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An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law

Douglas W. Vick*
Linda Macpherson**

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INTRODUCTION

The law of defamation in the United Kingdom remains to this day largely the product of 400 years of common law evolution. It reflects the efforts of successive generations of jurists to balance two fundamental but conflicting objectives: the protection of individual dignity, and the preservation of the freedoms of speech and press. Maintaining the proper equilibrium between these interests has always been difficult, particularly when one generation's accommodation of them is subjected to the pressures of the next generation's social, economic, and technological transformations. In the United Kingdom, moreover, inflexible rules of stare decisis[1] severely

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1. In the United Kingdom, the House of Lords performs both judicial and legislative functions that are kept distinct by the conventions of the "unwritten" British constitution. The Law Lords of the House of Lords sit as the final court of appeal in all matters save Scottish criminal cases, and the *ratio decidendi* of their decisions not only binds all inferior

limit common law adjustments to such pressures, particularly in areas like defamation law, where decades-old and even centuries-old binding precedents exist. Thus, it is not surprising that the tort of defamation has periodically undergone legislative modifications at the margins. Indeed, over the past two centuries, the British Parliament has enacted important reforms of defamation law about once every half century.[2] Conforming to this pattern, the Defamation Act 1996, which became law on July 4, 1996, is the first major piece of libel legislation since the Defamation Act 1952.

Although most of the provisions of the 1996 Act apply throughout the United Kingdom,[3] they were drafted with an eye toward the acute problems currently experienced in England and Wales. The relative ease with which libel plaintiffs can establish a defendant's liability and the huge damage awards that have become commonplace in England since the mid-1980s have raised fears that English law goes too far in safeguarding the reputational interests of claimants at the expense of free discussion, discouraging legitimate investigative journalism and the open criticism of

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courts, but are rarely deviated from by the Law Lords themselves in subsequent cases. Indeed, the House of Lords considered itself bound by its previous precedents until 1966, when it abandoned this uncompromising rule. *See* Note 3 All E.R. 177 (1966). To this day, the House of Lords has rarely overruled one of its prior decisions. *See* E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 371 (11th ed. 1993). *See generally* SIR RUPERT CROSS, PRECEDENT IN ENGLISH LAW (3d ed. 1977); A.A. PATERSON, THE LAW LORDS (1982). A sense of the stringent institutional constraints the British system places on judicial discretion can be gained from the following observation by Lord Hailsham:

> A judge in Britain is hedged about by a far more restrictive view of precedent than they [foreign judges], and since most decisions nowadays consist in the interpretation and application of Acts of Parliament, it is even more important that the rules of construing Acts of Parliament followed by English and Scottish judges are far more rigid and limiting than any country in the world not operating the British system. . . . [O]ur traditional method of Parliamentary draughtsmanship is so much more detailed than in any European country as to fetter judicial independence to an extent quite unparalleled elsewhere. Even on matters where we are wont to leave a question to a judge's discretion, his use of it is subject to the pyramidal system of appeal.

LORD HAILSHAM, THE DILEMMA OF DEMOCRACY: DIAGNOSIS AND PRESCRIPTION 106-07 (1978).

2. Prominent libel lawyer Peter Carter-Ruck, who observed this pattern, cites Fox's Libel Act 1792, three measures between 1840 and 1845 (the Parliamentary Papers Act 1840, Libel Act 1843, and Libel Act 1845), the Law of Libel Amendment Act 1888, and the Defamation Act 1952. *See* P.F. CARTER-RUCK, ET AL, CARTER-RUCK ON LIBEL AND SLANDER 15 (4th ed. 1992).

3. All of the changes that the Act makes apply in England and Wales and in Northern Ireland. The Act did not alter the limitations period for defamation claims brought in Scotland (which remains three years), and neither the new "summary disposal of claim" procedure, discussed below, nor a minor rule regarding applications for interlocutory orders, *see* Defamation Act, 1996, § 7, were made available in Scotland. The Act has no effect in the Channel Islands or the Isle of Man, the other two legal systems of the United Kingdom.

public policy and policy-makers. And it is not just the English press that is affected. In the information age, publications in both written and electronic form originating from all corners of the world, and particularly the United States, are freely disseminated throughout the United Kingdom, and many of those publications contain statements that could give rise to English defamation suits.[4] It is easy under English law for English courts to exercise jurisdiction over libel claims even in cases where relatively few copies of an allegedly defamatory publication reach the United Kingdom,[5] and thus publishers whose main audience live outside of the United Kingdom could find themselves defending an English libel action. The success or failure of defamation reform in the United Kingdom, therefore, is an issue of importance to the media throughout the world.

The Defamation Act 1996, like its legislative forebearers, fine-tunes rather than overhauls long-standing principles of English defamation law. Nonetheless, the scope of the reforms it makes is fairly wide. For example, the Act attempts to modernize certain defenses to defamation claims so that they take account of the difficulties posed by the emergence of new communication technologies and the growing internationalization of the

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4. And in fact they often have. An American corporation sued a retired Scottish professor for highly critical statements reported in *The New York Times*. *See* James Penzi, Comment, *Libel Actions in England, a Game of Truth or Dare? Considering Recent* Upjohn *Cases and the Consequences of "Speaking Out,"* 10 TEMP. INT'L & COMP. L.J. 211 (1996). In 1990, a Swedish newspaper settled a London libel action commenced by an Indian businessman. *See* Gregory T. Walters, Note, Bachchan v. India Abroad Publications Inc.: *The Clash Between Protection of Free Speech in the United States and Great Britain,* 16 FORDHAM INT'L L.J. 895, 919-22 (1993). London was the preferred forum of former Greek Prime Minister Andreas Papandreou when he sued the United States magazine *Time* for libel. *See* Don J. DeBenedictis, *Moving Abroad: Libel Plaintiffs Say it's Easier Suing U.S. Media Elsewhere,* 75 A.B.A. J. 38 (Sept. 1989). A scientist based in Geneva and the United States was sued in London for statements he made on Usenet, a world-wide computer-based communication system. *See, e.g.,* Clare Dyer, *Scientist Wins Out of Court Damages for Internet Libel,* THE GUARDIAN (London), June 5, 1995, pt. 1, at 5. The authors discuss the impact that a proliferation of English libel suits against non-English publications could have on the nations of the European Union in Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union,* 36 VA. J. INT'L L. (forthcoming 1997).

5. For example, a British arctic explorer was awarded £100,000 ($150,000) in a suit against a Canadian magazine with a circulation of 400 within the United Kingdom, *see* GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW 44 (3d ed. 1992); a Member of Parliament was awarded £150,000 (reduced to £50,000 on appeal) for a satirical press release circulated to 91 people, *id.*; a plaintiff won £450,000 from a Greek-language newspaper with a U.K. circulation of 50, *see* Costas Douzinas et al., *It's All Greek to Me: Libel Law and Freedom of the Press,* 137 NEW L.J. 609 (1987); an Arabic-language magazine with a small circulation lost a £310,000 verdict, *see Koo's £300,000 — A Sign of the Times,* 138 NEW L.J. 824 (1988); and a monthly magazine with a circulation under 9,000 had a £300,000 judgment entered against it, *see* Tom G. Crone, *A Newspaper Lawyer's View,* 86 LAW SOC'Y GAZ. 14 (Sept. 6, 1989).

media.[6] It reduces the limitations period for defamation claims made within England, Wales, and Northern Ireland to one year.[7] More ambitiously, the Act introduces procedural reforms intended to simplify defamation lawsuits, encourage early settlement of less serious claims, and curb the escalating cost of libel litigation.[8] It permits Members of Parliament (MPs) to selectively waive their Parliamentary privilege if necessary to pursue their own defamation claims (without losing their immunity from claims brought by others).[9] With the exception of this last provision, which was added late in the law-making process so that an individual MP could pursue a libel claim against *The Guardian* newspaper, each of the changes the Act makes was well-considered and should improve the operation of defamation law. Nonetheless, we believe that the impact of the Act will be much less dramatic than its sponsors no doubt hope, and that an opportunity for more meaningful and effective reform was squandered.

Because the Act was primarily directed at problems that have arisen in England, this article focuses on the Act's effect on the law of England and Wales.[10] In the first part of the article we will canvass English defamation law as it stood before passage of the 1996 Act, and some of the problems that prompted legislative action. In the second part we will discuss the Act itself with particular attention being paid to its likely impact on libel litigation in England and Wales. In the final section of the article we will argue that the Act ultimately failed to confront, much less remedy, the crisis in English defamation law.

I. BACKGROUND OF THE ACT

Under long-established English common law principles, a plaintiff—whether an individual, company, or other legal person[11]—can establish a prima facie case of defamation merely by showing that the defendant voluntarily communicated to a third party ("published") a defamatory statement referring directly or indirectly to the plaintiff.[12] A defamatory statement is simply a statement that exposes the plaintiff to

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6. Defamation Act, 1996, §§ 1, 14, 15 & sched. 1.
7. *Id.* §§ 5, 6.
8. *Id.* §§ 2-4, 8-11.
9. *Id.* § 13.
10. For a brief discussion of the 1996 Act's effect on the law of Scotland, see Linda Macpherson & Douglas W. Vick, *Defamation Reform in Scotland*, 1997 JURID. REV. 53.
11. Cases supporting the principle that companies and other legal persons may sue in libel in the same manner as natural persons include *South Hetton Coal Co. Ltd. v. North Eastern News Ass'n Ltd.*, [1894] 1 Q.B. 133, 138-39, and *Bognor Regis U.D.C. v. Campion*, [1972] 2 Q.B. 169, 176-77.
12. *See, e.g.*, Newstead v. London Express Newspaper Ltd., [1940] 1 K.B. 377, 388-89.

hatred, contempt, or ridicule, or tends to "lower the plaintiff in the estimation of right-thinking members of society generally."[13] There is a rebuttable presumption that a defamatory statement is false, relieving the plaintiff of any obligation to introduce evidence regarding the statement's accuracy,[14] and the plaintiff can make out a prima facie case without presenting evidence that the defendant intended to defame anyone[15] or acted in bad faith.[16] If the statement is in writing, recorded, or otherwise in some permanent form (a "libel"), the plaintiff is presumed to have suffered injury from publication of the statement, and need not offer proof of any actual harm.[17]

It is through several available defenses to a defamation claim that English law recognizes free speech and free press interests. For example, while a defamatory statement is presumed false, the defendant can avoid liability by proving that the statement is substantially true (the "justification" defense).[18] The defense of "fair comment" protects the expression of opinion concerning issues of public importance and criticism of the conduct of government officials, provided the opinion is expressed without malice[19] and the defendant can prove the facts on which the opinion was based.[20] Some statements—for example, those made during Parliamentary debate, or in a fair and accurate report of judicial proceedings within the United Kingdom—are absolutely privileged.[21] Other statements might be covered by a qualified privilege if by publishing them the defendant advanced some recognized "legal, social, or moral" duty.[22] For example, a qualified

13. Sim v. Stretch, [1936] 2 All E.R. 1237, 1240 (Lord Atkin).

14. *See, e.g.*, Belt v. Lawes, [1882] L.J.Q.B. 359, 361.

15. *See, e.g.*, Cassidy v. Daily Mirror Newspapers, [1929] 2 K.B. 331, 354 (Russell L.J.).

16. The plaintiff is required to plead that the statements were published "maliciously," but this is a formality, as malicious intent is not a necessary element for recovery. *See* Bromage and Another v. Prosser, [1825] 107 Eng. Rep. 1051, 1055.

17. *See, e.g.*, Jones v. Jones, [1916] 2 A.C. 481, 500 (Lord Sumner); Ratcliffe v. Evans, [1892] 2 Q.B. 524, 528-30 (Bowen L.J.).

18. 28 HALSBURY'S LAWS OF ENGLAND para. 81 (4th ed. 1979). *See also* M'Pherson v. Daniels, [1829] B. & C. 263 (Littledale, J.).

19. In this context, "malice" means indifference to the truth of what is published, a desire to injure the plaintiff, or desire to obtain an improper personal advantage. ROBERTSON & NICOL, *supra* note 5, at 71-72; Horrocks v. Lowe, [1975] A.C. 135, 149 (Lord Diplock).

20. Kemsley v. Foot, [1952] A.C. 345, 356-57 (Lord Porter); Hunt v. Star Newspaper Co. Ltd., [1908] 2 K.B. 309, 320 (Fletcher Moulton L.J.).

21. 28 HALSBURY'S LAWS, *supra* note 18, para. 98.

22. *Id.* ¶ 111; ROBERTSON & NICOL, *supra* note 5, at 86-93. The defendant must also show that the parties to whom such statements were published had a legitimate interest in receiving them.

privilege attaches to a fair and accurate report of a matter of public interest.[23] Unlike an absolute privilege, the assertion of a qualified privilege will be defeated by proof of malice.[24] Less commonly invoked defenses include innocent dissemination and unintentional defamation, which are discussed below.

This brief summary of the various available defenses does not do justice to the complexity of their application in concrete cases. Indeed, the defenses, with their myriad limitations and qualifications, are typically the primary focus of libel suits, and their convolutions are usually responsible for the often staggering expense litigants incur in defamation cases.[25] Moreover, it has become apparent in recent years that these defenses do not always respond to the realities of modern media activities. For example, the increasingly international character of media reports available within the United Kingdom—fuelled both by the UK's involvement in the European Union as well as the now commonplace availability of foreign publications—has exposed shortcomings in legal principles developed with domestic news reporting in mind. The unique problems posed by new computer-based technologies, like the Internet, confound efforts to allocate responsibility for defamatory messages transmitted through them.

More fundamentally, in the past decade there has been a dramatic rise in the amounts of damages awarded against media defendants in libel cases, with detrimental consequences for press freedom. Defamation law has been exempt from the general trend of removing civil actions from the province of juries.[26] Even with the changes brought by the Defamation Act 1996, juries will continue to decide most of the substantive issues relevant to the outcome of a libel case.[27] More controversially, juries remain vested with the power to determine the level of compensatory and exemplary damages

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23. ROBERTSON & NICOL, *supra* note 5, at 365-66, 393-95.

24. 28 HALSBURY'S LAWS, *supra* note 18, para 3.

25. *See, e.g.*, Angella Johnson & Clare Dyer, *'Scapegoat' Doctor Wins Libel Damage of £625,000*, THE GUARDIAN (London), Feb. 24, 1996, pt. 1, at 1 (defendant liable for plaintiff's costs of £500,000, in addition to £625,000 awarded in damages).

26. Either party to a defamation action can demand a jury trial. Supreme Court Act, 1981, § 69; Rules of Supreme Court, Order 33, rule 5. Such a request can be refused only when a jury trial would impede the efficient administration of justice, for example where a lengthy examination of complex documents or accounts is required. *See* Viscount De L'Isle v. Times Newspapers Ltd., [1987] 3 All E.R. 499; Beta Construction Ltd. and Another v. Channel Four TV Co. Ltd., [1990] 2 All E.R. 1012.

27. A few key issues are determined by the judge rather than the jury. Prominent among them are whether the defendant's words are capable of bearing a defamatory meaning, *see* Keays v. Murdoch Magazines (UK) Ltd. and Another, [1991] 1 W.L.R. 1184, and whether a statement implicates the public interest, *see* Telnikoff v. Matusevitch [1990] 3 W.L.R. 725, 730.

to be awarded to a successful plaintiff. Damage awards (and settlements) in defamation cases routinely surpass £50,000 ($75,000), and a few cases have topped £1,000,000 ($1,500,000).[28] In addition, under the English rule a defeated defendant is responsible for the plaintiff's costs and legal fees,[29] which in libel cases often approach the size of the verdict itself. Despite recent judicial efforts to rein in runaway libel verdicts,[30] the compensation awarded for reputational harms still frequently exceeds that awarded in cases involving serious physical injuries.[31]

The two most conspicuous characteristics of modern libel litigation—the expense involved in pursuing and defending a claim, and the threat of a huge award of damages and costs—have created a system that operates much differently for less wealthy individuals than for the rich and the powerful. Because contingency fee arrangements are unlawful in the United Kingdom, moderate- and low-income persons depend on the state-funded legal aid program to obtain legal representation in civil lawsuits.[32]

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28. For examples of six- and seven-figure damage awards made in recent years, *see* ROBERTSON & NICOL, *supra* note 5, at 44; Crone, *supra* note 5; Johnson & Dyer, *supra* note 25, at 3; *Koo's £300,000— A Sign of the Times*, *supra* note 5; P.R. Ghandi, *No End to Libel Roulette*, 86 LAW SOC'Y GAZ. 19 (Dec. 6, 1989); Richard Shillito, *Making Bones of Sticks & Stones*, 91 LAW SOC'Y GAZ. 20, 22-23 (Oct. 19, 1994). Huge damage awards have been handed down even against publications with a limited circulation within the United Kingdom. *See supra* note 5.

29. In the United Kingdom, as in most European countries, the losing party in litigation is required to pay the costs and attorney fees of the prevailing party as a matter of course. *See* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (Winter 1984).

30. In December 1995, the Court of Appeal broke from long-established custom and permitted trial judges, if they so choose, to provide greater guidance to juries regarding damage awards in libel cases. Judges may now suggest nonbinding upper and lower damage figures, and inform juries (for purposes of drawing comparisons) of the awards typically made in personal injury cases. *See* John v. MGN Ltd., [1996] 2 All E.R. 35. In 1990, the Court of Appeal was given the power to substitute its own assessment of damages for that of the jury whenever it found a libel judgment excessive. Court and Legal Services Act, 1990, § 8(1). Between 1990 and the end of 1995, the Court of Appeal substituted its own figure for that of the jury on four occasions, reducing jury verdicts ranging from £150,000 to £350,000 to awards ranging from £50,000 to £120,000. *See John*, [1996] 2 All E.R 35; Houston v. Smith [1993] C.A. Transcript 1544 (unreported case, Court of Appeal, December 14, 1993) (*cited in John*, [1996] 2 All E.R. at 50); Rantzen v. Mirror Group Newspapers (1986) Ltd., [1993] 3 W.L.R. 953; Gorman v. Mudd, [1992] CA Transcript 1076 (unreported case, Court of Appeal, October 15, 1992) (*cited in John*, [1996] 2 All E.R. at 49).

31. *See, e.g.*, James Meikle, *Ex-council Chief gets Libel Payout*, THE GUARDIAN (London), June 5, 1996, part 1, at 4; Johnson and Dyer, *supra* note 25, at 1, 3. *See generally* ROBERTSON & NICOL, *supra* note 5, at 43.

32. In the United Kingdom, it is primarily through the statutory schemes for legal aid, *see, e.g.*, Legal Aid Act, 1988, that those who are not wealthy obtain legal representation in civil matters. The United Kingdom does not allow lawyers to enter into contingency fee arrangements of the sort prevalent in the United States, where clients agree that a set

Legal aid is unavailable in defamation cases,[33] however, and the cost of pursuing a libel claim has become prohibitive for all but the most wealthy, or those backed by organizations with substantial resources. As a consequence, the press is largely unaccountable in reporting stories involving those individuals financially incapable of bringing a defamation action. On the other hand, a unique combination of substantive and procedural rules makes English defamation law singularly favorable to those plaintiffs who have the resources necessary to pursue a libel action to its conclusion. Little is required to establish a prima facie case of defamation while the defenses intended to protect free expression are plagued by limitations that often undermine their effectiveness, and those who can afford to make the considerable investment required to pursue a libel action are often handsomely rewarded with extravagant monetary awards at the end of the process.

The irony is that the law deters critical reporting of precisely those whose activities most directly affect the public interest. Those who can afford libel litigation are also most likely to be the subject of legitimate comment or journalistic investigation, and are in the best position to rebut negative publicity without needing to resort to the bludgeon of English libel law. Yet the temptation to use the threat of a libel writ to control one's press coverage can be irresistible, and experience shows that many have yielded to this temptation. Particularly litigious individuals, such as Robert Maxwell, have used this threat to discourage inquiry into their activities.[34] The *raison d'être* for the Goldsmith Libel Fund is to finance libel suits by plaintiffs with conservative sympathies against the "left-wing" press.[35]

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percentage of any damage award or settlement will go the client's attorney. Thus, perhaps the most important mechanism for providing access to justice for middle- and lower-income individuals in the United States is unavailable in Great Britain. Parliament has authorized "conditional fee arrangements" in certain proceedings specified by the Lord Chancellor, *see* Courts and Legal Services Act, 1990, § 58, and the Lord Chancellor has recently issued orders implementing the Act. *See* Lord Mackay, *Reducing Risks for Clients*, LAW SOC'Y GAZ. 10 (July 5, 1995). It is unlikely that this limited scheme will displace legal aid as the primary means for access to justice in the British system.

33. Legal Aid Act, 1988, ch. 34, sched. 2, pt. II, para. 1 (Eng.).

34. For a discussion of Maxwell's coercion of the press, see Russell L. Weaver & Geoffrey Bennett, New York Times v. Sullivan: *The "Actual Malice"-Standard and Editorial Decisionmaking*, 14 J. MEDIA L. & PRAC. 2, 8 (1993). Parallels can be drawn to recent experiences in the United States, where some less scrupulous companies have attempted to intimidate their critics and silence their opponents by launching costly libel lawsuits, despite the long odds of prevailing on the merits under U.S. defamation laws. *See, e.g.*, GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996); LOIS G. FORER, A CHILLING EFFECT (1987); DONALD M. GILLMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW 40-41 (1992).

35. *See* ROBERTSON & NICOL, *supra* note 5, at 40.

English defamation law is frequently criticized for deterring the speech that matters most, and has drawn the censure of the European Court of Human Rights.[36]

In the years following the enactment of the Defamation Act 1952, various working groups proposed reforms of English libel law. Perhaps the best known of these proposals were contained in the reports prepared by the Joint Working Party of Justice and the British Committee of the International Press Institute in 1965[37] and the Committee on Defamation (Faulks Committee) in 1975.[38] For the most part, Parliament was unswayed by the various demands for reform,[39] until a working group led by Lord Justice Neill recommended changes in practice and procedure in 1991.[40] The recommendations in the Neill Committee report ultimately led to the introduction of a Defamation Reform Bill in the House of Lords in 1995. That bill evolved into the Defamation Act 1996.

II. THE DEFAMATION ACT 1996

The provisions of the Defamation Act 1996 can be divided roughly into three categories. In the first category are the provisions modifying established defenses to make them more responsive to the problems posed by new technologies and the increasingly international scope of news reporting.[41] A second category includes largely procedural reforms meant to reduce the complexity and expense associated with trying less serious libel cases.[42] Finally, in a category by itself, is a provision allowing Members of Parliament to waive Parliamentary privilege if necessary to

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36. *See, e.g.*, Tolstoy Miloslavsky v. U.K., App. No. 18139/91, 20 Eur. H.R. Rep. 442 (1995) (court decision) (ruling that a £1.5 million damage award infringed defendant's rights under article 10 of the European Convention on Human Rights). Under the law of the United Kingdom, however, the precedential value of the rulings of the European Court of Human Rights is limited. *See infra* note 145.

37. JOINT WORKING PARTY OF JUSTICE AND THE BRITISH COMM. OF THE INT'L PRESS INST., THE LAW AND THE PRESS 43-44 (1965).

38. REPORT OF THE COMMITTEE ON DEFAMATION (1975), CMND 5909, 172-81 [hereinafter FAULKS COMMITTEE REPORT].

39. Parliament did reduce the limitations period for defamation actions from six years to three in 1985, *see* Administration of Justice Act, 1985, ch. 61, § 57 (Eng.), and in 1990 empowered the Court of Appeal to substitute its independent determination of damages for that of the jury in cases in which the verdict was deemed excessive. *See* Courts and Legal Services Act, 1990, ch. 41, § 8(a) (Eng.).

40. Lord Chancellor's Department, *Reforming Defamation Law and Procedure: Consultation on Draft Bill* ¶ 1.2 (July 1995) (hereinafter *Consultation Report*) (citing Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (1991)).

41. Defamation Act, 1996, ch. 31, §§ 1, 7, 12, 14-15, sched. 1 (Eng.).

42. *Id.* §§ 2-6, 8-10.

pursue a libel claim.[43]

A. *The New Defenses*[44]

Section 1 of the Act, designated "responsibility for publication," modernizes the common law defense of innocent dissemination. Generally, each person responsible for making, repeating, or disseminating a defamatory statement is liable to the victim of the libel even in the absence of proof of fault. This rule reaches not only authors and publishers exercising editorial control over the works they produce, but also printers, newsagents, booksellers, and libraries which play a role in making the offending statement available to the public. Taken to its logical extreme, this rule would impose unreasonable burdens on parties who do not and could not know that certain publications they helped produce or distribute contained defamatory matter. The defense of innocent dissemination was the common law's response to the occasional injustice strict application of this rule produced. This defense relieved distributors (but, perversely, not printers) of liability, if they had no control over the content of the offending publication and neither knew nor should have known that an item they distributed contained or was likely to contain defamatory statements.[45]

The innocent dissemination defense as modified by the 1996 Act remains unavailable to the authors, editors, and commercial publishers primarily responsible for the content of materials they produce for public consumption.[46] However, the Act provides that the defense will now cover

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43. *Id.* § 13.

44. In addition to reforms discussed in the text, the Act also amended an evidentiary rule that affects the operation of the justification defense in narrow circumstances. The Civil Evidence Act, 1968, ch. 64, § 13, provided that evidence of a criminal conviction was irrebuttable proof in a subsequent defamation action that the person convicted actually committed the crime at issue. The Neill Committee concluded that this rule deterred the media from questioning official conduct in connection with doubtful convictions. Under the old rule, if a report challenging someone's conviction as wrongful became the subject of a defamation suit (brought, for example, by police investigators or prosecutors), the defendant would not be able to plead and prove justification because of the conclusive effect given evidence of the challenged conviction. The Defamation Act 1996 amends the Civil Evidence Act 1968 so as to limit the situations in which convictions are given conclusive effect to cases in which the *plaintiff* has been convicted of an offense. Proof of the conviction of someone other than the plaintiff will still be admissible, but will not be deemed conclusive. *See* Defamation Act, 1996, § 12.

45. Emmens v. Pottle, 16 Q.B.D. 354 (Eng. C.A. 1885).

46. Defamation Act, 1996, § 1(1)(a). The Act defines the "author" of a statement as the statement's "originator," unless that person "did not intend that his statement be published at all"; the "editor" as the "person having editorial or equivalent responsibility for the content of the statement or the decision to publish it;" and the "publisher" as the "person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business." *Id.* § 1(2). Although the

printers,[47] and sets out a nonexhaustive list of other persons eligible to claim the defense.[48] Now, the defense may be asserted by the manufacturers, distributors, and exhibitors of films and sound recordings, as well as those who process or operate electronic communications equipment, such as CD- ROMs.[49] It is available to broadcasters of live radio or television programs, when defamatory statements are made "in circumstances in which [the broadcaster] has no effective control over the maker of the statement."[50] This scenario arose recently when a government minister sued a London television company over an unsolicited defamatory comment made by a member of the studio audience during a live political comment program.[51] In addition, the Act provides that the operators or providers of "access to a communications system" can assert the defense so long as they had "no effective control" over the person transmitting a defamatory statement over the system.[52] This would presumably protect telephone companies, mobile phone systems, radio communication systems, and the like. Although the Act does not expressly say so, this provision should also cover the individuals and institutions, including universities, that operate the computers constituting the Internet network, as well as commercial online computer host services such as CompuServe, Prodigy, and Delphi.[53]

Act defines "publisher" more narrowly than that term is understood at common law (i.e., the person who communicates the statement complained of to a party other than the plaintiff), Parliament contemplated no change in the common law meaning of the term outside the context of determining whether the innocent dissemination defense applies. *Id.* § 17. It is interesting to note that under the Act's definition, someone who originates a message may not be the message's "author" if that person did not intend the statement be "published" (presumably in the common law sense of the term). This likely will have little practical importance, since the innocent dissemination defense will be available only to those who exercise reasonable care, *see infra* text accompanying notes 146-47, and it would be rare that a statement would be unintentionally communicated to a third party under circumstances where the originator was not negligent in allowing the statement to reach that third party.

47. *Id.* § 1(3)(a). The Lord Chancellor's Department, representing the views of the Conservative Party government in power when the Defamation Bill was proposed, justified this change by noting that modern printing processes allow work to be completed without the printer ever seeing the work in written form. *Consultation Report*, *supra* note 40, para. 2.2.

48. *See* Defamation Act, 1996, § 1(3). Because the list is not exhaustive, the courts may extend it by analogy as new communications technologies emerge.

49. *Id.* § 1(3)(b), (c).

50. *Id.* § 1(3)(d).

51. Lawrence Abramson & Denton Hall, *Responsibility for Publication: Potential Developments in the Law of Defamation*, 13 INT'L MEDIA L. 61, 61 (1995).

52. Defamation Act, 1996, § 1(3)(e).

53. When the Defamation Bill was introduced in the House of Lords, the Parliamentary Under-Secretary of State indicated that Internet service providers would be covered by section 1(3)(e). H.L. Deb. vol. 570 col. 605, 8 March 1996. It is noteworthy, however, that section 1(3)(c) was amended in the Commons so that the defense covered those who "oper-

However, the Act does not directly address under what circumstances those who make defamatory statements over computer-based communications systems are beyond the "effective control" of the operators, a difficult question since it is at least theoretically possible to screen the messages and the users of such systems.[54]

Like its common law predecessor, the defense provided by section 1 is not absolute. To invoke it, the defendant must show that "he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement,"[55] and that "he took reasonable care in relation to [the statement's] publication."[56] The Act offers guidance for the determination of whether the defendant acted reasonably, listing three factors to be considered: the degree to which the defendant was responsible "for the content of the statement or the decision to publish it," the circumstances surrounding the publication, and "the previous conduct or character of the author, editor or publisher" primarily responsible for communicating the defamatory statement.[57] This last consideration seems to indicate that distributors of controversial publications like *Private Eye*, a satirical news magazine, might not be able to sustain their burden of showing they acted with due care without establishing some system for screening all issues of such publications for defamatory content. Lord Denning warned that a rule punishing those who disseminate publications of a "bad character" was potentially repressive;[58] it encourages a privatized form of censorship, as distributors will refuse to carry those publications most critical of public figures if they fear that they might be liable for what those publications say. Those concerned about the implications this has for freedom of speech within the United Kingdom will find little solace in the

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at[e] or provid[e] any . . . system or service by means of which the [defamatory] statement is . . . made available in electronic form." The change was apparently requested by Reuters and other press agencies, and was intended to ensure that providers of electronically recorded information were covered by the Act. *See* H.C. Standing Committee A col. 4, 6 June 1996. Arguably, this language too could apply to the Internet and other computer-based communication systems.

54. The difficulties this issue presents are apparent in recent decisions from the United States. *See, e.g.*, Cubby v. Compuserve Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmount Inc. v. Prodigy Services Co., 23 Media L. Rep. (BNA) 1784 (N.Y. 1995).

55. Defamation Act, 1996, § 1(1)(c).

56. *Id.* § 1(1)(b).

57. *Id.* § 1(5). In its original draft, the Defamation Bill stated that these factors were not exhaustive; this language was omitted from subsequent versions of the Bill, and is not found in the Act.

58. Goldsmith v. Sperrings Ltd., 2 All E.R. 566, 573 (Eng. C.A. 1977) (Lord Denning MR, dissenting).

case law interpreting a distributor's duty of care at common law[59] (which will remain persuasive authority when courts interpret section 1 of the new Act), or in the comments made during Parliamentary debates, which were hardly sympathetic to this criticism of the new rule.[60]

The Act's other major substantive changes to the defamation defenses are contained in sections 14 and 15, which expand the scope of the statutory privileges. The relevant pre-existing law was set out in the Law of Libel Amendment Act 1888 and the Defamation Act 1952.[61] Those Acts provided that newspapers, radio, and television broadcasters were absolutely privileged in presenting fair, accurate, and contemporaneous reports of court proceedings within the United Kingdom,[62] and were entitled to a qualified privilege in connection with any reports concerning matters listed in the Schedule to the 1952 Act.[63]

Section 14 of the Defamation Act 1996 confirms the absolute privilege recognized in prior law and expands its scope in two ways. First, it does not limit the privilege to reports appearing in newspapers, television and radio programs.[64] Second, the absolute privilege now applies not only to reports of proceedings in the domestic courts of the United Kingdom, but also to proceedings in the European Court of Justice or any "attached" court,[65] the

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59. *See, e.g.,* Weldon v. Times Book Co. Ltd., 28 T.L.R. 143 (Eng. C.A. 1911), indicating that while a library was not expected to review the contents of every book it possesses, some works may call for a more searching examination, depending on the type of book at issue, the reputation of the author, and the standing of the publisher. Recently, a printer, retailer, and several wholesalers of the now-defunct satirical magazine *Scallywag* paid substantial sums to settle claims arising out of statements in that magazine. *See Scallywag Sequel: Printer and Seller Pay Out,* MEDIA LAWYER, July 1996, at 14.

60. *See, e.g.,* H.C. Deb. vol. 280 cols. 115-16, 119, 24 June 1996; H.C. Standing Committee A cols. 5, 30, 6 June 1996; H.L. Deb. vol. 571 cols. 214-15, 2 April 1996.

61. *See* Law of Libel Amendment Act, 1888, 51 & 52 Vict. ch. 64, § 3 (Eng.); Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, §§ 7-9 & sched (Eng.).

62. *See* Law of Libel Amendment Act, 1888, § 3; Defamation Act, 1952, §§ 8, 9(2). *See also* McCarey v. Associated Newspapers Ltd., [1964] 1 W.L.R. 855 (Q.B. 1964) (clarifying that this privilege was absolute, not qualified).

63. Defamation Act, 1952, §§ 7, 9. The qualified privileges were later extended to the cable and satellite media. *See* Cable and Broadcasting Act, 1984, ch. 46 § 28(3) (Eng.); Broadcasting Act, 1990, ch. 42 § 166(3) (Eng.).

64. Defamation Act, 1996, ch. 31 § 14(1) (Eng.). In addition to the new electronic and computer-based technologies, the privilege now applies to print publications in all their forms. The defense set out in the 1952 Act applied to "newspapers," defined as papers "containing public news or observations thereon . . . which [are] printed for sale and [are] published in the United Kingdom either periodically or . . . at intervals not exceeding thirty-six days." Defamation Act, 1952, § 7(5). This limiting definition is not carried forward in the new Act, and the privilege now applies to free newspapers, "one-off" or occasional publications, and those magazines and journals which appear less often than every 36 days.

65. This is a reference to the European Court of First Instance, but would also include any other court created in future treaties by the nations of the European Union.

European Court of Human Rights, and war crimes tribunals established by the United Nations Security Council or through international agreements.[66] As under prior law, a report is entitled to the absolute privilege provided by this section only if it is fair and accurate and made contemporaneously with the court proceedings in issue.[67]

Section 15 of the 1996 Act revamps the qualified privilege provided by the 1952 Act.[68] The new Act provides that a statement is entitled to qualified privilege if it addresses a matter of public concern published "for the public benefit"[69] and falls within the coverage of Schedule 1 to the new Act. Echoing established principles, the statements must be "fair and accurate" to be privileged, and proof of malice will negate the privilege.[70] Like the 1952 Act, the 1996 Act distinguishes between statements entitled to qualified privilege "without explanation or contradiction,"[71] and statements which are privileged subject to explanation or contradiction. The reports and statements falling within the former category are listed in Part I of Schedule 1, reproduced in the margin.[72] They include reports of the

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66. Defamation Act, 1996, § 14(3).

67. *Id.* § 14(1). If the report is delayed because either an order of court or a statutory provision required that the report be postponed, the report "shall be treated as published contemporaneously if it is published as soon as practicable after publication is permitted." *Id.* § 14(2).

68. The superceded provisions were contained in the Schedule to the Defamation Act 1952. Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, sched., pts. I & II (Eng.).

69. Defamation Act, 1996, § 15(3). The Act specifically states that the qualified privilege provided by section 15 will not apply if the publication is prohibited by law. *Id.* § 15(4)(a).

70. *Id.* § 15(1).

71. *Id.* sched. 1, pts I & II.

72. Part I of Schedule 1 provides that the following statements are entitled to qualified privilege without explanation or contradiction:

1. A fair and accurate report of proceedings in public of a legislature anywhere in the world.
2. A fair and accurate report of proceedings in public before a court anywhere in the world.
3. A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world.
4. A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.
5. A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.
6. A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.
7. A fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world.
8. A fair and accurate copy of or extract from matter published anywhere in the world by an international organization or an international conference.

Id. sched. 1, pt. I.

proceedings of international organizations, national legislatures (including Parliament), and national courts that convene anywhere in the world.[73] The Schedule recognizes the increasingly international character of news reporting by significantly broadening the geographical scope of the statutory privilege, which in the 1952 Act had been limited to reports of official proceedings within the United Kingdom, or, in some cases, the nations of the British Commonwealth.

For statements falling within a second category of reports listed in Part II of Schedule 1, the defendant's qualified privilege is made subject to the additional requirement that the defendant agrees, upon the plaintiff's request, to "publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction."[74] The Act indicates that "a suitable manner" means either in the same manner that the defamatory material was published or "in a manner that is adequate and reasonable in the circumstances."[75] In essence, this gives the plaintiff a limited right of reply, and if the defendant refuses or neglects to honor a request to respond to a defamatory statement, the defendant forfeits the privilege. As does Part I of the Schedule, Part II extends the geographical scope of the correlative provisions of the Defamation Act 1952, particularly with respect to news gathering in Europe. The qualified privilege subject to explanation or contradiction attaches to copies of documents, notices, or the like that are made publicly available by the various institutions of the European Union or the national legislatures, governments, or courts of the European Union's member states; reports of the proceedings of any public meeting held within the member states; reports of proceedings of general meetings of UK public companies and their equivalents in other member states; and reports of the proceedings of local authorities, justices of the peace, and local inquiry commissions within the United Kingdom.[76] Importantly, reports of statements issued by "any authority performing governmental functions" within the European Union—including police functions—are covered by this privilege.[77] The Lord Chancellor[78] is given the power to designate

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73. This section would cover reports of proceedings in the courts of the United Kingdom in circumstances where section 14 did not apply (for example, when the report is not contemporaneous with the proceedings). In addition, it applies to reports of proceedings or notices issued by the International Court of Justice and other tribunals established to resolve disputes between nations. *Id.* sched. 1, pt. III, para. 16(3)(d).

74. *Id.* §15(2)(a).

75. *Id.* § 15(2)(b).

76. *Id.* sched. 1, pt. II. This is but a sample of the reports and documents identified in Part II of the Schedule.

77. *Id.* sched. 1, pt. II, para. 9. While the Defamation Bill was advancing through the House of Lords, it was suggested that the privilege for reports issued by the police contained

additional "bod[ies], officer[s] or other person[s]" whose reports or statements will be covered by the privilege.[79]

B. *The Procedural Reforms*

At the heart of the 1996 Act are several provisions effecting three procedural reforms designed to reduce the delays and expense associated with libel litigation.[80] The most straightforward of these provisions is section 5, which reduces the limitation period in defamation cases (as well as malicious falsehood cases) brought in England and Wales from three years to one year.[81] Because defendants bear the burden of proof on most of the contested issues in libel actions, it is important that they receive notice of claims against them in a timely fashion. In most civil cases, the

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in paragraph 9 of the Schedule to the Defamation Act 1952 had been inadvertently dropped. Paragraph 9 of Schedule 1 to the 1996 Act was thereafter amended to make clear that such reports would continue to be privileged. H.L. Deb. vol. 571 col. 263, 2 April 1996.

78. The Lord Chancellor is a unique figure in the constitutional structure of the United Kingdom. The individual appointed to this office exercises executive functions (as a Cabinet member in the ruling government), presides over the House of Lords when it sits in its legislative capacity, and is the head of the judiciary, entitled to preside over the Appellate Committee, which performs the judicial functions of the House of Lords. *See* WADE & BRADLEY, *supra* note 1, at 60-62.

79. Defamation Act, 1996, sched. 1, pt. II, para. 15. In Scotland, this power is vested with the Secretary of State. It may be through this provision that the qualified privilege "subject to explanation or contradiction" will be extended to fair and accurate reports of those "quasi-autonomous non-governmental entities" which in recent years have been delegated duties performed by governmental bodies in the past. Such "quangos" do not otherwise fall within the Schedule. *See Media to Blame for Flawed Libel Bill*, MEDIA LAWYER, March 1996, at 14-15.

80. A fourth measure in the 1996 Act intended to streamline defamation cases is section 7, which forbids applications for interlocutory rulings regarding "whether a statement is arguably capable, as opposed to capable, of bearing a particular meaning or meanings attributed to it." While the ultimate determination of the meaning of allegedly defamatory words is left to the jury, judges can withdraw from the jury any meaning proposed by the plaintiff which a reasonable person could not understand the words to bear. Before the new Act, there was no interlocutory procedure for deciding whether words are "capable" of bearing a particular meaning, but a quirk in the procedural rules did allow defendants to move to strike a claim on the basis that it was not "arguable" that the words complained of were capable of bearing a meaning defamatory of the plaintiff. Section 7 abolishes this practice. At the same time, the Rules of Court have been amended to allow either party to apply for an interlocutory order determining whether or not words complained of are capable of bearing a particular meaning attributed to them, without needing to first raise the issue of whether the words are "arguably" capable of bearing that meaning. Rules of Supreme Court, Order 82, rule A.

81. Defamation Act, 1996, § 5, amending Limitation Act, 1980, §§ 4A, 28, 32A, 36(1) (Eng.). The limitation period for defamation and malicious falsehood cases brought in Northern Ireland was also reduced to one year; *see* Defamation Act, 1996, § 6, amending Limitation Order, 1989 (N. Ir.), but the three-year limitation period in force in Scotland remained unchanged. *See* Prescription and Limitation (Scotland) Act, 1973, § 18A (Scot.).

party who bears the burden of proof on the chief issues (the plaintiff) is in a position to prepare his or her case before formally commencing an action. This is not always true in defamation cases, since defendants are often unaware that they may have published actionable words until a libel writ has been issued, and if too much time elapses between a media report and the filing of a lawsuit, it may become impossible to recreate the circumstances and locate the sources underpinning an allegedly defamatory statement. During debate in both Houses of Parliament, some concern was expressed that reducing the limitation period would unfairly prejudice plaintiffs, particularly those who need time to amass the financial resources necessary to pursue a claim.[82] These concerns were allayed by the government, which noted that in practice most defamation suits are brought within one year of the alleged libel, and in any event the new law significantly broadens the discretionary power of judges to allow late filings.[83]

A more ambitious procedural reform is undertaken by sections 2-4 of the new Act. These provisions substantially rewrite the "offer of amends" procedure introduced by section 4 of the Defamation Act 1952. This older provision created a mitigating defense in cases of so-called "unintentional" defamation, where the defendant, despite exercising reasonable care, was unaware that a statement he or she made referred to an actual person or could be subject to a defamatory interpretation.[84] The situations where this defense might apply do not arise often; a defamatory statement is simply one that "lowers the plaintiff in the estimation of right-thinking people," and it is rare that a speaker is unaware that this is the effect of an allegedly defamatory remark. The defense might apply, however, when an author innocently gives a fictional character the same name as that of a real

82. 571 PARL. DEB., H.L. (5th ser.) 260 (1996); 571 PARL. DEB., H.L. (5th ser.) 673 (1996); 278 PARL. DEB., H.L. (5th ser.) 133 (1996); PARL. DEB., H.L. Standing Committee A (5th ser.) 18-19 (1996).

83. Before the 1996 amendments, a court could extend the period for filing only if the plaintiff was unaware of the relevant facts relating to the cause of action. Under the new law, the court can take into account all relevant factors in determining whether it would be equitable to allow the claim to proceed in cases where the victim (or the victim's personal representative in malicious falsehood cases that survive the death of the victim) fails to bring suit within the one-year limitation period. Defamation Act, 1996, § 5(4), amending Limitation Act, 1980, §§ 32A and 36(1). Situations that might justify the exercise of such discretion could arise in cases involving police officers or doctors who need to concentrate their resources on internal investigations before considering resort to the defamation laws, or persons who have complained about unfair treatment or infringement of privacy to the Broadcasting Complaints Commission, which cannot process the complaint if a court action concerning the same subject matter is commenced. *See* Broadcasting Act, 1990, § 144(4)(b) (Eng.). *See generally* Consultation Report, *supra* note 40, paras. 4.2-4.5.

84. Defamation Act, 1952, § 4(5).

person,[85] or when a seemingly innocuous statement turns out to be defamatory because of circumstances unknown to the defendant.[86] The 1952 Act was supposed to allow defendants to avoid heavy damages in such circumstances by offering to remedy the harm inadvertently done (an "offer of amends"). The defendant had to make the offer of amends promptly upon discovering the defamatory nature of a publication, and to serve with the offer a detailed affidavit setting out all of the facts relating to the innocent publication of the defamatory words. The defendant was thereafter unable to offer evidence that differed from the facts specified in the affidavit.[87] This process could be costly, and if the offer was rejected, the affidavit could prejudice the defendant's case at trial. As a consequence, the procedure set out in section 4 was rarely invoked even in those cases in which unintentional defamation did occur.[88]

The 1996 Act simplifies and expands the scope of the offer of amends procedure. Now, *any* person who has published an allegedly defamatory statement may make an "offer to make amends," even in cases that do not fall within the "unintentional" defamation category defined by the old law.[89] The new provision requires that the offer be made in writing, but dispenses with the requirement of an affidavit.[90] The offer may be "general," in the sense that it covers all interpretations that might be given to a statement, or it may be "qualified," referring only to a specific defamatory meaning the offeror concedes might be conveyed by the statement.[91] The offer must include a proposal for making and publicizing a suitable correction and apology, as well as a proposal for compensating the aggrieved party for any damage caused by the statement.[92]

At first glance, an "offer to make amends" may resemble an ordinary settlement offer, but it has legal consequences that differ substantially from those of an offer governed by familiar contract principles.[93] An offer of amends can be "accepted" even if the offeree does not agree that any of the specific steps proposed by the offeror are sufficient. By accepting an offer

85. *See, e.g.*, E. Hulton & Co. v. Jones [1910] App. Cas. 20 (P.C. 1909) (appeal taken from Eng.).

86. *See, e.g.*, Morrison v. Ritchie & Co., 39 Fr. 432 (Sess. Cas. 1902) (newspaper printed a birth announcement without knowing that pursuer had been married only a month).

87. Defamation Act, 1952, § 4(1)(b), (2); *see also* Ross v. Hopkinson, 1956 C.L.Y.B. 5011 (offer made seven weeks after discovery of defamation deemed untimely).

88. *See generally* ROBERTSON & NICOL, *supra* note 5, at 94-95.

89. Defamation Act, 1996, § 2(1).

90. The requirements of the writing are set out in section 2(3), *id.*

91. *Id.* § 2(2).

92. *Id.* § 2(4).

93. However, an offer of amends can be withdrawn before acceptance, just like an ordinary contract offer. *See id.* § 2(6).

of amends, the offeree is really only agreeing that the dispute-resolution machinery established by section 3 of the new Act will govern the case.[94] The offeree surrenders any right to "bring or continue defamation proceedings in respect of the publication concerned" against the offeror,[95] as well as the right to have a jury decide the claim.[96] In return, however, the offeree will obtain the benefits of a streamlined procedure that should resolve the claim rapidly and inexpensively, at least in comparison to the traditional litigation route.

If the offer of amends is accepted and the parties agree on the specific steps to be taken by the offeror, that is effectively the end of the matter. If the offeror fails to fulfil the terms of the offer, the aggrieved party simply applies for a court order requiring the offeror to take the specific steps that were agreed.[97] If the parties do not agree on the compensation or costs to be paid by the offeror, the matter is referred to the court, which resolves the issue by reference to the same principles that govern the determination of damages and costs in defamation cases, with the important caveat that the court, and not a jury, will make this determination.[98] But if the parties cannot agree on how a correction and apology should be made, the offeror has final say over what steps should be taken, and the court cannot override this determination.[99] In earlier drafts, the Defamation Bill allowed judges to resolve disputes between the parties over the terms of the offer by dictating the content and form of a correction and apology, including the prominence the correction would be given in a subsequent publication or broadcast.[100] The media strenuously objected to this, fearing judicial interference with their editorial independence. The government feared that

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94. *Id.* § 3.

95. *Id.* § 3(2). Acceptance of an offer of amends from one person does not affect any claims that can be made against others legally responsible for the same publication. *Id.* § 3(7). Any amount paid under an offer of amends is treated like a bona fide compromise of the claim for purposes of discharging the offeror and calculating any diminution of the plaintiff's recovery against other defendants under the relevant sections of the Civil Liability (Contribution) Act, 1978 (in England and Wales and Northern Ireland) or the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940 (in Scotland). *Id.* § 3(8), (9).

96. Defamation Act, 1996, § 3(10).

97. *Id.* § 3(3).

98. *Id.* § 3(5), (6).

99. *Id.* § 3(4). This provision expressly allows the offeror to "make the correction and apology by a statement in open court in terms approved by the court" and "give an undertaking to the court as to the manner of their publication." *Id.* Since the Act contemplates that an offer of amends can be made and accepted before a defamation action has been commenced, amendments to the rules of court will be required in order to allow this undertaking to be made.

100. The High Court, the primary trial court in England and Wales, was given similar powers by section 4(4)(a) of the 1952 Act.

if the offending provisions were not removed, the media would not invoke the new procedure, rendering it as useless as section 4 of the 1952 Act had been.[101] Thus, under the terms of the Act as passed, the courts cannot interfere with the manner in which a correction and apology is made. The reasonableness of the offeror's actions, however, will be taken into account by the court in making a compensation award.[102]

If the offeree declines the offer of amends, the case goes forward as any other libel lawsuit. The fact that the offer was made is a complete defense to liability only if the defendant either did not know and had no reason to believe that the offending statement was defamatory, or did not know and had no reason to believe that it "referred to the aggrieved party or was likely to be understood as referring to him."[103] In essence, this is the old unintentional defamation defense, but with one important difference. Following the advice of the Neill Committee, the burden of proof on the issue of the defendant's knowledge in cases where this defense is pleaded will be placed on the plaintiff, not the defendant.[104] Given the broad common law definition of defamation, it should be easy for plaintiffs to discharge this burden in cases where the defense does not apply, but in those rarer situations where unintentional defamation has actually occurred, it should be easier for defendants to escape liability if they make an offer of amends. In cases other than those of unintentional defamation, the fact that the defendant made an offer of amends can be pleaded in mitigation of damages.[105] This may be useful for those defendants who acted negligently but in good faith in making a defamatory statement.

While the new offer of amends procedure is a marked improvement over section 4 of the 1952 Act, several shortcomings may diminish its effectiveness. For example, an offer must be made before a defense has been served in defamation proceedings brought against the offeror.[106] The Parliamentary Secretary to the Lord Chancellor's Department argued that the machinery created by sections 2-4 of the new Act is "designed to

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101. *E.g.*, 572 PARL. DEB., H.L. (5th Ser.) 20 (1996).

102. Defamation Act, 1996, ch. 31, § 3(5) (Eng.).

103. *Id.* § 4(2) and (3). If the defendant made a qualified offer, the defense only applies with respect to "the meaning to which the offer related." *Id.* § 4(2).

104. *Id.* § 4(3). This subsection creates a rebuttable presumption that the defendant's defamatory statement was unintentional.

105. *Id.* § 4(5). The offer may mitigate damages regardless of whether the defendant decides to plead it as a defense. Since relying on the offer as a defense is tantamount to forfeiting all other defenses, *see infra* note 108 and accompanying text, one suspects that most defendants will prefer the mitigation route to relying on the defense provided by section 4(2).

106. *Id.* § 2(5).

provide immediate amends, avoiding all the trouble and expense of conventional proceedings" by encouraging a potential defendant to "come[] forward at once," and that allowing a defendant to invoke the procedure after serving defenses would render the process "cluttered and confused."[107] The problem is that defendants may be unwilling to submit to the procedure (which entails a tacit admission of wrong-doing) on such short notice. A second problem is that the Act does not impose an upper limit on the damages that may be awarded after an offer is made. As a consequence, defendants conceding liability are not insulated from the threat of substantial damages, awarded either by a judge (if the offer is accepted) or a jury (if it is not), and this may dampen their enthusiasm for the procedure. Moreover, there is little strategic advantage in making an offer in cases where the plaintiff is unlikely to accept. Although the defendant can rely on the offer as a defense in unintentional defamation cases, this is risky, because the Act provides that an offeror asserting the offer as a defense "may not rely on any other defence."[108] Opting instead to rely on the offer as mitigation is little different than the existing rule that allows defendants to mitigate their damages by issuing a prompt apology, a practice that seemingly has done little to stem the tide of ever-climbing damage awards against media defendants in the past decade. It remains to be seen whether these strategic pitfalls will discourage defendants from using the procedure, particularly in high profile cases in which plaintiffs are most likely to insist on jury trials.

Whether to invoke the offer of amends procedure is strictly in the hands of the parties: the defendant decides whether to make an offer, and the plaintiff decides whether to accept it. With regard to the 1996 Act's third important procedural reform, the parties do not have this exclusive power. The "summary disposal of claim" procedure introduced by sections 8-10 of the Act contemplates early judicial evaluation of defamation claims—whether requested by the parties or not—and a judicial determination of the most straightforward claims without a jury.[109]

The new Act envisions the adoption of rules of court which will, among other things, authorize either party to a defamation action to seek summary disposal at any point in the litigation, and permit the court to invoke the summary procedure on its own accord.[110] If the court deter-

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107. PARL. DEB. H.C. STANDING COMMITTEE A, First Sitting, Parl. Deb., H.C. (5th ser.) 9 (1996).

108. Defamation Act, 1996, § 4(4). In cases of qualified offers, this limitation only applies "in respect of the meaning to which the offer related." *Id.*

109. *Id.* § 8.

110. *Id.* § 10(1) and (2).

mines that the plaintiff's claim is meritless, it may summarily dismiss the case.[111] On the other hand, if the court determines that the defendant has "no defence . . . which has a realistic prospect of success, and that there is no other reason why the claim should be tried," it may enter judgment for the plaintiff and grant summary relief in accordance with section 9 of the Act.[112] Section 9 gives the court the discretionary power to declare that the plaintiff was libeled and to restrain the defendant from any further dissemination of the defamatory statement;[113] to award damages not exceeding £10,000;[114] and to order the defendant to publish "a suitable correction and apology."[115] Controversially, in cases in which the parties cannot agree on the content of the correction and apology or the manner in which it is to be published, the court is empowered to direct the defendant to publish a summary of the court's judgment in the manner and at the time the court determines.[116] Although the media successfully opposed a similar provision in the offer of amends procedure on the ground it authorized judicial interference with editorial decisionmaking, the same objection went unheeded with respect to the summary procedure.[117]

Notwithstanding this potential for infringement on editorial autonomy, at first blush the summary procedure may seem particularly attractive to media defendants. The £10,000 cap on damages is so far below the amounts commonly awarded by juries or paid out in settlements that the media might be tempted to abandon their defenses simply to take advantage of the procedure. This would be unwise. Lord Hoffman, who proposed the procedure, noted that it was devised for cases in which plaintiffs sought a quick public vindication of their reputations rather than substantial monetary

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111. *Id.* § 8(2).

112. *Id.* § 8(3). This determination will not necessarily be made on the basis of pleadings or the representations of counsel alone. The Act contemplates that procedural rules will be drafted allowing the court to conduct a hearing at which it will consider affidavits, witness statements, or (at the court's discretion) oral testimony and other evidence. *See id.* § 10(2)(c)-(f). In determining whether to summarily dispose of a claim, the court is instructed to consider the "extent to which there is a conflict of evidence," *id.* § 8(4)(c), which implies that some cases may be disposed of without a jury trial even if certain substantive points are contested.

113. *Id.* § 9(1)(a) and (d).

114. *Id.* § 9(1)(c). In the future, this ceiling can be raised by the Lord Chancellor through a statutory instrument (regulation), which will be effective unless annulled by either House of Parliament in a subsequent resolution. *Id.* § 9(1)(c) & (3).

115. *Id.* § 9(1)(b).

116. *Id.* § 9(2).

117. *See, e.g.*, 278 PARL. DEB., H.C. (5th Ser.) 145 (1996); A PARL. DEB., H.C. (5th Ser.) 35-40 (1996). The different outcome may be due to the fact that the offer of amends procedure will only work if the media are willing to invoke it, while the operation of the summary procedure does not depend on the media's cooperation.

compensation, or in which defendants were threatened with litigation by "gold diggers" over trivial defamatory remarks. Lord Hoffman stressed that his proposal was intended to be a modest measure that would not affect most of the high profile cases of recent years.[118] Thus, the Act provides that in determining whether to dispose of a claim without a jury trial, the court is to take account of the seriousness of the plaintiff's claim and "whether it is justifiable in the circumstances" to deny the plaintiff a full trial, even in cases in which the defendant waives all defenses.[119] Moreover, the court is specifically instructed to consider whether the maximum award available under the procedure is adequate to compensate the plaintiff.[120] Unless there is a major departure from what has come to be regarded in England as an acceptable level of damages even in routine libel cases against the mass media, this procedure will remove few if any important libel cases from juries.

Indeed, many opposed the procedure as unnecessary, and Lord Justice Neill's working group had rejected it when it was first proposed. While the new procedure is intended to encourage quicker settlements, the Neill Committee was unconvinced that there were many trivial cases of the sort at which the procedure is directed that would not be settled promptly by the parties without judicial intervention.[121] The media are anxious to settle cases quickly when they have no viable defenses, since to act otherwise would only exacerbate the bill for costs. Another weakness of the procedure—really a weakness of libel law generally—is the unavailability of legal aid. While the summary procedure provides a cheaper means of resolving a dispute, someone contemplating legal action cannot be certain that the procedure will be used once suit is brought. If the defendant can establish that there is a genuine defense to the claim, the action will proceed through the usual expensive and lengthy litigation process. This prospect will continue to discourage lower- and middle-income individuals from seeking redress for reputational harms.

C. *Waiving Parliamentary Privilege*

Unlike most of their constituents, Members of Parliament need little

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118. *E.g.*, 570 PARL. DEB., H.L. (5th ser.) 599 (1996).

119. Defamation Act, 1996, ch. 31 § 8(4)(d), (e) (Eng.). The court is also directed to consider whether all potential defendants have been joined in the action and whether summary disposal would be inappropriate for other defendants in the action. *Id.* § 8(4)(a) and (b).

120. *Id.* § 8(3). The court need not take this into account if the plaintiff affirmatively requests summary relief.

121. *E.g.*, 570 PARL. DEB., H.L. (5th Ser.) 599 (1996).

encouragement or assistance to exploit the defamation laws when criticized too vociferously in the press. Yet they themselves, if so inclined, are free to attack others without fear of a libel writ, as statements made by members of either the House of Commons or the House of Lords in the course of Parliamentary proceedings are absolutely privileged. The fountainhead of this privilege is Article 9 of the Bill of Rights 1688, which provides that "[f]reedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[122] This privilege was of central importance in the historical struggle between the Commons and the Crown for supremacy, and to this day the liberty of MPs to speak freely without fear of persecution in conducting their public duties is critical to the process of democratic self-government. Parliamentary privilege covers debates on the floor in either House, anything said in the transaction of Parliamentary business, statements made in committee (by MPs or witnesses giving evidence), and statements made in preparing any document connected with the transaction of Parliamentary business or drafted in response to an order emanating from Parliament.[123]

Recently, MPs discovered that the privilege does not always operate to their advantage. It is well established that the courts regard the privilege as an absolute bar to any judicial inquiry into the workings of Parliament, even in cases primarily concerned with statements made outside of Parliament.[124] When Member of Parliament Neil Hamilton sued *The Guardian* newspaper over allegations of improper behavior in Parliament,[125] the court stayed the action on the ground that because it was unable to admit evidence of Parliamentary proceedings pivotal to *The Guardian*'s justification defense, the defendant would be unduly prejudiced by allowing the matter to proceed to trial.[126] Parliament was outraged by this perceived inequity; Lord Hoffman commented that "it is unjust that [Mr. Hamilton] should not be able to put the matter before a judge and jury, like any other citizen who considers that his integrity has been publicly

122. Church of Scientology of California v. Johnson-Smith, 1 App Cas. 522 (A.B. 1972). The Scottish Claim of Right 1689, contains a similar provision.

123. *See* WADE & BRADLEY, *supra* note 1, at 226-31, 242.

124. *See, e.g.*, Church of Scientology of California v. Johnson-Smith, 1 App. Cas. 522 (Q.B. 1972) (court cannot inquire into what defendant MP said in Parliament in order to prove MP's out-of-Parliament statements were malicious).

125. The newspaper alleged that Hamilton had failed to disclose that he had accepted cash in exchange for asking questions on the Commons floor. It is through such questions that Members of Parliament can raise issues and indirectly propose government action on issues of interest to them or their constituents.

126. *Change Will Allow MP to Try to Clear Name*, MEDIA LAWYER, July 1996, at 25-26.

defamed"[127] (except those citizens, of course, who are defamed in Parliament and prevented from suing by the Parliamentary privilege). In response, what became Section 13 of the Defamation Act 1996 was introduced at the Committee stage in the House of Lords and adopted at the third reading in the Lords.

Section 13 allows a Member of Parliament to waive Parliamentary privilege "so far as [it] concerns him" if necessary to pursue a civil claim.[128] This waiver would allow evidence to be introduced in a civil trial concerning the Member's conduct within Parliament, even if such evidence would otherwise be forbidden by the privilege.[129] Section 13 provides that one Member's waiver does not affect the "operation" of the privilege "in relation to a person who has not waived it,"[130] a limitation which certainly has the potential for creating interesting conflicts when two or more Members are involved in privileged conduct and only one of them wishes to waive the privilege.[131] Section 13 also makes clear that a Member's waiver will not affect that Member's immunity from "legal liability for words spoken or things done" conferred by the privilege that is "waived."[132] In other words, the waiver contemplated by section 13 is a selective one. An MP may waive the privilege if necessary to pursue his or her own claim, but the evidence used in this context cannot be used against the MP by a claimant in the same or a separate action if it would render the MP liable to that claimant. It is perhaps the paradigmatic case of having one's cake and eating it.

Of all the changes made in the law by the Defamation Act, this late amendment drew the most comment both within Parliament and in the press.[133] Many were concerned that insufficient consideration was being given to the potential constitutional implications of the measure. But however interesting section 13 may be to scholars of the British Constitution, it is unlikely to have much impact on defamation law. On the third

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127. *E.g.*, 572 PARL. DEB., H.L. (5th ser.) 26 (1996).

128. Defamation Act, 1996, ch. 31 § 13(1) (Eng.).

129. *See id.* § 13(2).

130. *Id.* § 13(3).

131. Indeed, this problem was presented in Hamilton's case. In addition to Hamilton, *The Guardian*'s allegations implicated other Members of Parliament who did not wish to waive their privilege and contest those allegations in court.

132. Defamation Act, 1996, § 13(4).

133. This media attention intensified after the passage of the 1996 Act, when Hamilton's libel action collapsed on the eve of trial. *The Guardian* claimed that the case was dropped because Hamilton realized that the paper was prepared to prove the truth of its allegations, trumpeting its victory with a banner headline that has already entered British journalistic lore. *See* David Hencke et al., *A Liar and A Cheat*, THE GUARDIAN (London), October 1, 1996, pt. 1, 1.

reading in the Lords, Lord Hoffman pointed out that before the Hamilton case, there had been no cases in the 300 years since the English Bill of Rights was proclaimed in which an MP had attempted to bring a libel action which raised a question about his own Parliamentary conduct.[134] It may be that Hamilton's case is *sui generis*, and that section 13 is no more than the British equivalent of pork barrel legislation intended to benefit a single individual, rather than a reform of more general importance.[135]

III. AN OPPORTUNITY LOST

With the exception of section 13, the Defamation Act 1996 offers well-considered reforms of defamation law. Nonetheless, those reforms fall far short of resolving the most compelling problems in English defamation law. For middle- and lower-income individuals harmed by irresponsible conduct by the press, the libel laws will continue to seem to be a privilege reserved for the rich. Legal aid remains unavailable to potential plaintiffs (and defendants) in libel actions, and the procedural reforms conceived by the Act do not go far enough in providing less expensive alternatives to litigation for potential complainants. The offer of amends procedure established by sections 2-4 of the Act comes into play only if the defendant decides to make an offer, something a party contemplating legal action cannot depend upon in weighing the costs and benefits of bringing suit. Similarly, the summary disposal of claim procedure established by sections 8-11 affords few guarantees for a potential claimant concerned about the costs of litigation, since a demonstration that there are genuine defenses will defeat an application seeking summary relief. In short, the Act does not remedy the fundamental problem of access to justice for all but the wealthiest members of society.

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134. 572 PARL. DEB., H.L. (5th ser.) 25 (1996). This situation did arise, however, in a case originating in New Zealand and ultimately decided by the Privy Council. Prebble v. Television New Zealand Ltd., 3 All E.R. 407 (D.C. 1994). This case was the authority relied upon by the judge who ordered the stay in the Hamilton case.

135. This suggestion was denied by the amendment's supporters in Parliament. But it is noteworthy that section 13 is the only important provision of the 1996 Act that had an immediate impact on pending litigation. Sections 2-4 and 8-11, which introduce procedural reforms, section 7, which makes a minor procedural change, and sections 14-15, which overhaul the statutory privileges, were to be phased in on a date or dates to be determined by the Lord Chancellor (or in Scotland, by the Secretary of State). *See* Defamation Act, 1996, ch. 31, § 17 (Eng.). The remaining provisions (including section 13) came into force two months after the Act's passage, or on September 4, 1996. However, the Act expressly states that section 1 (responsibility for publication) and sections 5-6 (reducing the limitation period) do not apply to causes of action arising before that date. *See id.* §§ 1(6), 5(6), and 6(5). No such limitation was placed on section 12 (a minor evidential rule) or section 13, which apply to cases commenced before the Act's passage.

Moreover, the Act does not address the deleterious effect England's defamation laws have on the exercise of the freedoms of speech and press in the context where those freedoms matter most: when the conduct or character of public figures is at issue. Those individuals and organizations that have the resources and the inclination to pursue defamation claims with vigor are often those whose activities should be subject to the greatest public scrutiny. The defamation laws can deter the press from publishing truthful stories concerning such individuals and organizations, even when the stories concern "matters which it is very desirable to make public."[136] This is primarily the consequence of three characteristics of English law: the practical effects of the allocation of evidential burdens in defamation cases; the related problem that English law does not recognize a public figure defense; and the decisive role given to juries in defamation cases, which is the primary reason that exorbitant damage awards have become a commonplace feature of English libel litigation.

The allocation of burdens in defamation cases favors the plaintiff on virtually every issue of importance. This is an accident of history. Unlike most claims for civil wrongs, libel developed not as an action on the case (which required proof of damage) but instead was derived from the criminal law.[137] The purpose of criminal libel laws was the deterrence of speech that threatened to cause a breach of the peace; whether the content of the speech was true or of vital importance to the citizenry was irrelevant to the law's central concern for maintaining order. The elements of English defamation law that accommodate society's interest in preserving free speech—the rules protecting truthful reports, the expression of critical opinion, and fair and accurate reporting of official statements, for example—were an historical afterthought, annexed to existing legal principles as defenses to liability.

Though the structure of a defamation trial may be the result of historical fortune, it has profound effects on the outcome of contemporary defamation actions. To benefit from the justification and fair comment defenses, for example, a media defendant cannot simply rely on the knowledge that what was said was true, but rather must prove the truth of its statements with evidence that will satisfy a court of law. Thus, in any story involving someone with the means to sue, the media cannot rely on hearsay information, no matter how reliable, unless they are certain that the evidence would be admissible at trial. The press must give pause before

136. Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534, 548 (Lord Keith of Kinkel).

137. For a brief overview of the historical evolution of libel law, see CARTER-RUCK ET AL., *supra* note 2, at 17-32.

publishing any story based on the statements of witnesses who may be unwilling to repeat those statements in court, or based on information gleaned from confidential sources who may be unwilling to come forward and testify in the event the story becomes the subject of a lawsuit.[138] And the more politically sensitive a story, the more unlikely it will be that sources will be amenable to testifying on a media defendant's behalf. Moreover, by placing all important evidential burdens on the defendant, English law gives the media little breathing room for error, even error made in good faith and after reasonable investigation.[139] English law "assumes that there is congruence between the legal rule and its practical effect,"[140] ignoring the imprecision of the legal process in making determinations of "truth," and the behavioral repercussions of that imprecision, namely that the press will refrain from reporting much of what it knows is true because of the vagaries of the legal process.[141]

Other jurisdictions have recognized the chilling effect the burden of proving truth can have on the sort of legitimate investigative journalism upon which a democracy depends. In the United States, for instance, a plaintiff who sues a media defendant in libel bears the burden of proving the falsity of a statement concerning a matter of public interest.[142] In Germany, the Constitutional Court has held that the Basic Law (the German Constitution) precludes the imposition of liability on the press for the non-negligent publication of erroneous factual allegations, at least where the allegations concern an issue of great societal importance.[143] In the Netherlands, the fact that an allegation is untrue, or cannot be proven in a court of law, will not render the defendant criminally or civilly responsible unless the investigatory efforts undertaken by the defendant were not commensurate with the gravity of the allegation.[144] The European Court of Human Rights has indicated that in cases involving public figures, legal rules requiring the defendant to prove truth in defamation cases violate the

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138. *See* ROBERTSON & NICOL, *supra* note 5, at 41; Weaver & Bennett, *supra* note 34, at 7-8. As Lord Keith of Kinkel observed, "[Q]uite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available." Derbyshire County Council v. Times Newspapers Ltd., 1993 A.C. 534, 548.

139. *See* 28 HALSBURY'S LAWS, *supra* note 18, para. 131.

140. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 10 (1980).

141. *Id.* at 10-11.

142. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

143. ERIC BARENDT, FREEDOM OF SPEECH 186 (1985) (citing 54 BVerfGE 208, 220 (1980); and 61 BVerfGE 1, 8-9 (1982)).

144. Egbert Dommering, *Unlawful Publications under Dutch and European Law—Defamation, Libel and Advertising*, 13 J. MEDIA L. & PRAC. 262, 264 (1992).

freedom of expression guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[145]

The British Parliament, however, has determinedly resisted proposals to shift the burden of proof on the issue of truth in defamation cases. When the Defamation Bill was in Committee in the House of Lords, Lord Lester proposed an amendment that would have reversed the burden of proof in defamation actions. Finding no support, the amendment was withdrawn.[146] Even with respect to the relatively minor defense of innocent dissemination, the government rejected the suggestion that the plaintiff should have the burden of proving that the defendant acted unreasonably in distributing a defamatory publication, on the ground that only the defendant would possess the detailed knowledge of the practices and procedures relevant to the issue.[147] Yet the same can be said of any personal injury case in which the plaintiff must prove that the defendant was negligent. It is not clear why a libel plaintiff deserves special dispensation on this score.

A related shortcoming of English libel law is the absence of some form of public figure defense. Other legal systems, recognizing that democratic self-government depends on the unfettered flow of information and ideas concerning issues of public concern, provide heightened protection for political speech, including speech relating to a public

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145. Article 10 provides that freedom of expression is to be guaranteed, subject to legal prescriptions "necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others . . . ." Nov. 4, 1950, art. 10, 213 U.N.T.S. 221. In Lingens v. Austria, 8 E.H.R.R. 407 (1986), the European Court of Human Rights (ECHR) held that article 10 is violated if the defendant is required to prove an allegedly defamatory opinion concerning a public figure. The ECHR seemingly takes a broader view of what is protected "opinion" than do the English courts; in Oberschlick v. Austria, the ECHR treated as "opinion" a statement that a public figure's views "corresponded to the philosophy and aims" of the National Socialist Party. 19 E.H.R.R. 389, 433 (1995). Nonetheless, while the United Kingdom is a signatory to the European Convention on Human Rights, the ECHR's decisions interpreting the Convention, while binding in individual cases, are not considered part of the United Kingdom's domestic law, and are not binding precedent in subsequent cases before UK courts. *See generally* Brind v. Secretary of State, [1991] 1 A.C. 696 (H.L.).

146. 571 PARL. DEB., H.L. (5th Ser.) 239-43 (1996). Oddly, the argument offered against the amendment was that a plaintiff in a libel action was often a private person with limited resources, while the defendant was usually a wealthy corporation, and that the defendant could better afford to develop proof regarding the accuracy of a statement. This ignores the reality that modern defamation litigation is an option only available to the wealthy (or those backed by wealthy organizations, such as political parties or organizations, professional associations, or trade unions). Persons with limited resources are not likely to commence a libel action regardless of which party has the burden of proving the truth or falsity of a statement.

147. *See Consultation Report, supra* note 40, at para. 2.5 ("only the defendant knows exactly what care he has taken").

official's conduct, policies, or fitness for office. In *New York Times Co. v. Sullivan*, for example, the United States Supreme Court held that a public figure could not prevail in a defamation action unless he or she could establish by clear and convincing evidence that the defendant published a defamatory statement knowing that the statement was false, or with a reckless disregard as to whether the statement was true.[148] In part, the United States courts reason that public figures assume the risk of more intense criticism by voluntarily entering the public sphere, and have adequate access to the media so that they can effectively rebut attacks on their character.[149] Suggestions that a similar rule should be adopted in England have not been well received in Parliament. The Neill Committee doubted that the press would treat such a defense "responsibly."[150] During Parliamentary debates over the Defamation Bill, Lord Lester was the only peer who spoke in favour of a public figure defense.[151] Indeed, in adopting section 13 of the 1996 Act, Parliament betrayed a bias toward expanding, not contracting, the right of the powerful to sue over allegations made in the press, turning *New York Times Co. v. Sullivan* on its head.

Opposition to the public figure defense may be influenced by fears that the British press, already seen as irresponsible by most Members of Parliament, would move further toward the perceived excesses of American journalists. But other jurisdictions, including some that share England's common law tradition, have adopted an intermediate course. In Australia, for example, the courts have recognized a qualified privilege for defendants who defame public figures in the course of "political discussion" if they show that they were unaware that their defamatory statements were false, they did not publish with reckless disregard for the truth, and they acted reasonably in the circumstances.[152] In India, a public official can obtain an injunction against the circulation of a defamatory publication unless the defendant can prove the truth of the statement, but the official cannot obtain

148. 376 U.S. 254, 279-81 (1964) (interpreting the First Amendment to the United States Constitution).

149. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts 388 U.S. 130 (1967).

150. 570 PARL. DEB., H.L. (5th Ser.) 600 (1996) (quoting Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* 164 (1991)). The Neill Committee was of the opinion that giving the press a *Sullivan* defense "would mean, in effect, that newspapers could publish more or less what they liked, provided they were honest, if their subject happened to be within the definition of a 'public figure.' We think this would lead to great injustice." *Id.*

151. *Id.* at 583.

152. Theophanous v. The Herald & Weekly Times Ltd., 182 C.L.R. 104 (1994) (Aus. H.C.) (interpreting the right to freedom of communication implied in the Australian Constitution).

damages for a defamatory statement regarding acts and conduct associated with the official's public duties unless the official proves that the statement was false and that the defendant acted with reckless disregard for the truth.[153] In Germany, courts give greater latitude to "sharp and exaggerated expressions" concerning "an important issue for society,"[154] and expect participants in political debate to relinquish some of the protections they would otherwise be entitled to under the defamation laws.[155] Similarly, public figures in the Netherlands are expected to tolerate greater criticism than ordinary citizens.[156] Notwithstanding these precedents, the Defamation Act 1996 does nothing to remedy the intimidating effect that English law can have on political reporting.

The other characteristic of English law that over-deters free speech is the unconscionable level of damages awarded by juries in defamation cases. In part, escalating damage awards are a consequence of popular animosity toward the press, fuelled by the excesses of the British tabloid newspapers. But perhaps more problematical is the intangible nature of reputational harm, "a concept that has no equivalent in money or money's worth."[157] The pecuniary damages often attributed to libels, such as a business's loss of customers or goodwill, can be calculated with a reasonable degree of certainty using well-recognized criteria. But most plaintiffs in defamation cases are seeking a damage award that not only compensates for non-pecuniary harms—the shame and mental suffering experienced by the plaintiff—but also communicates a public vindication of the plaintiff's dignity.[158] Moreover, juries are allowed to assess aggravated damages when they find the defendant's conduct particularly vexatious,[159] and exemplary damages when they find the defendant has acted deliberately or recklessly with the object of profiting from the defamatory statements.[160] Here, too, juries are asked to equate a vague conception of the defendant's

153. Rajgopal v. State of Tamil Nadu, 6 S.C.C. 632 (1994) (interpreting article 19 of the Indian Constitution, protecting "freedom of speech and expression").

154. Gregory J. Thwaite & Wolfgang Brehm, *German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity*, 8 EUR. INTELL. PROP. REV. 336, 345 (1994).

155. BARENDT, *supra* note 143, at 186 (citing 61 BVerfGE 1, 13 (1982)).

156. Dommering, *supra* note 144, at 263-64.

157. ROBERTSON & NICOL, *supra* note 5, at 96.

158. *See* Cassell & Co. v. Broome, 1972 A.C. 1027, 1071 (quoting Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 115, 150 (1966) (Aus. H.C.)) ("compensation by damages operates in two ways-as a vindication of the plaintiff to the public and as consulation to him for a wrong done").

159. *See* John v. MGN Ltd. [1996] 2 All E.R. 35, 48.

160. Broome v. Cassell & Co., 1972 A.C. at 1078-79 (Lord Hailsham); Riches v. News Group Newspapers Ltd., 2 All E.R. 845, 850 (1985).

just desserts with a concrete monetary figure. It is hardly surprising that verdicts have been inconsistent and often excessive.

Over the decades, numerous reforms have been proposed with the hope of bringing jury verdicts into line. For instance, in 1975 the Faulks Committee recommended that juries should not assess damages directly, but rather only determine what "category" of damages should be awarded (substantial, moderate, nominal, or contemptuous), with the final determination of the actual amount to be awarded being left to judges.[161] The Committee also proposed that exemplary damages in defamation cases should be eliminated.[162] A decade earlier, it had been suggested that the judge should lay down minimum and maximum levels for an award, with the jury being free to assess damages within those limits.[163] While the Defamation Bill was being debated in the House of Lords, Lords Lester and Hoffman spoke in favour of the Faulks Committee's recommendations, and Lord Grantley suggested that jury trials in defamation cases be abolished altogether, except in exceptional cases.[164] But in the end, despite the introduction of the new offer of amends and summary disposal of claim procedures for minor claims, the Defamation Act 1996 will do nothing to dispel the threat of excessive damage awards that hangs over most English libel actions.

CONCLUSION

Certainly much that is disturbing about the British tabloid press is the consequence of the economic environment in which modern media companies operate. Driven by the desire for greater circulation figures, the temptation to sensationalize and trivialize can seem overwhelming. Nonetheless, we should not overlook the influence of legal doctrine, and especially the law of defamation, on the editorial choices made by the English press. The media naturally adapt their practices in order to minimize their liability exposure within the parameters defined by English libel law. For example, the preoccupation of the tabloid press with the personal lives of the Royal Family cannot be entirely separated from the knowledge that as a matter of policy the Royal Family never institutes defamation suits.[165] Coverage of stories involving the working class or the

161. FAULKS COMMITTEE REPORT, *supra* note 38, paras. 512-13. The Faulks Committee also questioned whether jury trials should be granted as often as they were in defamation cases. *Id.* paras. 455-57.

162. *Id.* para. 360.

163. *See* THE LAW AND THE PRESS, *supra* note 37, para. 113.

164. 570 PARL. DEB., H.L. (5th ser.) 584, 590-94 (1996).

165. *See* Weaver & Bennett, *supra* note 34, at 8.

poor—for example, the vast majority of crime stories, or the lurid coverage of the 1989 Hillsborough stadium disaster in which 95 soccer fans were crushed to death—is influenced inevitably by the knowledge that defamation actions are rarely brought by those who cannot afford the high stakes game of libel litigation. On the other hand, the stories that are of the greatest significance to a democratic society often go unreported, or are disguised with euphemisms that mask their import.

The central political roles of the press are to provide the citizenry with the information and debate necessary to the proper functioning of a democracy, and to act as a sentinel, warning the people of abuses of power by their governors. The English libel laws erect substantial obstacles hindering the ability of the press to fulfil these responsibilities. When Parliament gave its first serious consideration in nearly a half-century to reforming the law of defamation, it failed to meaningfully address, much less remove, these obstacles. In this sense, the Defamation Act 1996 must be judged a failure. In an age of global communication, the consequences of this failure will be felt far beyond the shores of the United Kingdom.