Cascading effort in defamation reform: four key themes

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There have always been problems with the law of defamation. I recall in one of the first academic texts I ever read on defamation, the disdain of the author for the fact that in libel 'swingeing damages' could be recovered without proof of any falsity or proof of any harm. Conversely, I also recall a similarly early encounter with the typical defendant lawyer's mantra: can they afford to sue?

Over time, in many jurisdictions, we have seen significant shifts in the common law and statutory interventions as lawyers, judges and legislators seek to redress perceived imbalances in the accommodation reached in the law between the various personal and societal interests at stake: interests in the accuracy of personal and corporate reputations; interest in freedom of speech and access to information on matters of public importance; interests in access to justice.

In England and Wales, we had a Defamation Act in 1952; another in 1996; in Australia, the various states collaborated to introduce coherent, uniform defamation laws by way of statute in 2005. Ireland revised its common law through a Defamation Act in 2009.

[SEE SLIDE 2] In terms of judicial revisions, we have seen piecemeal, incremental developments everywhere all the time, with the occasional shift of tectonic dimensions: *New York Times* v *Sullivan* in the US which created the 'public figure' defence; *Reynolds* and similar judgments – *Grant* v *Torstar* in Canada; *Lange* in Australia, and most recently *Durie* v *Gardiner* in NZ – that established 'public interest' defences resting on the responsibility or reasonableness of conduct.

[SEE SLIDE 3] What we have seen in recent years, however, beginning with the libel reform debate in England from about 2009 and culminating in the Defamation Act 2013, but then playing out in other parts of the UK in processes that have not yet reached their conclusions, then in Canada, Ireland and Australia is – or at least needs to be - something somewhat different.

[SEE SLIDE 4] Reflecting on the recent trail of reform efforts around the common law world, I want to suggest that there are four, interconnected things going on here; that there should have been – or should be, depending on the stage in the process that a given jurisdiction has reached - four key areas for consideration:

- to reach a proper accommodation between public and personal interests in reputation and free speech in substantive law;
- to accommodate the internet and social media and the manner in which we communicate thereon;
- to question whether legal forums are the best places in which to undertake the balancing of reputation and free speech given the attendant issues of cost and access to justice that legal processes almost necessarily generate, and
- to recognise the interplay with other areas of law that increasingly ask parallel questions to the law of defamation.

Accommodating the individual and social interests in reputation and free speech in substantive law

First, then, there is the age-old question of how to reach a proper accommodation between individual and social interests in reputation and free speech. This is really where the libel reform campaign in England got going. It managed to cast the public conception of concerns over defamation law as being very much about

the 'chilling effect' of libel law on free speech.[1] This was notwithstanding the fact that almost every significant reform over the prior 20 years had served to bolster free speech over the protection of reputation [SEE SLIDE 5]. In the discussion of defamation law, there is always a risk that concerns about the impact of the law on freedom of speech – because they are sometimes obvious and occasionally scandalous – come to predominate. As a matter of law and of principle, however, that is a mistake. Defamation law must ensure adequate recognition of all underpinning values and interests. Both freedom of speech and reputation are protected by Convention rights in Article 10 ECHR and Article 8 ECHR respectively. Access to justice is necessary for all parties whose rights may have been infringed.

The libel reform campaign was successful because they chose their defendants well and harnessed some truly excellent illustrations of effective censorship by relatively wealthy claimants:

- Simon Singh had been sued by the British Chiropractic Association for having written in the *Guardian* newspaper that it, as the respectable collective voice for practising chiropractors, 'happily promote[d] bogus treatments' for whose efficacy there was 'not a jot of evidence'. That case was focused on an article that could not have been more obviously written to benefit from the defence of fair comment (honest opinion), but – at least at first instance – Singh had lost.
- The campaign could also cite the egregious abuse of medical researcher Peter Wilmshurst whose corporate pursuers deployed almost every trick to keep the case alive until it was kicked out for failure to provide security for costs, and

To such cases could be added the general awareness of egregious abuse of the law: the case of the former Welsh Police Superintendent Gordon Anglesea who was awarded £400,000 for defamation in 1994 after having been accused of being a paedophile in the early 1990s by a number of British publications. Yet, in 2013, he was arrested and convicted of the abuse of several young boys. Or the case of Lance Armstrong, and the belated vindication of the *Sunday Times* reporting of his drugs cheating. Or Jimmy Savile, or Robert Maxwell and so on. There are, of course, many other similar illustrations.

So, the main initiatives in this area have been protective of free speech. On one hand, the 2013 Act saw the introduction of a 'serious harm test' in section 1 that was intended to 'raise the bar' for plainly unmeritorious claims. On the other hand, the legislation saw a continuing effort to get defences right [SEE SLIDES 6-8].

We have now had the 2013 Act in force for 5 years, and judges have been called on to interpret a number of its elements, most notably section 1. [SEE SLIDES 9-12] In *Lachaux* v *Independent Print Ltd*, the Court of Appeal seemed effectively to revert to the common law position – with its threshold of seriousness resting on the tendency of the words to cause (serious) harm – in its interpretation of the s.1 serious harm test. That interpretation was rejected by the Supreme Court in June, which has reinstated the requirement to demonstrate that some serious harm has actually occurred or is likely to occur.

As regards defences, and outside of the expansion and rationalisation of qualified privileges, I'm not sure that the Defamation Act 2013 achieved all that much. The Act abolished and then reinstated variants of the main common law defences. The most notable revisions to the section 2 defence of 'truth' and the section 3 defence of 'honest opinion' can be seen in the new nomenclature. [SEE SLIDES 13-14] The new statutory defence of 'publication on a matter of public interest' took a decidedly different form to the common law *Reynolds* privilege, and there was some debate on whether it comprised a 'good-faith' based test similar to *New York Times* v *Sullivan* (as sought by the libel reform campaign) or a statutory incarnation of the pre-existing law. The English courts have by now confirmed, in *Economou* v *de Freitas* and *Serafin* v *Malkiwicz*, that the defence is equivalent to *Reynolds*.

[1] A chronological review of the development of the movement for reform in England and Wales can be found in the NI Law Commission's consultation paper, [1.09]-[1.17].

In the report for the Northern Irish government, I suggested that there were a number of ways in which the defence of fair comment/honest opinion might be further revised in the hope of better reflecting the personal and social interests in free speech [SEE SLIDES 15-16]. Chief among these suggestions was the idea that the defence should be available not only when the underlying facts could be proven to be true or were privileged, but also where the defendant could prove that he or she held a reasonable belief in the truth of the underpinning facts at the time of publishing the comment. This idea has also found its way into the legislation proposed by the Scottish Law Commission.

Accommodating Internet and Social Media Speech in the Law of Defamation

The second focus mooted earlier concerns the need to accommodate the internet and social media and the manner in which we communicate thereon. The idea that libel laws predate the light bulb let alone the internet was a useful rhetorical trope for libel campaigners in Britain, but there really wasn't sufficient effort given to the array of issues that the new platforms generate. In England and Wales, we ended up with ss 5 and 10 [SEE SLIDE 17]. The latter provision provides that only the primary author, editor or publisher of defamatory material can usually be sued, unless it is 'not reasonably practicable' for such an action to be brought. That is, the potential liability of one person (the intermediary) is based upon the pure happenstance of whether the primary publisher has self-identified and is available to be sued. That doesn't seem conceptually very sound. Section 5 then provides for a somewhat convoluted scheme focused on 'operators of websites', which gives a defence, but takes it away if the operator doesn't follow a bureaucratic scheme prescribed in regulations.

When working on the Northern Irish study, I took the view that it was entirely wrong for third parties to a complaint about a publication to be put in a position where their own legal risk could be avoided only by taking down content whose merits were unclear or by jumping through significant procedural hoops. This notwithstanding the obvious practical advantages to claimants. Of course, intermediaries just take material down. For me, the question was really about how to bring the primary parties together. I proposed an alteration to s.10 that would leave it impossible to sue the intermediary; platforms would be absolved of the risk of liability [SEE SLIDE 18]. I also noted, however, that the longstanding rule in *Bonnard* v *Perryman* – the rule that usually precludes the award of an injunction in libel proceedings could be used to the benefit of the claimant in this context.

Intermediaries tend to respond to court orders. To obtain an order from the court the claimant has to present a prima facie arguable case of libel (and present the gist of any potentially available defences). If a defendant steps forward to say that he or she plans to defend the action, then no order is made. But the defendant has to step forward, or else an injunction will be issued, and take down on the basis of the court order will follow. Something like this scheme has been included by the Scottish Law Commission in their proposed Bill. There are other ways of doing this of course: one option is that set out by Emily Laidlaw and Hilary Young in their background paper for the Law Commission of Ontario [SEE SLIDES 19-20].[2] This starts from the same premise, but backs up compliance with the threat of fines for non-cooperation. The point is that the underpinning norms, as well as the practical schemes, have to be properly lined up.

Alternative Means of Resolving Publication and Reputation Disputes

The third theme, then, that I think should be receiving attention, but certainly hasn't to any significant degree in the British studies, is engagement with the question of how far legal forums are the best places

[2] Laidlaw and Young, 'Internet Intermediary Liability in Defamation' (2019) *Osgoode Hall Law Journal*, 56(1), 112-161. The original paper is available here: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf

to be engaging with the balancing of reputation and free speech given the attendant issues of cost and access to justice that legal processes almost necessarily generate.

It is often said that a claimant's primary goal when considering defamation proceedings is to 'set the record straight' by obtaining a swift correction of misleading publications concerning themselves. This idea was regularly repeated by lawyers during the debates on libel reform that culminated in the Defamation Act 2013. It was also reiterated more than once during the pre-consultation discussions held by the NI Law Commission, and is supported by such research as has been conducted on the question.[3] The general preference for a speedy discursive remedy is also recognised in the newly minted paragraph 1.4 of the English *Pre-Action Protocol for Media and Communications Claims*, which states that 'time is frequently "of the essence" in defamation and other publication claims… and often, a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation'.

Yet, the primary mechanism available to achieve vindication of a sullied reputation through the defamation process is an award of damages. This approach to vindication was justified by Lord Hailsham in *Cassell* v *Broome* as necessary 'in case the libel, driven underground, emerges from its lurking place at some future date...[to allow the claimant] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'.[4] While the symbolic value of damages can no doubt be deployed to serve this function, this seems hardly to represent the best means of achieving vindication. It seems obvious that a more effective way of vindicating a person's reputation is to ensure that the truth is aired and misrepresentations corrected, and that this should be done as swiftly as is possible. This is without even discussing the fact that reliance on damages as a means of obtaining vindication is predicated on the claimant's ability and willingness to sustain (the risk of) enormous cost to achieve that outcome.

As an aside, in that context it is understandable that the prospect of winning enormous damages might adequately motivate the vacillating claimant, but given the obviously deleterious ramifications of such 'mega-awards', there simply has to be a better way.

It should also be highlighted that the general failure of the law to ensure the correction of error – because the disgruntled subject of defamatory publications will not or cannot sue - has the result that the wider public is often left misinformed by false publications. The importance and value of freedom of expression is not just personal or individual. It is also social in character.

Discursive remedies – corrections, retractions, rights of reply and apologies – have long been identified as being of potential utility in the defamation context.[5] In her comment on the questions posed by the Australian Council of Attorneys-General to invigorate their study, Judge Judith Gibson (the Defamation List Judge of the District Court of NSW) picked up this theme.[6] The potential of such options has grown enormously in the context of online and social media, a fact emphasised in an excellent paper by US scholar David Ardia on alternative means of resolving disputes.[7]

I attempted something along these lines in the Northern Irish study in two ways. First, by noting the potential interplay between the serious harm test and the issuing of a prompt and prominent retraction or

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[3] That most defamation claimants wanted corrections and not financial windfalls was a core finding of the Iowa Libel Research project - see Bezanson, 'Libel Law and the Realities of Litigation: Setting the Record Straight' (1985) *Iowa Law Review*, 71, 215-233; 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) *California Law Review*, 74, 789-808.

[4] [1972] AC 1027, at 1071.

[5] See, Fleming, 'Retraction and Reply: Alternative Remedies for Defamation' (1978) *University of British Columbia Law Review*, 12, 15-31; Bezanson, Cranberg and Soloski, *Libel Law and the Press: Myth and Reality* (Free Press, 1987). For a recent reflection on the possibilities of this approach, see Kenyon, 'Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences (2014) *Journal of Media Law*, 6, 21-46.

[6] Gibson, 'Defamation Reform in Australia: rearranging the deckchairs', *Inforrm*, 7 March 2019.

[7] Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law' (2010) *Harvard Civil Rights-Civil Liberties Law Review*, 45, 261-328.

correction. In the early case under the 2013 Act of *Cooke* v *Mirror Group Newspapers*, Bean J considered that the swift and adequately prominent publication of an apology 'sufficient… to eradicate or at least minimise any unfavourable impression of the claimant' meant that the serious harm test had not been met. This interplay should promote the publication of corrections or retractions. It would not prevent recovery of damages for specific losses. The potential flaw is that the sometime reticence on the part of the media publisher to correct or retract publications might not be overcome by this device if they consider that the complainant would not be able or likely to sue in any event.

The second device in the Northern Irish report was focused on the fact that defamation law requires the identification by the court of the 'single meaning' that an impugned statement is to be taken to have. Indeed, disputes about meaning are often central to defamation actions. In the words of Mr Justice Tugendhat, they are 'very often if not always the most important issue'.[8] If a court is able to determine meaning early in proceedings, very often the dispute will be settled.

This obvious artifice – one often recognised by judges themselves [SEE SLIDES 21-23] - is intended to simplify proceedings so as to make them at all manageable. However, the need to select one from among an array of possible meanings has resulted in complex rules and practice on the pleading of meanings. The court-based process of arriving at the single meaning on which the remainder of the case will be premised is itself a convoluted, often protracted, and hence very costly dimension of the case. The process of selecting the single meaning is so highly complex and technical that it borders on the arcane. Due to the single meaning rule, the process of transposing a dispute from the public sphere to the legal forum provides opportunities for parties and their lawyers to indulge in cost-generating game playing.

In the NI study, we assessed the length of time that it took from the date of publication in a sample of cases for the single meaning to be determined by the court [SEE SLIDE 24]. We found that, excluding outlying cases of inordinate delay, the mean number of days taken to determine meaning was 499. In response to that discussion in the consultation paper, we were told that things would change drastically under the Defamation Act 2013 with the ending of trial by jury and the prospect of early judicial hearings on issues such as meaning, serious harm and the fact or comment question. I have recently repeated the exercise, and found that things have indeed changed: today, from a further sample of 10 cases which excluded two cases in which there were delays of several years, the average number of days taken between the date of publication and the judicial determination of meaning was 698.6 days. In one case, the determination took only 181 days.

As a second option in the final report to Government in Northern Ireland, I suggested allying the introduction of the 2013 Act provisions with a change to the process of determining meaning. This involved the option of combining the introduction of a bar on actions where a correction/retraction of claimed meanings had been made with the withdrawal of the single meaning rule (SEE SLIDE 25). The aim was to achieve, for all but the intractable cases where there really is a conflict over the truth of allegations, the speedy resolution of disputes without recourse to court, through the expedient of common decency. That proposal has wrecked on the rocks of media pragmatism, or perhaps intransigence. It wasn't been picked up by the Scots or Canadians.

Broader Context of Parallel Legal Technologies

The fourth and final theme and one that has been underplayed in the UK studies, is the fact that other areas of law increasingly ask parallel questions to the law of defamation, and there is arguably a need for that to be taken into account. In Europe generally, we are seeing the advent of the General Data Protection Regulation which is opening further questions over the balance between freedom of speech on

[8] Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930-II, Q622.

one hand and privacy and control of personal data on the other – essentially, we are seeing a new legal technology asking the same questions and not necessarily – that is **not** – coming up with the same answers. Here, a particular focus has been the legal position of online intermediaries, but it also raises questions about media freedom broadly.

Furthermore, we are seeing the expansion in English jurisprudence of the claim for misuse of private information to cover reputational dimensions. That is essentially what was going on in Cliff Richard's case against the BBC. Perhaps this is unfair, but it seems to me that Cliff Richard's primary purpose was to proclaim to the world that he really wasn't involved in any historic sexual assault and he is engaged in spectacular jurisprudence to make that clear. That is fine, but it is a matter of reputation, not privacy.

Conclusion

So, just to conclude, it would seem to me that engagement with these four themes is vital in any analysis of the shape of reform. Given the schedule of topics, speakers and Panels for today, the Irish Government would appear to be one of the first properly and fully to engage with each of these dimensions of what might become good and sustainable law reform in this area. They are to be highly commended for their work to date, while I am very much looking forward to today's discussions.