Margaret Howard Memorial Lecture 2004

The Honourable Mr Justice Gray

Literature and the Law
Freedom of Expression - checking the balances

May I start by saying how delighted I am to have been invited by Gillian Howard to give this Memorial Lecture in honour of her late mother Margaret - a remarkable woman. Previous speakers come from both the literary and the legal worlds. They include the President of Trinity (no less), Sir Louis Blom-Cooper and Lord Justice Laws. Those are hard acts to follow - particularly John Laws a large part of whose lecture was, at least in its printed form, in Greek!

The topic under discussion

My chosen topic is freedom of expression. It's a topic which has seemed from time to time to generate more heat than light. I shall assume that the importance of maintaining freedom of expression is to be taken for granted.

What I am particularly concerned to examine, however, are the mechanisms by which the law adjusts the balance between freedom of expression on the one hand and the various competing private and public rights on the other hand. What you might call "checks and balances".

The context in which I am supposed to examine those questions is, as the title of this series of lectures makes clear, that of literature. I hope I will be forgiven if for the purpose of this talk I give to the term "literature" a somewhat extended meaning. The problem of defining the permissible limitations on freedom of expression arises more often than not in the context of publications which scarcely deserve the epithet "literary".

So what I have to say will be as much about *Hello* magazine and the *Sun* as it is about DH Lawrence, Laurie Lee and Salman Rushdie. Like it or not, the reality is that the boundaries of free speech are nowadays delineated in cases involving the tabloid press. So for the purpose of this talk I am defining "literature" very broadly.

Writers v lawyers

Some see the law and literature as natural adversaries, especially when it comes to the right to freedom of expression. Writers have long regarded those who make the law and those who practise it with a suspicion which borders on contempt. Witness the rhyme produced by Southey in collaboration with Coleridge[1] about the Devil:

> "His jacket was red and his breeches were blue
> And there was a hole where the tail came through
> He saw a lawyer killing a viper
> On a dunghill hard by his stable;
> And the Devil smiled, for it put him in mind
> Of Cain, and his brother Abel".

Short and to the point. This lawyer-bashing started long before. Even Shakespeare joined in: in Henry VI Part 2, Cade dreams of what he will do when he becomes king to which Dick responds enthusiastically, if a little unkindly

"The first thing we do, lets kill all the lawyers"[2].

Many others have since taken over the baton, notably of course Dickens in *Bleak House*. John Stuart Mill said of the lawyer that "hires himself out to do injustice or frustrate justice with his tongue". Swift described lawyers as "a society of men ... bred up from their youth in the art of proving by words multiplied for the purpose, that white is black and black is white, according as they are paid". Lawyers' fees rankle with literary folk. Many others have expressed similar sentiments. I have even heard it said that the present Home Secretary is unenthusiastic about lawyers - but perhaps it's not fair to include him as a man of letters.

It is natural that there should be no love lost between writers and lawyers - and probably that is no bad thing. Inevitably there is a tension between those who exercise the freedom to express themselves in their literary creations and the lawyers who impose constraints upon them or at least are perceived to do so.

Resentment about the law's interference with writers is understandable given the multiple legal snares confronting them. Let me guide you quickly around the obstacle course. We all know about civil actions for libel and for breach of confidence or, as I will call it, misuse of private information. I will come back to them in a moment.

First there is criminal libel, where proof by the defendant of the truth of the libel is no defence. Another surviving species is blasphemous libel, a cause of action upheld (surprisingly) by the European Court of Human Rights in 1983[3]. *Gay News* was unable to persuade the judges in Strasbourg that such an offence goes against Article 10 of the European Convention on Human Rights, which of course guarantees freedom of expression. Blasphemy - of a non-libellous kind - is another survivor despite a recommendation of the Law Commission that it be repealed. Its definition is pretty wide. I quote from the leading text-book on Human Rights Law [4]: "Any denial of the truth of Christian doctrine .. expressed so as to shock or outrage ordinary Christians constitutes blasphemy". Note that Moslems and Buddhists are not protected.

Then there is obscenity. The Obscene Publications Act, 1959, was intended to be a liberalising measure but it didn't stop the prosecution of *Lady Chatterley's Lover* in 1960, unsuccessful though it was. Publication of obscene matter remains a criminal offence. So too is the publication of words with a seditious intention, as the Divisional Court held when an attempt, again unsuccessful, was made to prosecute the publishers of *The Satanic Verses*. As recently as October last year, the Court of Appeal affirmed the continued availability of the offence of "public nuisance" to prosecute someone for sending offensive material through the post [5].

The fact that these archaic offences remain on the statute book does not of course mean that they are invoked. To a large extent the legal thicket cleared during the last century. There's only been one prosecution for seditious libel in the last 80 years. And it is 30 years since the late Sir James Goldsmith persuaded a judge to allow him to prosecute *Private Eye* for criminal libel after the magazine ran a succession of articles accusing the tycoon of skulduggery in connection with the death or at least disappearance of Lord Lucan [6].

So in practice what laws still fetter freedom of expression today? To start with, there is defamation (plus malicious falsehood, a cause of action which is growing in popularity because legal aid is available, whereas in defamation it is not). Then there is misuse of private information [7]. The interaction of Article 8 of the European Convention on Human Rights (the right to respect for private and family life) and the domestic enactment of the Human Rights Act has created a fertile hunting ground for lawyers seeking to prevent uncomfortable disclosures about their clients' private lives.

Defamation and misuse of private information are the main surviving legal bases for restraining the exercise of the right to freedom of expression. But there are other potentially restrictive laws. One is the

law of contempt of court. You cannot publish information which may prejudice pending proceedings. The victory of the *Sunday Times* in Strasbourg in the thalidomide litigation [8] severely cut down the ambit of our contempt law. But publishers still face fines and even imprisonment if they publish prejudicial material. Statutory contempt by prejudicing proceedings is an offence of strict liability [9]. Reduced in scope it may be, but the law of contempt is alive and kicking. The present Attorney General has signalled his intention to make greater use of the law of contempt to prevent criminal trials (such as the case against the Newcastle footballers) being aborted by prejudicial publicity.

The law of contempt does not only affect the media. All sorts of publications are at risk. Mr Al Fayed invoked the law of contempt in his attempt to prevent Mr Tiny Rowland of Lonrho from continuing his campaign in the columns of the *Observer* to secure the publication of the DTI report on his acquisition of Harrods [10]. (The case is memorable for the fact that Lord Ackner did not sit on the appeal on the ground that many years before his father had been Mr Rowland's dentist). Mr Fayed's application failed.

A second potentially restrictive law is that of copyright. It can operate restrictively. Infringing literary works can be injuncted and damages can be awarded. Incidentally the work does not have to have literary merit, which may be a comfort to some authors. Indeed the work does not have to be literary at all - even exam papers qualify as literary works!

As it happens, actions for infringement of literary copyright are few and far between. It is hard to prove copying. The task of Mrs Burnett, author of *Little Lord Fauntleroy*, in proving plagiarism was made easier by the letter which the defendant had written to her:

"*Dear Madam - I write to tell you I have taken the liberty of writing a little comedy in three acts, the motive of which has been suggested to me by your most charming story, Little Lord Fauntleroy, I have, however, retained most of the characters and have let them remain just as you have so beautifully sketched them ...". [11]*

That case was decided in 1888. There have been precious few literary infringement cases since.

But I do not dwell on copyright since it is generally protective of the rights of authors and thereby promotes the free flow of information. For example damages are recoverable for derogatory treatment of a literary work or for false attribution of authorship [12]. Thus the late Alan Clark MP recovered damages from the Evening Standard for a column entitled

" Alan Clark's Secret Political Diaries" which was supposed to be a parody of the authentic diaries[13]. The enforcement of an author's copyright is in reality an endorsement of his or her right to freedom of expression. It cannot sensibly be regarded as an invasion of that right.

THE NATURE OF THE RIGHT

I said earlier that I took it for granted that we all value freedom of expression. That is perhaps an assumption which should not be too readily made. The common law traditionally prided itself for its insistence on free speech. In the Spycatcher litigation, Lord Bridge described it as "the first casualty under a totalitarian regime" [14]. In the 1993 case Derbyshire CC v Times Newspapers [15], a case concerned with the right of a local authority to sue for libel, Lord Keith said :

"...I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under [Article 10 of the European Convention on Human Rights]".

I think one could find judges in Strasbourg who would say that Lord Keith was being a touch complacent. And not only in Strasbourg. The present Master of the Rolls pointed out in Ashworth v MGN Ltd [16], decided in 2001, that decisions in Strasbourg demonstrate that freedom of the press has carried greater weight there than it has in the courts of this country.

But no one could accuse the House of Lords of failing to give full recognition to the right to freedom of expression recently. For example in the case of Simms [17], which was concerned with the right of convicted prisoners to have access to investigative journalists willing to assist them to challenge their convictions, Lord Steyn said [18]:

".... freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions which go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice".

Stirring words. But, as is well known, the right to freedom of expression is not absolute: Article 10(2) qualifies it:

"*The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such .... restrictions as are ... necessary in a democratic society .... for the protection of the reputation or rights of others [or] for preventing the disclosure of information received in confidence ...".* (I have omitted words which are not for present purposes material).

The big question is how to determine when the right to freedom of expression should give way to some other right or freedom. How in practice do the courts strike that delicate balance?

PRIOR RESTRAINT

It is sometimes overlooked that this question can arise at two distinct stages: restraint prior to publication and action post-publication. It is one thing for a judge to prevent a publication taking place, perhaps for ever; quite another for a judge (or a jury) to award compensation to an injured party after the event.

So far as prior restraint of defamation is concerned, English law is clear and has been so since the 19th century: no injunction pending trial will be granted in cases where the defendant asserts an intention to rely on the defence of justification or some other defence such as privilege.

Section 12(4) of the Human Rights Act, 1998 now warns judges to have "particular regard" to the Convention's right to freedom of expression. As far as I know there is no decided case to tell us what this provision actually means! But it shows the legislature nudging the courts towards greater freedom of expression [19].

It is open to question whether this rule of no prior restraint in defamation cases accords with Article 8 of the Convention (the right to privacy). What of the cases where it is clear, long before trial, that the defendant publisher is quite unable to advance any public interest why the publication should be permitted?

Take the case of a publication which accuses a distinguished man, of advanced years, of having committed adultery 40 years earlier. Assume that the allegation is true and that the publisher can prove it or claims he can. What public interest is served in such a case by applying the rule that no injunction should be granted because the publisher is pleading justification?

It is at least arguable that in such a case the Article 10 right of freedom of expression should yield to the individual's right of privacy. Is this not a situation where a further curtailment of the right to freedom of expression would be necessary and therefore justified? If justified at trial, why not also pending trial? Is there not a case for adopting the French right to be forgotten, which operates after 10 years?

But there is a broader anomaly. The reluctance to impose prior restraint is confined to libel. In other cases of action the principle in American Cyanamid [20] is applied: if there is a serious issue to be tried, an interim injunction will be granted or withheld according to the balance of convenience (or justice) in the particular case. That is the conventional test in private information cases. What should the Judge do where the claimant asserts a right to privacy and seeks an injunction to prevent the publication of information which is plainly defamatory of him? Should the judge in such a case apply the no prior restraint rule when the claimant has (wisely) chosen not to sue in libel? Or should the judge grant an injunction until trial on the basis that the just and convenient course is to postpone publication until after the trial?

As English law stands at present, the answer to this dilemma would appear to be that a claimant cannot circumvent the rule against prior restraint in libel by couching his or her claim in some other cause of action. Let me give an example: the pop star Tom Jones (and others) brought an action against their former PR man who was threatening to "tell all". The singers sued in libel and for what would now be called misuse of private information. A libel injunction was out of the question because the PR man said he would justify what he intended to publish. The Court of Appeal refused to grant an injunction on privacy grounds, holding that the truth should out. The balance "came down in favour of the truth being told" [21].

One can see why on the facts of that case, the court refused injunctions. But there will be other cases where injunctions should be granted pending trial even if that interferes with freedom of expression. In the English cases differing views have been expressed on the question whether the right to freedom of expression under Article 10 is a trump card. When Michael Douglas and Catherine Zeta-Jones sought an injunction to prevent Hello magazine from publishing their wedding photographs [22], one member of the Court Appeal [23] described the right to freedom of expression as "a powerful card" if not in every case the ace of trumps. But another Lord Justice [24] in the same case suggested that the rights of others (including the right to privacy) are as material as the right to freedom of expression . The famous couple failed to obtain an injunction but in due course recovered significant damages.

In the turf war between reputation and privacy the Council of Europe offers this guidance:

"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. The rights are neither absolute nor in any hierarchical order, since they are of equal value".

In my view judges hearing applications for injunctions against publications should continue to be on their guard against those, whether they be royals or footballers or soap stars, who invoke the law of privacy as a means of preventing the dissemination of defamatory material about their conduct [25]. Many would agree with the comment of a serving judge, Sedley LJ [26], that the principle of English domestic law that truth is an absolute defence to a claim in libel may require re-examination if the UK is to fulfil its obligations under the Convention.

THE POSITION OF THE TRIAL

What about the position at trial? Until towards the end of the last century, it could be argued that English law provided inadequate protection for freedom of expression. But in recent years important adjustments have been made tilting the balance in favour of freedom of expression.

Take private information. The courts have gradually developed a defence of public interest whereby the right to privacy is overridden where it is in the public interest for the information to be disclosed. So, for example, the courts have refused to grant an injunction preventing the publication of information which raised credible doubts about the reliability of the equipment used by the police for breath-testing drivers [27]. In another case publication of what would otherwise have been personal information was permitted because it related to the dangerous medical condition of a patient detained in a secure hospital [28].

By these and other similar decisions the courts prevented the law against the misuse of private information being invoked in circumstance where the public has a right to know. The chilling effect on freedom of expression is reduced.

Until very recently and despite the enactment of the Human Rights Act in 1998, the courts have been wary about recognising the existence of a free-standing right of privacy. In Wainwright v Home Office [29] the claimants, who had been strip-searched when visiting a relative in prison, failed to establish an entitlement to damages for breach of their right to privacy. The search took place at a time when the Human Rights Act was not in force. The House of Lords firmly rejected the invitation to declare that there had been a previously unknown tort of invasion of privacy [30].

But the law does not stand still. The super-model Naomi Campbell sought damages from the Mirror for two reports which revealed that she had been receiving therapy for drug-addiction through Narcotics Anonymous. The judge awarded her the modest sum of £2,500 plus aggravated damages of £1,000 - no doubt because of the offensive reference to her being as effective as a chocolate soldier [31]. The Court of Appeal held that since the model had falsely claimed not to have had a drug problem, the newspaper was entitled to put the record straight. As to the further revelation that Ms Campbell was attending sessions at Narcotics Anonymous, the court held that her right to privacy was outweighed by the newspaper's right to freedom of expression [32].

As everybody knows Naomi Campbell got back her damages from the House of Lords. The Law Lords were split 3 to 2 in her favour. The Mirror was quick to point out that all 3 Court of Appeal judges had been on the newspaper's side, so that it had won on a head count. But that is not quite how the law operates). Media reaction to the Lords' decision has ranged from dismissive to alarmist. I think both reactions are right. On its facts the case scarcely merited the attention of their Lordships. At the same time the alarm felt by some sections of the media is understandable in the light of some of their general observations.

Lords Nicholls and Hoffmann (both of whom, as it happens, dissented) had important things to say about privacy as a right. A right of privacy is unequivocally acknowledged in their opinions. Lord Nicholls said in terms that the right is better encapsulated now as misuse of private information. The touchstone of the new (or at least re-labelled) tort is whether the claimant had a reasonable expectation of privacy in respect of the information in question. In other words the issue whether the information in question is private will be determined from the perspective of the claimant. The Lords accept that the right to freedom of expression has to be weighed in the balance but it does not have precedence.

The tabloids have good reason to be worried about all this. Editors will have to think long and hard about kiss and tell stories. What of the story of the scorned former lover of a married TV star? Will the courts hold that he had no reasonable expectation of privacy? If so, on what basis? Is there a public, as opposed to a prurient, interest in such a story?

Photographs will be a particular problem. For Lord Hope, the photographs which the Mirror published of Ms Campbell persuaded him to allow Ms Campbell's appeal. Although she was in a public place, the caption made clear that she was leaving the premises of Narcotics Anonymous. So it seems that, if the activity photographed is private, so too will the photograph be, even if it is taken in a public place. Lord Hoffmann said "the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information" [33]. And Lady Hale accepted that photographs can add to the harm and render an otherwise acceptable story objectionable [34].

Just as in the case of privacy, in the field of defamation the courts became increasingly alive to the need to ensure that law does not "chill" freedom of expression and discussion. This has been achieved by a series of adjustments to the balance - what some would call the genius of the common law, although

statute has played its part as well. In their various ways they all tend to enlarge the right to freedom of expression.

One major adjustment, at least so far as the media are concerned, is the judge-made re-definition of the defence of qualified privilege. Newspapers commonly find themselves in a position where they have a story of real public concern but are not in a position to prove its truth. The law has traditionally recognised the right of a publisher to publish material, even if it is defamatory and untrue, if the publisher is under a duty to publish. But it was rare for a newspaper to be able to establish such a duty.

The House of Lords in Reynolds v Times Newspapers

[35] radically altered the defence of qualified privilege in cases involving the media. In Reynolds Lord Nicholls laid down a far more flexible test for deciding whether a media publication is protected by qualified privilege. He held that a media publication is privileged if the publisher is shown to have behaved responsibly, for example by verifying the information and including the claimant's side of the story and so on. The defence of privilege is now available in many cases where it would not previously have been.

Most would agree that liberalisation of the traditional approach to the defence of qualified privilege was needed. Time alone will tell whether the Reynolds test is the right way to achieve that end.

Another significant change, again judge-made, concerns the defence of fair comment. What the Final Court of Appeal of Hong Kong had to decide was whether the defence of fair comment is available to a defendant who honestly believes in the soundness of his comment but who had a malicious reason for making it - for example a theatre critic who in his review says that the play is appallingly written because that is what he honestly believes but who is motivated by some personal grudge against or animosity towards the playwright.

The name of the case is Tse Wai Chun Paul v Albert Cheng [36]. What Lord Nicholls said was that the touchstone of the defence of fair comment is the honesty of the commentator; ulterior motives are irrelevant:

"Liberty to make ... comments, genuinely held, on matters of public interest lies at the heart of the defence of fair comment. That is the very object for which the defence exists. Commentators, of all shades of opinion, are entitled to "have their own agenda". Politicians, social reformers, busybodies, those with political or other ambitions and those with none, all can grind their axes..."[37].

This clarifies and demystifies of the law. It affirms the right to express opinions without fear of retribution, provided only that those opinions are honestly held. The somewhat antiquated concept of "malice" is relegated to its proper place. The law now matches the famous dictum of CP Scott of the Manchester Guardian: "comment is free but facts are sacred ". Critics can have no objection to that; nor should the subjects of their criticism. I expect that in future the defence of fair comment will be deployed more frequently than in the past, and with greater success.

Another shift in the law towards freedom of expression is part judge-made and part statutory. It deals with a problem for authors, playwrights and film-makers which is exemplified by the case of Artemus Jones [38]. In 1907 the Sunday Chronicle published a satirical sketch featuring a fictional churchwarden from Peckham called Artemus Jones. The sketch included this passage:

"Whist! There is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing!...Who would suppose by his going on that he is a churchwarden at Peckham?".

Unfortunately for the newspaper there was at the time a Welsh barrister called Artemus Jones, a happily married man. He sued for libel and the House of Lords upheld an award of £1,750 (in 1907 money!).

That for a case of wholly unintentional defamation: the newspaper did not intend to refer to the real Artemus and did not even know of his existence.

This problem, which is a recurrent one, was one of those tackled in the Defamation Act of 1996, which introduced a mechanism, called the offer of amends procedure, by which an innocent publisher can offer to publish a correction and apology and compensation. The object is to provide the publisher with a quick and cheap escape route from a defamation claim. The media regularly invoke these provisions. The economics of book publishing make the procedure equally suitable in that field.

The intended effect of these changes is to reduce the incidence and costs of libel litigation. Of course that benefits claimants. What is more important for present purposes, however, is that the financial burden imposed on defendants by libel litigation is also reduced, thereby alleviating the chilling effect on freedom of expression.. It is another indication of the way the wind is blowing.

DAMAGES

So far I have been describing adjustments in the law affecting liability for the publication of defamatory statements. However nicely struck the balance between freedom of expression and other countervailing interests when it comes to deciding liability in a civil action, the applecart is well and truly upset if awards of damages are out of control.

That is what happened in defamation cases from the late 1970s until the mid-90s. A brief trip down memory lane will serve as a reminder of the bonanza which libel claimants in those days enjoyed: £300,000 for the actress Koo Stark for the suggestion that she continued to date the Duke of York after his marriage; £600,000 for Sonia Sutcliffe, the wife of the Yorkshire Ripper, for a libel in Private Eye (reduced on appeal); £500,000 for Lord Archer for the suggestion that he consorted with a prostitute (paid back with interest after his conviction for perjury); £200,000 for the singer and former Neighbours star Jason Donovan for the suggestion that he was a hypocrite and a liar to deny that he was gay; and so on.

These were jury awards. Many of them were against tabloid newspapers, so few tears were shed. No doubt the jury felt, correctly in point of fact but illegitimately in point of law, that the publishers concerned could well afford to pay. But of course the astronomic level of awards then being made by juries influenced the level of settlements out of court - I well remember acting for the Sun when it settled for £1 million a claim brought by Elton John on stories about his private life.

But the well-publicised awards in favour of pop stars and footballers inevitably had a spin-off effect on publishers of more modest means - local newspapers, magazines, publishers of biographies and novels. If they sought pre-publication advice, they had to be warned of their potential exposure. The result was often a decision not to publish. If the publication went ahead and a writ followed, only a brave publisher (or a brave insurer) would risk letting the case go to trial. Either way - whether the publisher settled or decided to fight the case, there would be less money in the kitty for the next book. To use the language of Article 10, the level of damages was interfering with the flow and imparting of information and ideas.

The music had to stop. In 1995, the Mirror appealed an award of libel damages made against it in an action brought by the singer Elton John. Perhaps it was emboldened by a decision of the European Court in the meantime. Lord Aldington was awarded by a jury damages of £1.5 million for an accusation in a pamphlet that he had been guilty of war crimes. Strasbourg found a violation of Article 10 because the judicial control of the jury trial had not offered adequate or effective safeguards against a disproportionately large award [39].

Elton John had been awarded £75,000 compensatory damages (plus £275,000 exemplary damages) for an article in the Sunday Mirror suggesting that he suffered from bulimia with the bizarre habit of

chewing but not swallowing his food. This Court of Appeal upheld arguments similar to those which had been advanced a year earlier in the Rantzen case. The Court of Appeal reduced both components of the award: compensatory damages came down to £25,000 and exemplary damages to £50,000 [40].

The significance of the case for present purposes, however, is that the court was persuaded that juries (likened by Lord Bingham to "sheep loosed on an unfenced common without a shepherd" [41]) required far greater guidance than had hitherto been the practice. In particular juries might in future be informed of the level of awards for pain and suffering in personal injury cases. The court expressed the view [42] that it was offensive to public opinion that a defamation plaintiff should recover damages for injury to reputation greater than if the same plaintiff had been rendered a helpless cripple or a mindless vegetable. Another innovation was that counsel and the judge should be permitted to suggest to the jury appropriate upper and lower brackets for damages.

My experience both at the Bar and on the Bench indicates that the changes in practice introduced by the Elton John case have brought about a dramatic reduction in the level of damage awards in defamation cases. The effective ceiling for compensatory damages in libel stands now at about £200,000 (the top of the bracket in a personal injury case for quadriplegia [43]). Awards nowadays are at a level of about a quarter of the awards made by juries a decade ago.

Much of the impetus for the judge-driven reduction in the level of awards in defamation cases derived from a concern that the level of damages had been running at such a pitch as to inhibit the free flow of information and to discourage the press from investigative journalism. Some feel that the pendulum may have swung too far in the opposite direction. Awards nowadays are not high enough to make an editor think twice before publishing - although, as we shall see, the potential costs liability often is.

In a recent libel action heard by Mr Justice Eady [44], the two claimants were social workers who sued on widely publicised allegations of child abuse. Awarding each of them £200,000, the Judge commented that they "had earned [the damages] several times over because of the scale, gravity and persistence of the allegations and the aggravating features". And it may be significant that ion a recent Privy Council case, Abrahams v The Gleaner Co Ltd [45], an award of damages in favour of a former Minister of Tourism in Jamaica which was the equivalent of £533,000 was upheld. The newspaper had treated the claimant shabbily and Lord Hoffmann said [46] that the Court of Appeal were entitled to take the view that if the award had a chilling effect on this kind of conduct, that would be no bad thing.

It remains to be seen whether that is the prelude to a modest upward adjustment in the level of damages for defamation. Given the changes in the substantive law, in the fields of both defamation and breach of confidence, affording greater recognition to the importance of freedom of expression, is the law not now in danger of putting too low a price on a person's good name? Does the level of damages set in Elton John place an adequate value on reputation at least in serious cases?

In private information cases awards of damages have hitherto been few and far between. They rarely go to trial. In Douglas v Hello, Mr Justice Lindsay awarded Michael Douglas and Catherine Zeta-Jones £3,750 each for the distress caused by the magazine's invasion of their right of privacy [47]. Awards of that magnitude are hardly chilling. But, following the Lords' decision in the Naomi Campbell case we can expect the volume of privacy claims to increase and some of them may yield substantial awards. Juries will not be involved, so it will be easier to maintain judicial control over the level of awards.

COSTS (incl CFAs)

Costs are always dealt with at the end of the case. I come to the question of costs at the end of this lecture. To the outsider costs may seem a humdrum and unimportant. Far from it; in contested cases (and in most cases which are not contested) the sums involved dwarf the amount of the damages.

Lawyers' fees have been, to say the least, controversial since Bleak House and before. But there exists today a feature which would have moved Dickens to even greater indignation. The problem arises out of the Access to Justice Act of 1999 which permitted for the first time clients to enter into conditional fee agreements (CFAs as they are known) with their legal advisers. Lawyers acting on CFAs get paid if they win but not if they don't. No foal, no fee, as they say in the racing world.

The legislation allows the lawyer acting on a CFA to charge his client and recover from the opposing party an "uplift" of a specified percentage of the standard costs which would ordinarily be payable. In libel cases this uplift is generally 100% of the standard fees. On top of that he can recover the cost of what is called "after the event" insurance cover. That is insurance taken out by the solicitor to protect himself against incurring substantial costs in a case which he ultimately loses. It comes pretty expensive: the premium may add another 80 per cent to the standard charge. So the total uplift may be 180 per cent.

What are the costs consequences of all this for the unfortunate defendant. Of course, if he loses, he will have to pay damages. But damages, relative to costs, will be small beer. In addition the defendant party will have to pay not only the cost of instructing his own solicitors and barristers, but also the legal costs incurred by the claimant in instructing his solicitors and barristers - doubled to take account of the 100 per cent uplift plus the insurance premium.

Solicitors generally charge by the hour. Libel actions are notoriously expensive. For specialist work (as defamation is recognised to be) the hourly rate for a partner may be in the region of £300.In a heavy case, the partner having conduct of the case may devote literally hundreds of hours to the preparation and conduct of a case at trial. I leave it to you to multiply £300 by 2 (for the 100 per cent uplift) and by 250 (for a hypothetical number of hours). You have been listening to me for a long time, so I will tell you that the answer is £150,000.

That is just for the partner. On top of that come charges for the assistant solicitors; the brief fees and refreshers of one two or three counsel and we must not forget the after the event insurance premium. Libel claimants' bills of costs after a contested trial can and do run into millions of pounds.

The aims of the legislation were laudable enough: to curb the rising cost of legal aid and to enable poorer litigants with deserving claims (chiefly in personal injury cases) to obtain access to the courts. Most people would agree lawyers acting on CFAs should be entitled to a substantial reward for having taken on a case, which, had it been lost, would have resulted in their recovering no fees at all.

You may wonder what all this has to do with freedom of expression. The answer is very simple. Claimants with the benefits of CFAs are in an enormously powerful position. They know that, if the claim is successful, the defendant will face a bill not only for his own costs but also for the uplifted costs of the successful claimant and the insurance premium. If on the other hand the claim fails, the claimant having no means will be unable to pay a bean. This point can be and is made forcibly to defendants in pre-trial negotiations.

Small wonder that many defendants buckle at the prospect. (Not all do. Two years I tried a libel action brought against Private Eye by an accountant who had entered into a CFA with his solicitors. It was a heavy case which required a detailed investigation of the accountant's dealings with many of his clients. It was painfully apparent to the defendants that, if they lost the action, the magazine could not have survived. Happily the claim was withdrawn. Private Eye had to meet its own costs but not the accountant's. But it survived).

If I appear to labour the point, it is because the empowerment of CFA-financed libel claimants (who may have indifferent claims) poses a real threat to freedom of expression. Editors of national newspapers attribute the virtual disappearance of investigative journalism to their proprietors' reluctance to expose

themselves to costs of being sued. How much more vulnerable are authors and publishers of more modest means.

CFAs are a good example of the willingness of the courts to play an interventionist role when there is a threat to freedom of expression. A political activist named Adam Musa King brought an action for libel against the Sunday Telegraph. His action was financed by a CFA. In a judgment handed down as recently as last week Brooke LJ in the Court of Appeal expressly recognised the obvious unfairness to the newspaper created by its disproportionate potential liability in costs and the consequent chilling effect on its right to freedom of expression [48]. He proposed the deployment of three weapons against costs extravagance: firstly, judicial costs capping from the inception of the litigation; secondly, a touch approach to assessment of costs at the conclusion of the litigation and thirdly wasted costs orders against the lawyers concerned. Time will tell whether this will solve the problem.

OVERVIEW

I have tried to describe the various ways in which the law copes or tries to cope with the threats to freedom of expression. What is to be learned from all this?

First and foremost, I would suggest, that freedom of expression is a right which is well worth preserving and protecting. Free speech, whether in the media or elsewhere, is valuable because it enables other important rights to be defended and abuses of power to be exposed. The days are long gone when this function was effectively performed by Parliament. However much one deplores the irresponsibility of large sections of the media, the temptation to curb press freedom must be resisted. The law has in recent years been alert to the need to protect freedom of expression. It has to be said that much of the credit for this is due to Strasbourg.

The second lesson I would suggest is that the threats to freedom of expression come from all sides, some of them unexpected and unpredictable. Some see the right of privacy as a growth area and a way of curbing tabloid excesses. But the price of privacy is a diminution of freedom of expression.

The threats come from many other angles. One such is the conditional fee agreement, for reasons which I have explained. An attempt was made to deploy the 1997 Protection from Harassment Act to prevent a newspaper exposing the claimant to unwelcome publicity [49]. Concern has been expressed that the 2003 Communications Act will interfere with the freedom of the press because of the wide powers it confers on the media regulator, Ofcom. Then there is the 1998 Data Protection Act. At this stage in the evening I will spare you its details. The Act has given birth to a creature with the Orwellian title of "data controller". Lurking in the schedules are all sorts of prohibitions on what the controller may do with his data. The provisions of that Act are said to have inhibited the police from informing Soham Social Services of the suspicions about sexual history of Ian Huntley - a striking example of interference with the free flow of information. It remains to be seen if the new Freedom of Information Act will provide an effective antidote.

That leaves the balancing act, which has been the topic of this lecture. It is ultimately up to the judges to make adjustments so as to maintain a proper balance between freedom of expression and the threats to that freedom, some of which I have mentioned. Important though I believe freedom of expression to be, there are countervailing considerations. It is in my view unhelpful to describe freedom of expression as a trump card. Article 10 itself recognises that it is nothing of the kind. Reputation is a right worthy of protection. So too are other rights: privacy is one and there is also the right to a fair trial untainted by prejudicial publicity.

But when reputation comes to be over-valued, as it did in the days of inflated awards of damages, and when the law becomes over-protective of the trial process, as happened in the domestic thalidomide litigation, then the law should and does step in and adjust the balance.

I believe - I hope without being complacent - that the common law, with the stimulus of the European Convention and sometimes with statutory assistance, has on the whole so far succeeded in making the necessary adjustments to strike an appropriate balance between freedom of expression and other competing rights and interests.

Notes:

[1] The Devil's Thoughts

[2] IV.2.73

[3] Gay News and Lemon v UK [1983] 5 EHRR 737

[4] The Law of Human Rights by Clayton and Tomlinson at para 14.14

[5] R v Goldstein, R vR [2004] 2 All ER 589

[6] Goldsmith v Pressdram [1977] 1 QB 83

[7] Campbell v MGN Limited [2003] QB 633

[8] Sunday Times v UK [1979] EHRR 245

[9] section 1, Contempt of Court Act, 1981

[10] In re Lonrho PLC [1990] 2 AC 154

[11] Warner v Seebohm [1888] 39 Ch D 73

[12] Copyright Designs and Patents Act, 1988, section 84

[13] Clark v Associated Newspapers [1998] RPC 261

[14] [1987] 1 WLR 1248 at 1321

[15] [1993] AC 534 at 551

[16] [2001] 1 WLR 515 at 536

[17] R v Secretary of State ex parte Simms [2000] AC 115

[18] at 126E-G

[19] see Cream Holdings v Bannerjee [2003] 3 WLR 999

[20] American Cyanamid v Ethicon [1975] AC 396

[21] Woodward v Hutchings [1977] 1 WLR 570 at 576 per Lord Denning MR

[22] Douglas v Hello [2001] QB 967

[23] Brooke LJ at para 49

[24] Sedley LJ at para 136

[25] see the discussion in A v B PLC [2003] QB 195

[26] "Freedom, Law and Justice" (The Hamlin Lecture 1999 Sweet & Maxwell)

[27] Lion Laboratories v Evans [1985] QB 526

[28] W v Edgell [1990] 1 Ch 359

[29] [2003] 4 All ER 969

[30] Lords Hoffmann at para 35

[31] [2002] EWHC 499 (QB)

[32] Campbell v MGN Limited [2003] QB 633

[33] at paragraph 75

[34] at paragraphs 155-6

[35] [2001] 2 AC 127

[36] [2001] EMLR 777

[37] at 788

[38] Hulton v Jones [1910] AC 20

[39] Tolstoy Miloslavsky v UK [1995] 20 EHRR 442

[40] John v MGN Limited [1997] QB 586

[41] at 608G

[42] at 614H

[43] Judicial Studies Board Guidelines for General Damages 6th edition at p3

[44] [2002] EWHC 1600 QB

[45] [2004] AC 628

[46] at 760

[47] [2004] EMLR 13

[48] Musa King v Telegraph Group Limited [2004] EWCA (Civ) 613

[49] Thomas v News Goup Newspapers [2002] EMLR 4