Contents

Issue 83 Autumn 2010

DEFAMATION – THE PROMISE OF REFORM

The Ministry of Justice has undertaken to publish a draft Defamation Bill for pre-legislative scrutiny early next year in the expectation that time will be allocated in the 2011-12 legislative programme for the introduction of a substantive Bill. This development has been prompted in no small measure by the introduction of a private member's Defamation Bill by Lord Lester in the House of Lords on May 26.

Lord Lester described the central aim of his Bill as being "to reform English defamation law so that it strikes a fair balance between the fundamental right to freedom of expression and public information and the protection of good reputation." It has, as he intended, acted as a catalyst for change. Lord McNally, the Minister of State for Justice, said during the second reading on July 9 that the government would not back Lord Lester's Bill, but promised that its own proposed timetable for legislation was "not a vague promise of better things to come, but a firm commitment to action on this matter."

In his Bill Lord Lester put forward a statutory defence of responsible publication on a matter of public interest, contending that this was a simpler and more effective version of the common law *Reynolds* defence of responsible journalism (he was counsel for *The Times* in *Reynolds v Times Newspapers* [2001] AC 127 and argued his case then before the House of Lords). The Bill also changed the name of the fair comment defence to "honest opinion" and the justification defence to "truth." This was designed to protect those engaging in an exchange of critical views from defamation proceedings by providing a defence if the words or matters complained of were substantially true. It was prompted, at least in part by the experience of the science writer Simon Singh, who was obliged to spent two years and large sums of money defending his publicly voiced opinions on chiropractice.

Other reforms introduced by Lord Lester's Bill included the granting of absolute privilege to fair, accurate and contemporaneous reports of proceedings in a court sitting in public, and the extension of absolute privilege to fair and accurate reports of proceedings in Parliament or anything published by or on the authority of Parliament. Proposals for a single publication rule were put forward, permitting only one action to be brought against a particular piece of defamatory material (the Ministry of Justice has already decided in principle to introduce a single publication rule after consulting on the issue last year). A corporate claimant was prevented from bringing an action in defamation unless it could prove that it had suffered, or was likely to suffer, financial loss. Courts were required to strike out claims where no realistic harm was caused, or realistically likely to be caused, to the claimant's reputation by a publication.

A number of points of concern over the Bill's content were raised in the House of Lords during second reading. Lord Hoffmann for example praised the Bill's provisions relating to Parliamentary privilege and the ban on corporate clients suing for defamation without being able to prove actual or likely financial loss. However, he was concerned that any attempt to restate the public interest defence as laid down in the House of Lords in *Reynolds* and *Jameel* could introduce uncertainty and create litigation. In Lord Hoffmann's view there was a good argument for leaving the common law defence well alone; other issues raised by the Bill, such as the public interest defence and "libel tourism," needed careful consideration. Baroness Kennedy applauded the strengthening of the public interest defence and the general purpose of the Bill, but called for it to be further reinforced "with a greater balance towards those who are traduced by libellous journalism."

The issue of costs in defamation proceedings – a matter of fundamental importance to the reform of defamation law – was not addressed by Lord Lester's Bill and is still the subject of debate. Earlier this year the maximum success fee charged in defamation proceedings funded under conditional fee agreements was reduced from 100 per cent to 10 per cent of base costs as an interim measure while the government decides when, and to what extent, to implement the recommendations contained in Lord Jackson's final report on civil litigation costs.

Julian Harris

Deputy General Editor, Amicus Curiae