LIBEL & LIBEL REFORM – RECENT DEVELOPMENTS

COMMON LAW DEVELOPMENT OR STATUTORY CODIFICATION ?

The role of codification:

1. Let me make clear where I stand from the start. The law of defamation is *par excellence* a common law tort. It has been developed by the judges over two centuries to try and strike the balance between the right to reputation and the right to free expression. Today, of course, that balance has to be struck by reference to Articles 8 and 10 of the European Convention, neither of which, as we have been repeatedly reminded from London and Strasbourg, has presumptive pre-eminence.

2. Over the years the role of legislation in defining the law of libel has been limited – a sprinkling of forgotten statutes in the 19th century, and more recently, the Defamation Acts of 952 and 1996. The latter produced sensible reforms (particularly the useful procedural mechanism for dealing with media mistakes by means of offers of amends in ***s.2-4 1996 Act***). But none of these statutes were, nor were they intended to be, attempts to codify the law.

3. Codification has a long and honourable tradition going back to the ancient Babylon of Hammurabi; but neither Justinian in 6th century Byzantium nor Napoleon in 19th century France used codification to reform the law. Nor did Lord Macaulay with the Indian Penal Code of 1862, or Sir Mackenzie Chalmers with the Sale of Goods Act 1893 and the Marine Insurance Act 1906.

4. Overt reforms are to be welcomed – indeed, although he promotes it as a reforming measure, in a number of ways Lord Lester's Bill does not go far enough, for example:

- to protect those writing in peer-reviewed scientific journals by means of qualified privilege, and
- to cut costs by ensuring the early resolution of disputes over meaning even in cases which may be tried by jury.

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5. Nor does he attempt to deal with some of the thorniest questions of all:

- the single meaning rule, recently held by the Court of Appeal in ***Ajinomoto Sweeteners v. Asda Stores [2010] EWCA Civ 609*** to be inapplicable to malicious falsehood,
- the repetition rule in the context of neutral reportage, and
- the proposal of the Culture, Media and Sport Committee that a claimant debarred from recovering damages in relation to a statute-barred internet publication should be entitled to a court order to correct a defamatory statement: see ***para.230***.

Codification containing elements of reform:

6. Codification with the clarity of Chalmers is to be welcomed: what gives rise to legitimate concern is codification, which appears to be trying to re-state the common law, but may or may not be booby-trapped with novel elements of reform. As Lord Hoffmann rightly

said, when speaking on the Second Reading of Lord Lester's Bill, this is a process which can only lead to expensive litigation over whether or not Parliament intended to change things.

7. That is the first objection – codification can actually make matters worse, and certainly more complex, and more expensive.Where there is a need for reform, it should be overt reform and flagged up as such.

Codification freezes the development of the common law:

8. The second objection is that codification fossilises the law. Instead of the living creature of the common law, we are presented with a fly set in amber. Codification trades the flexibility and the potential for development of the common law for the straitjacket of legislation.
It is a process which has invariably been counter-productive for the media.

9. Take, for example, ***s.10 Contempt of Court Act 1981*** and ***s.12 Human Rights Act 1998***.The former was intended to protect journalistic confidences, but (as cases like ***Goodwin*** and ***Interbrew*** have shown) ended by focusing attention on the exceptions to the rule, rather than the rule itself.

10. Nor did ***s.12 HRA***, which was intended to protect the media from so-called "pyjama-injunctions", make substantial inroads on the grant of prior restraint. Indeed, the decision in ***Cream Holdings v. Banerjee (2005) 1 AC 253,*** coupled with the recent emphasis by Strasbourg on reputation as a right under ***Art.8,*** has served to revive the debate as to whether the rule in ***Bonnard v. Perryman (1891) 2 Ch 269*** is water-tight. Distinguished voices have recently been heard to query whether ***Greene v. Associated Newspapers (2005) QB 972*** was rightly decided or is Convention-compliant.

11. If the balance of our law overall is sound – by which I mean what Lord Hoffmann calls "the bedrock principles" – then we tinker with the law at our peril if we try to codify it, as opposed to reforming what needs to be reformed. The worst of all is to mix codification with elements of reform, since that is nothing but a recipe for uncertainty followed by expensive litigation. That would be tragic since, as we can surely all agree, the major factor chilling freedom of expression is not the substantive law, but fear of the inordinate cost of litigation; and that is not an issue Lord Lester's Bill attempts to redress.

Specifics: honest opinion:

12. In one conspicuous respect the ability of the judiciary to mould reform means that the common law has already overtaken Lord Lester's bill. ***Clause 2*** re-names the defence of fair comment "honest opinion" but, as everyone knows, the defence had already been re-baptised by no less than the Lord Chief Justice and the Master of the Rolls in the ***Simon Singh*** case ***[2010] EWCA Civ 350***. More importantly, the flexible approach of the Court of Appeal in that case, imbued with the liberal spirit of Galileo, Milton and Orwell, is surely to be preferred to the complex attempt to codify the defence set out in the 8 sub-paragraphs of ***clause 3***.

13. ***Clause 3*** in its mixture of objective and subjective tests disabuses us of any idea

that Lord Lester's Bill is a simplifying measure. By virtue of ***sub-s.3(6)***, condition 4 – namely that an honest person could form the opinion on the basis of the facts or material shown by the defendant – would seem to leave out of account countervailing facts known to the Defendant which might well show that the condition was not satisfied.

14. Condition 4 is an objective test, in respect of which ***sub-s.3(1)*** places the burden on the defendant. In contrast, ***sub-s.3(7)*** is concerned with the subjective state of mind of the defendant, and here the burden is on the claimant to show that "*the defendant did not in fact hold the opinion"*. Presumably this means did not hold the ***honest*** opinion, so again one asks: why ignore countervailing facts known to the defendant ?

15. A similar issue arises over ***sub-s.3(6)(b)***: why take no account of whether the defendant first learnt of the underlying facts before or after publication, if by virtue of ***sub-s.3(4)*** those facts have to have existed at the time of publication ? These are all issues which the Supreme Court is likely to have to address in the imminent appeal in ***Joseph v. Spiller***. Why don't we wait and see what they say, once they have listened to detailed intervention by the media ?

Specifics: substantial harm to reputation:

16. Should you think that it is a triumph of hope over experience to place trust in the judiciary to develop the law, take a look at the recent judgment of Tugendhat J in ***Thornton v. Telegraph Media Group [2010] EWHC 1414 (QB)***. In ***Berkoff v. Burchill (1996) 4 AER 1008***, Neill LJ defined "defamatory" as meaning words which affect the attitude of other people towards the claimant in an adverse manner. In ***Thornton*** Tugendhat J emphasised the need for a threshold of seriousness -- some tendency or likelihood of adverse consequences for the claimant. Not surprisingly, what prompted this debate was the decision of the Court of Appeal in ***Youssef Jameel v. Dow Jones (2005) QB 946,*** which effectively requires the claimant to show more than minimal actual damage to his reputation, if his action is not to interfere disproportionately with the defendant's freedom of expression.

17. Tugendhat J therefore re-wrote the ***Berkoff*** definition to read "***substantially*** affects in an adverse manner the attitude of other people towards the claimant, ***or has a tendency to do so***": ***[2010] EWHC 1414; [95]***. As it happens, this was a recommendation made by the minority of the Faulks Committee.

18. In the light of this ruling (and one to much the same effect by Sharp J in ***Ecclestone v. Telegraph Media Group Ltd [2009] EWHC 2779 (QB)***), one is forced to question the need for ***clause 12*** of Lord Lester's Bill. Is it possible, and if so in what circumstances, that a substantial defamation would not cause or be likely to cause substantial harm to the claimant's reputation ? Once again, it is not clear whether the intention is to codify the ***Jameel*** doctrine that a claim will be struck out, if the game is not worth the candle (or even, as Lord Phillips put it, the wick), or to do something more. A provision of this nature will only give rise to yet further expenditure of time and money, as defendants test each new action for substantiality.

Codification of Reynolds, or not, as the case may be:

19. The Working Group set up by the last Lord Chancellor to examine the extent to which our libel law chilled freedom of expression had 17 members – only three of whom could be said to be claimant-orientated, and probably only two described as neutral as between claimants and defendants. Nonetheless it did not recommend pure codification of ***Reynolds [p26]***: it recommended further work by the Ministry of Justice on whether it is possible to reconcile the competing rights to reputation and freedom of expression in a way which clarified ***Reynolds*** in the light of ***(Mohammed) Jameel v. Wall Street Journal (2007) 1 AC 359.*** Any new proposals would then require full public consultation.

20. The Working Group was sufficiently realistic to acknowledge that the quest for certainty of application was illusory: the need for flexibility in reconciling competing public interests would always make that impossible ***[p33]***.

21. On the face of it, ***clause 1*** of the Bill headlined "*Responsible publication on matters of public interest*" looks like an attempt to codify ***Reynolds***. Indeed it was so described by Lord Pannick QC in his article in ***The Times*** of 15 July 2010. ***Sub-s.1(1)*** rehearses the two elements with which we have become so familiar: (a) the discussion of a matter of public interest, and (b) publishing responsibly. But there is an oddity in ***sub-s.1(2)*** in that the defence is extended beyond statements of fact to "*inferences and opinions*". This is odd because it is hard to see a defendant preferring to shoulder the burden of demonstrating responsibility in preference to that of honesty.

22. As regards responsibility, the Court is directed in ***sub-s.1(3)*** to have regard "*to all the circumstances of the case*". ***Sub-s.1(4)*** then states that "*those circumstances may include (among other things)*" some 7 of the 10 issues from Lord Nicholls' classic list in ***Reynolds***. Two of the missing three (the third being tone) would strike most fair-minded individuals as critical in nearly all cases: namely, the source of the information (whether the source had an axe to grind) and publication of the gist of the claimant's riposte. Indeed, the Canadian Supreme Court included the status and reliability of the source and whether the claimant's side of the story was sought and accurately reported as important elements of the defence in ***Grant v. Torstar***.

23. Neither in the Explanatory Notes to the Bill, nor in Lord Lester's speech to the House is any explanation given as to why these two factors have been ignored. It is particularly puzzling since the device of dropping them from ***sub-s.1(4)*** only leads to confusion and more uncertainty, since the Court under ***sub-s.1(3)*** "*must have regard to all the circumstances of the case*." We must all share Lord Hoffmann's puzzlement as to what this clause is trying to achieve. Is he not right when he says that after ***Jameel,*** which was generally welcomed by the press, "*there is a case for leaving well alone*" ?