Commentary on Defamation Act 2013

By Dan Tench

1. Introduction

1.1 This note sets out various concerns relating to the Defamation Act 2013 (the "**Act**") and some suggestions as to how these can be addressed and the Act improved. It represents my views alone. It does not necessarily represent the views of either my firm, my colleagues or my clients.

1.2 In my practice, as it has related to proceedings in defamation, I have acted in roughly equal proportion for claimants and defendants. Accordingly, these views do not reflect any particular claimant or defendant perspective. Rather they are an attempt to produce a practical and balanced regime for the law of defamation. I believe that if ultimately adopted, the suggestions would offer significant advantages to both claimants and defendants.

1.3 It is true that defamation actions have been in steep decline for nearly two decades. Fewer claims are issued and much fewer are pursued. The high profile libel trial, a regular occurrence 20 years ago, is now an extreme rarity. There are many possible reasons for this, including the decrease in libel damages awards, the reduced preparedness of newspapers to incur the cost of defending major libel cases in straitened times, and the reduced perceived necessity of challenging false allegations in a single news outlet in a world with a much greater multiplicity of sources of information. In addition, there have been a number of material changes to substantive defamation law as the courts have developed the common law which may have militated against actions being pursued.

1.4 But whilst defamation actions are less common, defamation law remains highly important both to give people legal recourse in relation to unwarranted assaults on their reputation and to delineate the parameters of proper freedom of expression and the Act should be seen in that context.

1.5 In this note, I address a number of specific provisions in the Act. However, first I will set out some general concerns with it.

2. General concerns

2.1 There are two general concerns which arise in respect of the Act. Firstly, the Act puts on a statutory footing a number of matters which have been reasonably well established in common law. Secondly, it is difficult to understand the varying approach the Act takes to substantive as opposed to jurisdictional law.

2.2 I consider these concerns in more detail below. However, before I do so, it is worth noting that the most significant single issue arising in respect of defamation actions is not any question of substantive law but the prohibitive costs of those actions. In abolishing the presumption in favour of jury trials, the Act takes an important step to seek to mitigate these costs. However, otherwise it is not clear how the Act will help to bring down costs. In

particular, the uncertainty and complexity to which it gives rise – as explained further in this note - are likely merely to increase costs.

Statutory footing

2.3 The Act puts on a statutory footing a number of matters which have been reasonably well established in common law. These include a threshold of seriousness before a defamation claim can be brought and the defences of truth, honest opinion[1] and public interest (where the common law defences are all abolished to be replaced with the new statutory regime).

2.4 The benefit of putting these matters on a statutory footing is unclear. It cannot seriously be argued that by doing so this brings greater clarity. No person could realistically seek to bring a libel claim based solely on knowledge of these statutory provisions; to understand these matters even to a basic level still requires familiarity with the case law.

2.5 Equally, these provisions do not seem to reform significantly the existing regime. They appear in the main part simply to reiterate the generally understood position under existing case law. To the extent that any reform of these aspects of defamation law was desirable, this could have been achieved without supplanting the common law position wholesale.

2.6 Moreover, there are two problems with replacing the common law position with a statutory scheme.

2.7 Firstly, it creates uncertainties, since it is not clear to what extent the detailed principles developed under the old law still apply. At the very least, with a new statutory code there will be an opportunity for revisiting legal issues which have been well established under common law. This will inevitably give to increased cost as parties litigate these uncertainties.

2.8 Secondly, it freezes the law in the form of the statute. As set out further below, there are a number of complex issues regarding the law in these areas. As with any developing area of common law, these could in time have been addressed by the judges and the law been sensibly progressed (as has happened to the great benefit of the law of defamation over recent decades). The statutory definitions of several of the key defences now mean that there is much less flexibility.

2.9 Finally, it is regrettable that the opportunity to address well recognised anomalies within the existing law was not taken. I set these out below.

Substantive / jurisdictional law

2.10 In defamation, the distinction between substantive law and questions of jurisdiction can be very important. This is because the publication of defamatory material often spills over territorial boundaries. The question of which disputes can be heard in the courts of the UK is quite distinct from what is unlawful under English law. An English court may, for example,

[1] It might be said that the move away from jury trials was also putting on a statutory basis the presumptive practice which had established in recent years in the courts but the jurisprudential basis for this practice was perhaps more uncertain.

entertain an action in respect of publication overseas (subject to the substantive law of the country of publication). Alternatively, there may be a dispute in a foreign court over publication in the UK, which applies English governing law.

2.11 The logic behind the approach adopted in the Act to addressing issues by substantive or alternatively jurisdictional measures is unclear. In particular, the serious harm test in section 1 is couched as a substantive law provision. This appears to make more sense as a matter of jurisdiction (or procedure). Equally, the new intermediary defence at section 10 is couched as a jurisdictional measure[2]. This appears to make more sense as a matter of substantive law, consistent with the other intermediary defences.

3. Section 1 - Serious harm

Text as enacted

1 Serious harm

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

3.1 There is no sensible objection to a seriousness threshold for a defamation claim. As the explanatory notes of the Act make clear, this was the law prior to the Act. However, the formulation of this threshold in section 1 of the Act is highly problematic. To understand why, it is helpful to have regard briefly to the judicial history of the seriousness threshold.

3.2 Firstly, in *Dow Jones & Co Inc v Jameel*[3], the Court of Appeal stayed a libel action[4] on the basis that the harm caused was so negligible that the action constituted an abuse of process[5]. This was plainly a jurisdictional bar. In assessing the extent of the harm, the court could have regard both to the seriousness of the allegation in the statement complained of and to the extent of circulation of that statement.

3.3 Then in *Thornton v Telegraph Media Group Ltd*[6], Mr Justice Tugendhat held that for words to be defamatory, their meaning must have a degree of seriousness[7]. Trivial allegations were simply not defamatory. Importantly, the judgment related to the harm caused by a statement solely due to the *meaning* of the words complained of. There was no regard to

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[2] "*A court does not have jurisdiction to hear..*" is a jurisdictional limitation.
[3] [2005] EWCA Civ 75
[4] Building on the decisions of *Schellenberg v BBC* [2000] EMLR 296 and *Wallis v Valentine* [2002] EWCA Civ 1034.
[5] In the famous words of Lord Phillips: "*The game will not merely not have been worth the candle, it will not have been worth the wick.*"
[6] [2010] EWHC 1414 (QB)
[7] The allegation in question in that case was that the claimant, an author, gave copy approval to the subjects of her writing. It was held that this allegation had an insufficiently serious meaning to be defamatory.

other factors which may affect the harm arising, most obviously the extent to which the statement was circulated.

3.4 Section 1 of the Act conflates these two principles. It now imports into the definition of "*defamatory*" a broad serious harm threshold, apparently to take into account not only the seriousness of allegation made but also the harm caused (or likely to be caused) by dissemination of the allegation.

3.5 This means that it is now not possible to determine whether a statement is *defamatory* until the extent of publication and the identity of the publishees is known. For example, even the most serious allegation would not cause or be likely to cause harm if published only to close friends of the claimant who did not believe them. At the moment of publication, such allegations would not therefore be defamatory under section 1. They would however, become defamatory if republished to other individuals who might believe them. However, they would cease to be defamatory if the republication was followed by a clear and persuasive statement of falsity. They might then become defamatory again if republished to someone without such a statement. Words might be defamatory on publication (because likely to cause harm), but then cease to be defamatory after wide circulation because the reaction of publishees was one of disbelief.

3.6 The result of this is that in contrast to the previous law (and the law in every other jurisdiction of which I am aware), it is not possible to assess before, or at the time of publication, whether a statement is defamatory simply by studying the words in question.

3.7 Beyond this confusion, a number of other immediate practical problems also arise.

3.8 Firstly, there could be a series of statements published, for example as part of a campaign, each of which is damaging (though insufficiently so to meet the serious harm threshold) which when taken together may be seriously damaging. Under the provision as drafted, it is hard to see how such a campaign would be actionable. Each statement would be judged on its own merits and deemed expressly by statute <u>not</u> to be defamatory. A combination of any number of statements deemed <u>not</u> to be defamatory individually cannot become defamatory together, regardless of the harm caused collectively by them. Accordingly, a concerted and coordinated campaign of separate statements which taken together are highly damaging appears may no longer be actionable.

3.9 Secondly, the term "*defamatory*" is widely used in contracts to refer to the nature of the meaning of the words in question. For example, a commissioned author may warrant that his or her work is not "*defamatory*". Equally, the term is frequently used in statutes. To take one example, section 10 of the Legal Deposit Libraries Act 2003 provides an immunity to librarians when copies of works are made available. However, under section 10(2) this immunity is lifted if the librarian "*knows … that the copy contains a defamatory statement*".

3.10 Hitherto, these principles would have required regard solely to the words themselves to determine their meaning. However, section 1 now requires a quite different interpretation of the word "*defamatory*" to take into account wider matters which may affect the harm

caused, such as the circulation of the material. This could create untold uncertainty and complexity[8].

3.11 There are four further issues arising in respect of the formulation of section 1 as follows.

(a) It is unclear how one is to assess "*serious financial loss*" in respect of corporate defamations under section 1(2). In particular, is one to have regard to the size and resources of the company? If so, is it right that the same statement causing the same level of damage can be actionable by one company (if it is small) and not by another (because it is big)? That would mean that two companies of differing sizes could make the same allegations about each other and one could sue and the other could not. That seems unfair. Indeed, could a major company realistically ever sue[9] - or would it simply have to accept that it could be subject to all manner of allegations without legal remedy?

(b) It is unclear how section 1 operates where there is publication abroad as well as within the jurisdiction. Is the publication abroad simply to be ignored when assessing the harm? If so, this seems unfair on claimants who wish to bring an action where the harm arising from the publication across the whole world in aggregate is serious but in any one country falls below the threshold. If the harm arising from publication abroad is to be taken into account, then how is this to be done and what regard should be had to whether the publication was lawful in the foreign jurisdiction?

(c) Section 1 relates solely to claims in defamation, leaving that cause of action at odds with its relatively close cousin, malicious falsehood[10]. There seems no reason for this. As things stand, the wording of section 1 will simply channel many potential claimants into malicious falsehood rather than defamation claims.

(d) The "*likely to cause serious harm*" test also creates significant issues. In particular, a statement may be published in circumstances such that at the point of publication it was *likely* to cause serious harm. However, it may be that in the event (for example as assessed at trial), no such harm came to pass. Does that mean that it ceases to be defamatory? Or is it actionable because even though by the time of *trial* no serious harm was caused, at the time of *publication* it was nonetheless *likely* to cause serious harm?

The alternative proposal

3.12 Taking these points together, assuming that there is a need to put the seriousness threshold on a statutory footing, it seems most sensible to set this on a jurisdictional rather

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[8] At the very least, any sensible contract which includes a reference to material being "*defamatory*" should include the (rather cumbersome) wording "excluding the effect of section 1 of the Defamation Act 2013".
[9] That is could the "*financial loss*" caused or likely to be caused by the publication of any statement be considered to be sufficiently "*serious*" in the context of its financial position.
[10] An action for malicious falsehood may be brought without the need to prove special loss in the circumstances set out in section 3 of the Defamation Act 1952. Under this provision, such an action may be brought merely where the words are "*calculated to cause pecuniary damage*", which appears to be a lower threshold than "likely to cause … serious financial loss".

than a substantive law basis. This gives the court the ability to prevent defamation actions proceeding in respect of trivial allegations - including when they are made abroad (and indeed there they are subject to foreign law) - and also gives the court the flexibility to allow cases where the seriousness threshold is met by the publication of multiple connected statements, or by publication across multiple jurisdictions.

3.13 A provision which establishes this and meets the concerns set out above could be achieved with the following amendments to section 1 of the Act:

Alternative proposed text

1. Serious harm

(1) A court has no jurisdiction to hear a claim in defamation or malicious falsehood in respect of the publication of a statement unless that publication– or that publication taken together with other statements published by the same person - was at the time of publication likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body corporate that trades for profit is not "serious harm" unless it has caused or is likely to cause the body corporate financial loss.

(3) For the purposes of this section, where there is publication of the statement or statements abroad, account is to be given to the harm caused to the reputation of the claimant by that publication save where the publication would be lawful according to the law of the place of publication.

4. Sections 2 and 3 - Truth and honest comment

4.1 The text as enacted in sections 2 and 3 is as follows.

Text as enacted

2 Truth

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
(2) The first condition is that the statement complained of was a statement of opinion.
(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
(4) The third condition is that an honest person could have held the opinion on the basis of—
  (a) any fact which existed at the time the statement complained of was published;
  (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
(7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
  (a) a defence under section 4 (publication on matter of public interest);
  (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
  (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
  (d) a defence under section 15 of that Act (other reports protected by qualified privilege).
(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

4.2 As noted above, the desirability for putting the defences of justification (or truth) and comment (or opinion) on a statutory footing is in itself unclear and this is likely simply to cause uncertainty as to the existing law and thus unnecessary cost. Leaving that general concern aside, I would also note the following specific issues arising from these provisions.

Truth

4.3 Subsections (2) and (3) seek to reiterate the provisions in section 5 of the Defamation Act 1952 where a relatively innocuous libel cannot be successfully sued over in the context of a much more serious one.

4.4 The historic issue and concern with section 5 was whether the matter for comparison with the indefensible libel was either (a) the entire material published or (b) simply the words

selected for complaint by the claimant. This was resolved by the Court of Appeal in *Polly Peck (Holdings) plc v Trelford*[11], with O'Connor LJ stating (with unanimous approval):

> "*In my judgment section 5 plainly requires the distinct charges against the plaintiff to be founded on separate words, and these must be contained in the passages of which the plaintiff complains.*" [Emphasis added.]

4.5 That approach of course meant that a claimant could often largely neutralise the effect of section 5 by restricting his claim solely to the indefensible libel. In that way, a relatively innocuous libel appearing in a publication containing much more serious defamatory material could still be actionable. At least arguably, section 5 was actually intended to offer reassurance to the journalist that at the time of publication he need concentrate his concerns on ensuring that the most serious allegations were defensible. The less serious allegations were unlikely to be separately actionable. That sensible approach was undermined by how the provision was interpreted rendering it much less useful.

4.6 This difficulty is (at least arguably) retained in the wording of section 2 of the Act. The Act would have been a good opportunity to provide that the point of comparison was not only the entire publication as published but also any connected publication. In that way, the gravity of the allegation complained of could be measured by reference to allegations contained in a series of articles published with the statement complained of.

Opinion

4.7 The nature of the comment/opinion defence has been in something of a state of flux over the past 25 years or so[12]. It definitively lost the requirement of fairness (the comment now need be merely honest) and the nature of what may be comment has consistently been amended and expanded.

4.8 But there were plainly still new frontiers to be crossed, most particularly I think in respect of inferential statements. For some time, the courts have recognised that an inference can constitute a comment or an opinion for the purposes of this defence[13]. However, the true nature of an inference had not yet been properly explored. It appeared to remain the law that where a conclusion was "*objectively verifiable*" it was not defensible as comment[14].

4.9 But an inference can plainly be (and indeed is most naturally) a *factual* conclusion, albeit one drawn from other facts. It would be a natural extension of the common law defence to include the situation where the defendant had set out in the publication complained of a number of accurate facts and then stated his conclusion inferred from those stated facts. The reader may share the inference or disagree with it, but if it is all set out, no serious unfairness is occasioned to the subject of the piece.

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[11] [1986] QB 1000
[12] Indeed it has undergone a number of changes of name.
[13] In the most recent case on the defence before the Supreme Court, *Spiller & Anor v Joseph & Ors* [2010] UKSC 53, the term "inference" appears no less than 39 times.
[14] Although reconciling *Hamilton v Clifford* [2004] EWHC 1542 (QB) and *British Chiropractic Association v Singh* [2010] EWCA Civ 350 is not straight forward on this.

4.10 So if for example a journalist in an article were to summarise correctly a number of facts regarding an individual and then on that basis set out his or her conclusion that that individual is likely to be guilty of some offence or other wrongdoing (plainly something which would be objectively verifiable), there would be a defence of inference. This not only allows a significant extension in freedom of expression, but also accords with the ordinary way in which people typically discuss matters of controversy. Moreover, it is impossible to read the judgments of the Supreme Court in *Spiller & Anor v Joseph & Ors*[15] and the Court of Appeal in *British Chiropractic Association v Singh*[16] without concluding that this is the territory into which the common law, left to its own devices, would have rapidly crossed.

4.11 But that is not the law under section 3. A conclusion that an individual is guilty of some offence – even if plainly inferred from other stated facts - is likely to be held to be a factual allegation not an opinion[17]. This final and usefully reforming step in the law of comment has been effectively stymied by the enactment of section 3.

4.12 Another issue with section 3 is the nature of the facts needed to sustain an opinion defence. The wording as enacted provides that there had to be facts which "*existed*" at the time of publication. However, there appears to be no need for these facts to have actually been known to the defendant.

4.13 Moreover, it is not clear what the effect is of other facts which may equally well exist at the time of publication, which count against the opinion. For example, if there is an accusation of parsimony against an individual, can it really be right that that comment can be sustained by a few limited acts of miserliness while other acts of tireless philanthropy are to be disregarded? The proper test each way should be the facts known to the author. If where there is continuous publication (such as on a website) and the facts known to the author change after the first publication (because for example he has been apprised of further matters), it is right that the copy be amended to reflect this[18].

4.14 The following amendment would, I believe, address these concerns.

Alternative proposed text

2 Truth

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
(2) Subsection (3) applies in an action for defamation if the statement complained of or any connected statement conveys two or more distinct imputations.
(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be

[15] [2010] UKSC 53
[16] [2010] EWCA Civ 350
[17] In *Spiller*, the Supreme Court repeatedly distinguished between "*opinion*" and "*inference*". This is more than semantics. As I explain below, it is desirable that the apparatus for a defence of factual inference is somewhat different to that of one of pure comment since it should require that the facts on which the inference was drawn are set out so that the reader can undertake the same process. That is wholly unnecessary for opinion as pure value judgement.
[18] Although the legal requirement to do this would be subject to the newly enacted single publication rule at section 8 of the Act.

substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3 Honest opinion and inference

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion or a factual inference.

(3) The second condition is that in respect of a statement of opinion, the statement complained of indicated, whether in general or specific terms, the basis of the opinion and in respect of a factual inference, the statement complained of reasonably summarised the matters in the third condition from which the inference could be drawn including any such matters militating against the inference.

(4) The third condition is that an honest person could have held the opinion or drawn the inference on the basis of any relevant—

(a) facts, or

(b) things asserted to be facts in a privileged statement,

known to the author of the statement at the time the statement complained of was published.

(5) The defence is defeated if in respect of a statement of opinion, the claimant shows that the defendant did not hold the opinion and in respect if a factual inference if the defendant was malicious.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author in respect of a statement of opinion, did not hold the opinion and in respect if an inference that the author was malicious..

(7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);

(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) defence under section 15 of that Act (other reports protected by qualified privilege).

(8) In this section a factual inference is a statement concerning a factual state of affairs which is expressly stated to be inferred from other matters.

(9) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

5. Section 4 - Publication on matter of public interest

5.1 The text as enacted in section 4 is as follows.

Text as enacted

4 Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—
  (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

5.2 This section is apparently intended to reproduce the existing law, however it does not do so as clearly as it might. The case law which has developed through most of the common law world and in Strasbourg since the decision in *Reynolds* v *Times Newspapers* has properly focussed on "*responsible journalism*" or, using the Strasbourg terminology, "*the ethics of journalism*". This reflects a sensible and appropriate policy: journalists writing about matters of public interest should not be exposed to legal action if they act responsibly. However, this section avoids any express reference to the obligation on the defendant to undertake a reasonable and responsible investigation, concentrating instead on the concept of "*reasonable belief*".

5.3 In *Reynolds*, there was no doubt that responsibility on the part of the defendant was a key element. At least five of Lord Nicholls' so-called "ten commandments" related to the conduct of the journalist. Responsibility also remained key to all the subsequent cases, including the reasoning of all the Justices in the Supreme Court in *Flood v Times*

Newspapers Limited[19]. The wording of section 4 appears to be derived almost verbatim from the opening sentence of paragraph 113 of the judgment of Lord Brown. However, read as a whole, there can be no doubt that Lord Brown fully agreed with the other Justices that responsibility on the part of the defendant was a crucial factor.

5.4 The issue of whether responsibility on the part of the defendant is a necessary component of this type of defence has been considered carefully in other common law jurisdictions.

(a) In Australia, the Defendant must have taken "*proper steps, so far as they were reasonably open, to verify the accuracy of the material"* and must *"not believe the imputation to be untrue*"[20].

(b) In *Canada, in Grant v. Torstar Corp*[21]*,* the Supreme Court laid out its the defence of "*responsible communication*", incorporating most of the *Reynolds* factors relating to the conduct of the defendant.

(c) By contrast in New Zealand, there is no reasonableness requirement in the prima facie availability of the defence[22], although evidence of irresponsibility can be adduced by the plaintiff to show that the privilege has been misused.

5.5 This may in fact be less a substantive concern than a practical one. In light of the obvious provenance of section 4 in *Flood*, it seems very likely that the section would be interpreted as importing in an obligation of responsibility on the part of the defendant[23], even though it does not state this expressly. The difficulty is that if a potential victim is seeking pre-publication to insist that a journalist is required to undertake the usual responsible steps such as putting the allegation to the victim, there is no express wording in the statutory defence to refer to, in order to underline that requirement. At the very least, the victim must undertake some legal archaeology to explain that the requirement (arguably) exists. With the increased focus on responsible news reporting, it seems particularly curious that the express requirement for responsibility has been omitted.

5.6 This issue is easily remedied by introducing an express obligation that the defendant must act responsibly as follows.

Text as enacted

4 Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—
  (a) the statement complained of was, or formed part of, a statement on a matter of public interest;
  (b) the defendant reasonably believed that publishing the statement complained of was in the public interest; and

[19] [2012] UKSC 11
[20] *Lange v. Australian Broadcasting Corp* (1997) 189 CLR 520 at page 118.
[21] 2009 SCC 61, [2009] 3
[22] *Lange v. Atkinson* (1998) 4 BHRC 573
[23] The explanatory notes of the Act states expressly (para 29) that "*The intention in this provision is to reflect the existing common law as most recently set out in Flood v Times Newspapers*".

(c) in investigating and publishing the statement, the defendant acted reasonably and responsibly.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

6. Sections 5 and 10 - intermediary defences

6.1 The text as enacted in sections 5 and 10 is as follows.

Text as enacted

5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section—

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section "regulations" means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

10 Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

(2) In this section "author", "editor" and "publisher" have the same meaning as in section 1 of the Defamation Act 1996.

6.2 The Act thus adds two intermediary defences to defamation actions. It leaves unchanged the significant existing intermediary defences at section 1 of the Defamation Act 1996 (the "**1996 Act**") and Regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002 (the "**Regulations**").

6.3 That means that there are now four separate statutory intermediary defences[24], all of varying forms, as follows:

[24] There may even be a fifth in the common law defence on innocent dissemination. As to whether this survived section 1 of the 1996 Act see *Metropolitan International Schools Ltd v Designtechnica Corp & Ors* [2009] EWHC 1765 (QB) at paragraph 65 *et sequia* (in that case, Mr Justice Eady held that the defence did survive).

(a) the defence in section 1 of the 1996 Act and the defences in sections 5 and 10 of the Act relate solely to claims in defamation, the defences in Regulations 17 to 19 of the Regulations relate to all civil claims;

(b) the defences in section 1 of the 1996 Act, section 5 of the Act and in Regulations 17 to 19 of the Regulations, are all to some extent (but in different ways) defeated by notice, the defence in section 10 of the Act is not;

(c) the defences in section 1 of the 1996 Act, section 5 of the Act and in Regulations 17 to 19 of the Regulations relate to substantive law, the defence in section 10 of the Act is a jurisdictional limitation;

(d) the defences in sections 5 and 10 of the Act depend to some extent (but again in different ways) on the practicality of issuing proceedings against the primary publisher, the defences in section 1 of the 1996 Act and in Regulations 17 to 19 of the Regulations do not; and

(e) the defences in section 5 of the Act and in Regulations 17 to 19 of the Regulations relate specifically to the Internet, the defences in section 1 of the 1996 Act and section 10 of the Act do not.

6.4 As well as these four intermediary defences, there is also the issue of common law liability in defamation for intermediaries[25].

6.5 This leaves even the seasoned practitioner bewildered by the criss-cross of intermediary defences with overlapping issues. To a normal Internet user, victim of Internet libel, or Internet intermediary these defences taken together are simply incomprehensible. Given the inherent international reach of the Internet and frequency of Internet abuse, it seems particularly unfortunate that the law here is now so complicated.

6.6 Moreover, leaving aside this general complexity, the section 5 defence is problematic. In particular, there are likely to be occasions when it will provide inadequate reassurance to a website operator that it has a defence because it will not be certain that it was *"not possible for the claimant to identify the person who posted the statement*"[26]. If there is any potential for liability, most intermediary operators will adopt the safest course and take down the material.

6.7 Conversely there may be cases where the poster of the statement in question can be identified and so the intermediary operator certainly has a defence, but in reality no action against the poster is feasible, perhaps because the poster has no resources, is dead, or proves elusive. In such a case, it seems undesirable that the claimant has simply no recourse in any circumstances against an operator who continues to publish highly

[25] Often a vexed issue in Internet cases, see for example *Bunt v Tilley & Ors* [2006] EWHC 407and *Metropolitan International Schools Ltd v Designtechnica Corp & Ors* [2009] EWHC 1765 (QB)
[26] The test for this in subsection 5(4) that "*the claimant has sufficient information to bring proceedings against the person*" leaves plenty of ambiguity.

defamatory material unless and until the claimant secures judgement of a full libel claim against the poster.

6.8 I set out below a reform which would greatly simplify the intermediary defences while providing greater protection to victims and greater certainty to intermediaries. This provides that there be:

(a) primary publishers – that is authors or any other persons who took deliberate and concerted steps to cause the publication of the material – who will always be liable; and

(b) intermediaries – that is persons who "take steps to cause the publication of the material" or "who could take steps to prevent the publication of the material" and the court orders they should respectively stop taking those steps or take those steps. A court may make such an order only if:

(i) all reasonable steps have been taken by the claimant to notify the intermediary and any person who is a primary publisher in respect of the material of the application; and

(ii) it is reasonable in all the circumstances to require that the intermediary takes the steps to stop the publication.

6.9 The advantages of this approach would include the following.

(a) It would be a comprehensive regime covering common law liability, as well as the appropriate statutory defences, and would applying across all civil actions, not just defamation.

(b) It gives certainty and clarity to intermediaries, ensuing that they have a defence without question until the court makes an order and so properly protecting freedom of expression, while affording protection to claimants more effectively than the current statutory regimes.

(c) It is entirely technology neutral.

6.10 It may be said that it is unduly cumbersome to interpose the requirement on the claimant of obtaining a court order before there is any possibility of any liability on the part of an intermediary. However in reality, is very common at the start of any claim where there is an intermediary for there to be an application to the Court for a *Norwich Pharmacal* disclosure order requiring the intermediary to provide details of the primary publisher to the complainant. In these circumstances, the further requirement for an order imposing liability on the intermediary is unlikely to constitute a substantial additional burden. In any event, this regime is favourable to claimants over the current section 5 since it offers a realistic remedy against intermediaries in circumstances when section 5 offers none.

6.11 The full wording of the alternative proposal is as follows.

Alternative proposed text

Intermediary liability

(1) This section applies to any civil claim arising from the publication of material (a "publication claim").
(2) No publication claim can be brought save in the circumstances prescribed in this section.
(3) A publication claim can be brought against any person (the "primary publisher") who is
  (a) the author of the material; or
  (b) any other person who took deliberate and concerted steps to cause the publication of the material.
(4) In subsection (4), "author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all
(5) Schedule 1 contains examples of persons who are not primary publishers.
(6) A publication claim can be brought against any person (the "intermediary") who is not a primary publisher but who:
  (a) takes steps to cause the publication of the material, or
  (b) who could take steps to prevent the publication of the material,
  provided the condition in sub-section (7) is satisfied.
(7) The condition referred to in in sub-section (6) is that a court has, on the application of the claimant, issued a declaration that the intermediary should stop publishing the material.
(8) A court will not issue a declaration pursuant to sub-section (7) unless it is satisfied that-
  (a) all reasonable steps have been taken by the claimant to notify the intermediary and any person who is a primary publisher in respect of the material of the application, and
  (b) it is reasonable in all the circumstances to require the intermediary to stop taking the steps to cause the publication of the material or to take steps to prevent the publication of the material.
(9) A declaration issued pursuant to sub-section (7) must specify the steps which the intermediary must take or must cease to take in respect of the publication of material.
(10) On an application to issue a declaration pursuant to sub-section (7), a court must have regard to-
  (a) the preparedness of any primary publisher to defend the claim,
  (b) the extent to which a claim against any primary publisher is feasible,
  (c) the underlying merits of any such claim,
  (d) the damage being caused to the claimant by the continuing publication of the material by the intermediary,
  (e) the interests of any relevant party including those of any primary publisher, and
  (f) any other matter which it considers to be relevant.
(11) On an application to issue a declaration pursuant to sub-section (7), the court may not issue any order as to the costs of the application against the intermediary save-
  (a) where the intermediary has been grossly obstructive, or
  (b) there are other exceptional circumstances justifying such an award.
(12) Where an intermediary receives a complaint regarding a publication claim, no action can be brought by any primary publisher against the intermediary in respect of any

information reasonably disclosed to the complainant by the intermediary relating to the primary publisher which is potentially relevant to the claim.

(13) Section 1 of the Defamation Act 1996, and sections 5 and 10 of the Defamation Act 2013 are abolished.

Schedule 1

Persons who are not primary publishers for the purposes of establishing intermediary liability.

In respect of all publication claims

1. A person involved in the publication of the material only as the broadcaster of a live programme containing the material in circumstances in which he has no effective control over the author of the material.

2. An operator of a website in respect of material posted on the website was not the person who posted the material on the website.

In respect of all publication claims excluding intellectual property claims

3. A person involved in the publication of the material only in printing, producing, distributing or selling printed material containing the material.

4. A person involved in the publication of the material only in processing, making copies of, distributing, exhibiting or selling a film or sound recording containing the material.

5. A person involved in the publication of the material only in processing, making copies of, distributing or selling any electronic medium in or on which the material is recorded, or in operating or providing any equipment, system or service by means of which the material is retrieved, copied, distributed or made available in electronic form.

DJT
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Olswang LLP