyses the problems which have arisen from the use of CFAs, particularly when accompanied by ATE policies. The problems which he has identified with this regime can (with some allowance for simplification) be summarised thus:

**41.1.** when a potential litigant approaches a lawyer asking to be represented under a CFA, that lawyer would often and honestly conclude that the chances of winning the case were 50:50. This would cause the lawyer to also conclude that if he won the case he would be entitled to a 100% success fee and that he would need such

a success fee in order to carry out such work. This reasoning was endorsed by the government because it had concluded that, as a matter of mathematical logic, if a lawyer fights two 50% cases he will most likely win one of them and lose one of them. In order to ensure that the lawyer will act under this basis, he must be paid his normal fee and a 100% success fee when he wins a case. Thus, applying the normal law of probability, the CFA-funded lawyer will receive the same financial reward as if he had conducted both such cases on a privately paid basis<sup>17</sup>. This gave rise to two largely unanticipated problems:

- 41.1.1.** It did not allow for the fact that having entered into the CFA, the case might settle in the CFA-funded party's favour in the early stages of the litigation. In such circumstances the securing of a 100% success fee to the lawyer could be said to be an undeserved windfall. This anomaly has been greatly reduced by staged success fees, which are now common in defamation actions. Thus, for instance, if a case settles before being formally commenced by the issue of a Claim Form, no success fee will be charged, and 100% will normally only be charged if the case proceeds to the point where it is apparent that both sides intend to fight the case through to trial (i.e. both sides have concluded that there is at least around a 50% chance of success, assuming they are acting rationally). Whilst they are commonplace within defamation, staged success fees have not been made compulsory.
- 41.1.2.** It did not consider the problem that by providing for a 100% success fee for one party's lawyers, this might unduly hinder the opponent's access to justice. When evaluating the risk of defending a claim, the decision to defend it will usually depend at least in part upon an assessment of the worst case scenario, in which the quantification of what will be paid to

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<sup>17</sup> However, it is important to bear in mind that whilst a successful party is entitled to his costs, he is not entitled to all of his costs. The court will often conclude that an opponent ought only to pay somewhere between 70% - 90% of his costs. It is this amount upon which a success fee is calculated. Thus e.g. if a CFA party recovers 75% of his costs i.e. £75 for every £100 billed (which is not unusual, whether by order of the court or by agreement between the parties) he will recover 100% on the £75 figure. Thus he will recover £150 in total for normal fees plus his success fee. This is equivalent to a success fee of 50% on what he would have been able to charge a private client, who would be obliged to pay his bill to his own lawyer regardless of what amount in costs he could recover from an opponent. In the experience of the writer, defamation cases tend usually to end in settlements which will result, following negotiation, in success fees of between 10% and 30% being paid. Sometimes a right to a success fee will be waived in order to secure a decent settlement for a client and to bring the litigation to a fair conclusion.

the successful opponent in costs will be highly significant. All other things being equal, a party is more likely to defend itself if the worst case scenario is that it will pay £Y in costs rather than £Y x 2 (i.e. where the claimant is funded by a CFA which provides for a 100% success fee). There is a reasonable argument (although quantification is difficult) that the existence of a 100% success fee will put undue pressure on an opponent to capitulate at an early stage of the litigation rather than contest it. This has an important ramification in defamation proceedings because capitulation will usually mean that the defendant will have to make some form of concession that the allegation complained of is false thus, potentially, society will suffer because false information has been given currency.

**41.1.3.** The above problems have been compounded by the fact that a defendant sued successfully by a CFA-funded party will sometimes also have to pay for the opponent's ATE policy (they are not taken up universally by CFA-funded litigants, for instance, there is no reason for a person without net assets to obtain one.). In the defamation field the practice has developed whereby such premiums do not become payable for a certain period of time, giving an opponent a chance to settle the matter at an early stage without incurring the cost of such a premium. Staged premiums have also gained wide usage within defamation litigation. However, this will not mean that a non-CFA party will not be unduly influenced by the prospect of paying a full ATE premium as part of its quantification of the worst case scenario.

**41.1.4.** The CFA-funded party with an ATE, or the CFA party who has no net assets, will have litigated in a risk free environment. This will mean that, because there is no real prospect of him paying his own costs or the other side's costs, there is no incentive for him to keep control of his costs (whereas a privately paying party without an ATE will have a very real interest in keeping cost down). This is a potential problem but it ought to be borne in mind that the rational lawyer acting under a CFA ought to strive to keep costs down because he ought to be aware that he is unlikely to recoup costs which the court concludes have not been reasonably incurred.

42. It is important to remember that because there are worst case scenarios in the way in which the current regime operates that that is not necessarily a justification for abolishing it; it is, however, a justification for reforming it.
43. The CFA regime and the use of ATE insurance in litigation will almost certainly be reformed regardless of who wins the forthcoming general election. The Jackson report is due to be further considered and no doubt a new regime, constructed following a further period of careful consideration, instituted via statute. On any analysis of the Jackson report, the way in which CFAs and ATEs have been used has caused problems which need to be addressed in a considered and balanced way which will not unduly restrict anyone's, claimant or defendant's, access to justice. The report does not conclude that the problem is any greater in defamation than in other areas. Indeed, given the problems which CFAs accompanied by ATEs have caused NHS Trusts (the vehicles by which public health is provided) it is difficult to see that any other group of defendants (including the media) is more deserving of special treatment.
44. The Lord Chancellor and Secretary of State for Justice (Jack Straw occupies both positions) appears to be intent upon rushing through special and apparently urgent reforms before the forthcoming general election is called to reduce success fees chargeable under CFAs in defamation and privacy actions to 10%. The government plans to achieve its aim by the use of a statutory instrument. This measure will not require the same level of scrutiny by Parliament as would have been necessary if the proposed change had been introduced via primary legislation. This is even though the proposed statutory instrument implementing a 10% cap will, on the writer's analysis, undermine such as to destroy the very purpose of the statute which established CFA funding for defamation claims: access to justice. The government risks lurching from one unsatisfactory extreme to another. One can perhaps understand the reactions of those critics quoted in paragraph 18 above.

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