Defamation Bill [HL], Bill 127 of 1995-96: Law and Procedure

Research Paper 96/60

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This paper seeks to give a brief outline of the law of defamation and to explain the main provisions of the Defamation Bill [HL] which is due to have its Second Reading on 21 May 1996. Although the paper deals mainly with the changes proposed to law and procedure in England and Wales it is pointed out where the changes affect Scotland and Northern Ireland. This paper should be read in conjuction with Research Paper 96/61 which discusses parliamentary privilege in the context of the law of defamation and the interpretation of 'proceedings in Parliament'.

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Summary

The Defamation Bill [HL] is intended to "simplify this complex area of law and procedure, and fit well with current developments in the conduct of civil litigation generally".[1]

In brief the Bill seeks to introduce the following amendments to the law and procedure in actions for defamation:

- a new statutory defence to supersede the common law defence of innocent dissemination and to concentrate on the concept of responsibility for publication
- a new and more streamlined defence of unintentional defamation which would be available to a defendant who is willing to make an 'offer of amends' (ie to pay compensation assessed by a judge and to publish an appropriate correction and apology)
- a one-year limitation period for actions for libel, slander or malicious falsehood
- a new fast-track offer of amends procedure intended to provide a prompt and inexpensive remedy in less serious defamation cases
- new powers for judges enabling them to dispose of a claim summarily and to grant damages of up to £10,000

There has long been consensus on the need for reform of defamation law and procedure, particularly in view of certain high awards of damages by juries and the high costs of proceedings. There is also a large degree of consensus on the subject matter of the current Bill although some have questioned whether it will in fact achieve its avowed purpose of simplifying and reducing the costs in defamation cases. Questions have also been raised in respect of editorial freedom and the offer of amends defence and on matters not addressed in the Bill, such as the non-availability of legal aid in defamation cases.

It has, however, been argued that the most significant development in relation to defamation law and procedure was the judgment of the Court of Appeal in the Elton John libel case in which the Court decided that judges give could give certain guidelines to juries regarding the appropriate level of awards of damages.

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[1] Lord Chancellor on Second Reading, HL Deb vol 570 c578 - 8.3.96

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I Defamation Law - a brief introduction

A. The tort of defamation

Libel and slander together make the tort of defamation and actions in defamation are taken by persons seeking to protect their reputations. In recent years there have been a number of cases which have attracted a great deal of publicity, either because of the large awards of damages or because the taking of legal action has been seen as a disproportionate response to the words complained of. The debate surrounding defamation actions, particularly libel actions, is very much linked to the debate about the freedom of the press to comment on matters of public interest.

There is no single or satisfactory definition of a defamatory statement but the best known is

> "a statement concerning any person which exposes him to hatred or ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade."[2]

Libel is a defamatory statement published in a permanent form. This obviously includes written or printed statements but defamatory statements contained in radio or television broadcasts or film or theatrical productions are also treated as libel.

Slander is publication in spoken or transient form.

One of the main practical distinctions between libel and slander is that it is necessary to prove actual monetary loss in a slander action but in an action for libel, damage is presumed. The distinction between libel and slander does not exist in Scotland and the Faulks Committee[3] recommended abolition of the distinction in England and Wales. The Committee also recommended that there be a statutory definition of defamation.

Every libel is also a crime but prosecutions for criminal libel are rare. Slander is not of itself a crime although the words complained of may involve the commission of a criminal offence by reason of their being obscene or blasphemous, for example. This paper is concerned only with civil actions relating to defamation.

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2 *Fraser on Libel and Slander* 7th edition 1936, p.3

3 *Report of the Committee on Defamation* Cmnd 5909, March 1975

Trials in defamation actions take place in the High Court alone. They are also unusual in that they are civil proceedings in which either party is entitled in most cases to insist on trial by jury[4] and the jury decides whether the words complained of are defamatory of the plaintiff (ie the person bringing the action). This is an application of English legal principle that when a man's life, liberty or honour is at stake that he should have the right to be judged by his fellow countrymen. In an action for defamation the judge decides whether the words complained of are reasonably capable as a matter of law as bearing a defamatory meaning and the jury decides whether they are in fact defamatory. The jury also assesses the damages.

B. Defences to libel actions

The main defences to libel actions are as follows:

1. *Justification* - This is the truth defence. It is a complete defence that the words complained of are true and the Faulks Committee recommended that the defence should be renamed 'truth'.

2. *Fair Comment* - This defence is available where a statement has been made in good faith and without malice on a matter of public interest. It applies therefore to statements of opinion and not of fact. The defence must prove that the subject matter of the comment is a matter of legitimate public interest, that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts. The defence will fail where that defendant was motivated by malice.

3. *Absolute privilege* - Rather than being a defence as such, absolute privilege accords an immunity from suit in certain circumstances. The main circumstance in which it applies is proceedings in parliament even if the words complained of are false or malicious. This is known as parliamentary privilege.

4. *Qualified privilege* - If a defendant claims qualified privilege the plaintiff will not succeed unless he can prove that the defendant was actuated by malice. It is impossible to set out all the situations in which this defence might apply but it does apply to statements made in performance of a legal moral or social duty (eg the provision of a character reference).

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[4] section 69, *Supreme Court Act 1981*

C. Damages in libel actions

The main remedy for defamation is damages although the court has powers of injunction to restrain publication of defamatory matter.

The level of damages reflects the seriousness of the action. *Contemptuous* damages are awarded when in the opinion of the jury the action should never have been brought, either because the action is trivial or the plaintiff already had a bad reputation. These damages are usually the smallest coin in the realm (one penny). *Nominal* damages are usually only a few pounds and are awarded when the plaintiff only wanted to clear his name or there was no significant injury to him even though he was wronged. *Compensatory* damages are the jury's estimate of the sum necessary to vindicate the plaintiff's reputation and to compensate him for the injury to his feelings. *Aggravated* damages are awarded where the defendant has pleaded the defence of justification but cannot establish it or where he has been actuated by malice. *Exemplary* damages are only awarded in serious circumstances, for example where the defendant's conduct was calculated to make a profit for himself which may be greater than the compensation payable to the plaintiff.

Until recently neither the judge nor counsel for the parties could suggest a sum to the jury as being appropriate. The judge's direction used merely to be that the award should not be excessive and that it should be fair to both sides. The problem was that the jury did not know where to start and could be influenced by recent decisions reported in the press which may have involved large sums of damages in different circumstances.

High awards of damages by juries and inconsistencies in awards became a subject of concern. The tendency for juries to award much higher levels of damages than judges has resulted in a marked difference between the level of awards in libel cases and those assessed in judges in personal injuries cases.

It has been alleged that libel plaintiffs can sometimes profit out of the damage to their reputation whereas personal injury plaintiffs are barely adequately compensated for the damage they have suffered. It is also alleged that high levels of damages in libel cases lead to "gold-digging" plaintiffs making trivial claims against newspapers.

However, during the 1990s the Court of Appeal has made a number of decisions which have the effect of allowing some guidance now to be given to juries. In *Sutcliffe v Pressdram Ltd*[5]

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[5] [1990] 1 All ER 269

the Court of Appeal decided that the judge should give the jury some guidance in his summing up as to the financial implications of the sum which might be awarded by pointing out the investment income from, or the purchasing power of, large sums so that the jury were able to appreciate the real value of such sums and to weigh any sum they had in mind to award. In that case, however, Lord Donaldson (then Master of the Rolls) made it quite clear that awards for personal injuries could not be used as a basis for compensation in defamation cases. In addition, by virtue of section 8 of the *Courts and Legal Services Act 1990* and rule 11(4), Order 59 of the *Rules of the Supreme Court* the Court of Appeal now has discretion in all cases set down for trial since 1 February 1991 to substitute such sum as appears to it to be proper in cases where it is of the opinion that the damages were excessive or inadequate. Hitherto the Court of Appeal could only interfere by ordering a new trial if the amount awarded was so great or so small that no jury could reasonably have awarded such a sum.

The next major case was a case involving Esther Rantzen[6] in which the Court of Appeal decided that reference to awards confirmed or substituted by the Court of Appeal could be made to the jury. At that time the Court rejected the argument that reference should be made to personal injury awards.

In December 1995 the Court of Appeal reduced the size of the damages award in Elton John's case against Mirror Group Newspapers.[7] Compulsory damages were reduced from £75,000 to £25,000 and exemplary (i.e. punitive) damages were reduced from £275,000 to £50,000. In its judgment the Court made the following decisions on guidance to juries on damages in defamation cases:

1. No reference may be made to awards by other juries in comparable defamation actions.

2. Reference may be made to awards approved or substituted by the Court of Appeal in other cases can be made.

3. Reference may be made to damages in personal injury cases.

4. Reference may be made to an appropriate award and an appropriate bracket into which the award might fall.

Both the judge and counsel for both parties could make such references to the jury. In the Elton John case Sir Thomas Bingham, Master of the Rolls, said it was "rightly offensive to public opinion that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a

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6 *Rantzen v Mirror Group Newspapers* [1994] QB 670

7 *John v MGN Ltd* Times Law Report 14.12.95

helpless cripple or an insensate vegetable". This view is very much in line with the view of the Law Commission in its consultation paper on damages for personal injury.[8]

The effect of the Court of Appeal's decision could be that an award made by a jury in excess of the band of figures suggested by the judge will be appealed by the defendant. A plaintiff would then be likely to settle at the figure suggested by the judge rather than risk wiping out his award with the cost of an unsuccessful appeal. If this is the result it could then be asked why assessment of damages should not reside with the judge. However, in a written answer of 22 February 1995 John Taylor, then Parliamentary Secretary, Lord Chancellor's Department, said that the Government had no plans to make it the responsibility of the trial judge rather than the jury to determine the level of damages in defamation cases but would rather be introducing a new summary procedure so that the judge will have power to dispose of straightforward claims summarily instead of sending them to trial.[9] The new summary procedure is contained in **Clause 8 to 11** of the current Bill and is discussed in Part III E of this Paper.

It is possible that the Court of Appeal may eventually allow reference to be made to previous jury awards once a body of precedent has built up under the new guidelines. Legal commentators have seen the decision in the Elton John case as the most significant reform of defamation law in recent years and possibly more significant than anything in the current Bill. However, the decision has rekindled some concern that the decision could encourage newspapers to publish stories they know to be untrue because they might calculate that they would gain more in sales than they would have to pay if sued for libel.

In 1989 damages of £1.5 million (the highest ever sum) were awarded to Lord Aldington in respect of a defamatory pamphlet written about him by Count Nicolai Tolstoy Miloslausky. On July 13 1995 the European Court of Human Rights ruled[10] that the size of the award together with the lack of "adequate and effective" safeguards against such a size of award gave rise to a violation of the right to freedom of expression as guaranteed by article 10 of the European Convention on Human Rights. The decision in the Elton John case and the new procedures in the current Bill may have addressed the violation of the European Convention to some extent. In the absence of a further case there cannot, however, be any certainty that these reforms would be sufficient to satisfy the European Court of Human Rights.

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8 *Damages for Personal Injury: Non-Pecuniary Loss* Law Commission Consultation Paper No 140, December 1995

9 HC Deb vol 225 c204W - 22.2.96

10 Case No 8/1994/455/536, *Times Law Report* 19.6.95

D. Legal aid

Legal aid is not available to either party to take or defend defamation proceedings.[11] The view was taken as long ago as 1967 by a joint committee of the Law Society and the Bar Council that it is unjust that the poor cannot defend their reputations. This view was endorsed by both the Faulks Committee[12] and the Royal Commission on Legal Services.[13] Section 58 of the *Courts and Legal Services Act 1990* empowers the Lord Chancellor to specify by order proceedings in which lawyers can enter into conditional fee agreements with their clients. However, the *Conditional Fee Agreements Order 1995*[14] does not include defamation proceedings. Thus defamation proceedings remain out of reach for most people. However, one of the factors which might militate against enabling defamation proceedings to be brought within the scope of conditional fee agreements is the difficulty for lawyers in assessing whether the words complained of will be taken as defamatory by the jury and so in assessing their own risk under the agreement.

The lack of funding for taking defamation proceedings is said to lead to an inequality between plaintiffs and defendants who tend to be well-off businesses. However, legal aid is not available to defendants in defamation cases either and it is said that this can lead to a rich plaintiff issuing a "gagging writ" to silence a less well-off defendant. The question of "gagging writs" is discussed in Part IV A of this Paper.

The new summary procedure proposed in the current Bill (see Part III E of this Paper) is intended to lead to reduced costs but there is no proposal to introduce legal aid for such cases. In a written answer of 26 March 1996 Jonathan Evans, Parliamentary Secretary, Lord Chancellor's Department said that it was not the Government's intention to extend the scope of legal aid to libel cases.[15]

In a letter to Lord Bethell of 19 March 1996[16] the Lord Chancellor said that "successive governments have taken the view that the outcome of such cases [i.e. defamation cases] is uniquely difficult to foresee and that even if the general mechanisms against unmeritorious proceedings could be strengthened in some way, they would still not provide an effective safeguard against the potential waste of public money". He also pointed out the possibility of an individual who qualifies financially being entitled to receive legal advice and assistance

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11 Part II, Schedule 2 of the *Legal Aid Act 1988*

12 Cmnd 5090, March 1975

13 Cmnd 7648, 1979 (the "Benson Report") Section 58 of the *Courts and Legal Services Act 1990*

14 SI 1995/1674

15 HC Deb vol 274 c541W - 26.3.96

16 Library location Dep 3/5064

under the legal aid Green Form scheme for preliminary matters, such as initial advice and obtaining counsel's opinion.

E. Malicious falsehood

An action for malicious falsehood (or injurious falsehood) covers those statements which are false but not defamatory because they do not touch the reputation of the person concerned. For example it is not defamatory to wrongly publish a statement that a person is retired but an action could be brought for malicious falsehood if there has been financial loss to the person concerned and malice on the part of the defendant. Anticipated reduced costs of the summary procedure could mean that plaintiffs of moderate means might be able to consider taking proceedings in respect of a defamatory statement.

II Background and Introduction to the Bill

In its 1992 General Election Manifesto *The Best Future for Britain* the Conservative Party stated its intention to simplify the law relating to libel in the light of the recommendations of the Neill Committee and, in particular, to introduce an offer of amends defence.[17]

The Defamation Bill [HL][18] was introduced in the House of Lords on 8 February 1996. It is intended to give effect to recommendations made by a working group of the Supreme Court Procedure Committee, under the chairmanship of Lord Justice Neill, to improve defamation practice and procedure. It seeks also to make other reforms to the law of defamation. The Bill, as originally introduced in the Lords, was the result of three consultation exercises by the Lord Chancellor's Department and of additional consultations in Scotland and Northern Ireland. The most recent consultation took the form of the publication of a consultation paper and a draft Bill by the Lord Chancellor's Department in July 1995.[19]

On Lords Second Reading the Lord Chancellor said:[20]

> "The Bill represents a useful measure of law reform. It will, I believe, simplify this complex area of law and procedure and fit well with current developments in the context of civil litigation generally".

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17 p.25

18 Bill 127 of 1995/96

19 *Reforming Defamation Law and Procedure: Consultation on Draft Bill,* Lord Chancellor's Department July 1995

20 HL Deb vol 570 c578 - 8.3.96

Lord Williams of Mostyn set out in that debate the interests he thought were involved in defamation law:[21]

> A number of diverse interests are involved here and there cannot be a perfect reconciliation of them. The first is the right to privacy in personal and family life. That is insufficiently regarded, if at all, in our law. Its protection under the European Convention on Human Rights finds no adequate reflection in domestic law. The second is the right to freedom of speech and expression. The third is the English vice-not the usual one but the more important one-of obsessive secrecy for no useful purpose. One recalls the recent debate in your Lordships' House on Lord Justice Scott's Report and reflects how much a Freedom of Information Act is needed in this country.
>
> The fourth is the public's right to know. We are lamentably lacking in any details of information, except on the occasion of the report to which I referred a moment ago, of what those do who are set in authority above us. The fifth is the inequality of arms in this area of law. There is no legal aid for libel or slander though, curiously, by an anomaly, there is for malicious falsehood. Private people who are wounded and defamed act, by and large, at their own expense except for those who have a union or professional association to support them. It is worth bearing in mind that defendants in this field are normally financially powerful corporations.
>
> Overarching all of this is something which I suggest is too easily forgotten and overlooked, namely, the sense of the very bitter and continuing wound that is caused to a man or woman who is wrongly defamed. Often that wound is much grosser and graver to the plaintiff in question than a physical injury.

III The Main Provisions of the Bill

It is important to note the specific legal meanings imported to the word "publication", "publish" and "statement" in the Bill. By **clause 18(1)** "publish" and "publication" are intended, in relation to a statement, to have the meaning that they have for the purposes of the law of defamation generally (i.e. communication to a third party). However, "publisher" is specifically defined for the purposes of **clause 1** (see Part III A2 of this Paper). "Statement is intended to mean words, pictures, visual images, gestures or any other method of signifying meaning.

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[21] c579

A. Responsibility for Publication - the 'innocent dissemination' defence

1. Background to the Defence and Proposals for Reform

On 15 February 1990 the Lord Chancellor announced that he intended to issue consultation papers inviting views on proposals to modify specific aspects of the substantive law of defamation, including the problems of those who use advanced technology and innocently disseminate defamatory materials.[22] A consultation paper[23] was published in July 1990 seeking views on modifying the current rules which apply to the defence of innocent dissemination.

The cause of action (ie the right to issue legal proceedings) in libel arises from the *publication* rather than the writing of defamatory matter. Publication has a specific legal meaning and in its 1990 consultation paper the Lord Chancellor's Department said: "Technically there may be a separate actionable publication at every link in the chain of commercial production and distribution, starting with the publication by the author to the publishing house, then the publishing house to the printer, the printer to the distributor, and so on". It continued:

> There will not necessarily have been a publication of a libel by every person who has participated in the process. An important distinction has developed between the primary participants, such as the writer, and newspaper company, the book publisher and the printer, on the one hand and on the other hand, participants who only play a secondary role in the distribution system. The primary participants are all fully responsible for the material they publish and they cannot evoke the defence of innocent dissemination. Those who are considered only to have a secondary role in the distribution of the material, such as carriers, newsagents, booksellers and libraries are entitled, if it be the case, to claim that they did not know, and were not negligent in not knowing of the defamatory content of the distributed material. This is known as the defence of innocent dissemination. It is not a complete immunity, but it is a fundamental defence, which enables the innocent disseminator to deny that there has been any publication of the defamatory material by him. The defence is not available to a distributor who was aware of the libellous content or who ought to have known about it, so that his lack of knowledge amounts to negligence on his part.

The possibility of extending the defence to printers was considered by both the Committee on the Law of Defamation (the "Porter Committee") which reported in 1948,[24] and the Committee on Defamation (the "Faulks Committee") which reported in 1975.[25] However the Committees came to rather different conclusions. Although the Porter Committee appreciated the practical difficulties for printers in knowing whether or not the matter they were required

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22 HL Deb vol 515 c1532-3WA - 15.2.90

23 *Defamation: The Defence of Innocent Dissemination*, Lord Chancellor's Department, July 1990

24 Cmd 7536 (1948)

25 *Report of the Committee on Defamation* Cmnd 5909, March 1975

to print was libellous they took the view that printers had a number of means available to them to protect themselves financially against the risk involved. The Faulks Committee, however, did recommend the extension of the defence to printers although they did unanimously reject the printers' plea for complete immunity from suit.

The case for extending the defence has centred on the unreasonable burden that is placed on printers who may be proceeded against in circumstances where they have no knowledge or negligence; freedom of expression for authors who might find it difficult to get their work published if they could not afford to indemnify the printer against loss; the introduction of new technology which does not involve the printer in any familiarisation with the content of the work to be printed.

The case against extending the defence remains that put forward by the Porter Committee: it is open to the printer to protect himself from liability by checking the material to be printed, taking out insurance or seeking an indemnity from his customers.

2. The Bill

Clause 1 seeks to create a new statutory defence which would supersede the common law defence of innocent dissemination. Such defence would be available to distributors, printers and others who do not have primary responsibility for a defamatory publication, provided that they neither knew nor had reason to believe that their acts contributed to the publication of defamatory material. **Clause 1** seeks to concentrate on the concept of responsibility for publication and would extend throughout the United Kingdom.

Clause 1(1) seeks to offer a defence to a person who is not the author, editor or publisher provided that he took reasonable care and neither knew or had reason to believe that he was causing or contributing to the publication of a defamatory statement.

Author, *editor* and *publisher* are defined in *subsection 2*.

Author is defined as the originator of a statement, but not including a person who did not intend any publication of his statement (eg a person whose private diary is published without his consent).

Editor is defined as a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it.

Publisher is defined as a commercial publisher, whose business is issuing material to the public or a section of it, and who publishes the statement in the course of that business. This is a narrower meaning than the word would normally have in the context of defamation and **clause 18(1)** confines that meaning to its use in this clause.

Subsection 3 is drafted so as to exclude in effect from the definition of author, editor or publisher such people as printers, producers, distributors, booksellers; those processing, making copies of, distributing or selling a film or sound recording or recordings made on any other electronic medium; broadcasters of live programmes who have no effective control over the maker of a defamatory statement; operators or providers of access to communications systems by means of which a defamatory statement is transmitted or made available who have no effective control over the person sending or making available the statement (eg Internet providers).

It has been suggested that the "no effective control" requirement in relation to Internet providers could create an anomaly as those providers who seek to act responsibly and provide some control over the content of their system might not come within the scope of the defence whereas those who do not attempt to control material would come within the scope of the defence[26]. However it is possible that the courts will take the view that those who refuse to adopt a sensible policy towards policing their networks will be deemed to have "reason to believe" that they are publishing defamatory material. There is, however, no requirement in the Bill for Internet providers to remove material found to be defamatory from their systems nor does the Bill clarify when and where a publication has taken place when computer networks are used. In relation to the latter point Lord Inglewood, Parliamentary Under-Secretary at the Department of National Heritage, said on Lords Second Reading that the consultation on the July 1995 draft Bill had revealed strong views in favour of legislation in this area but that the Government did not think it right to attempt legislation without full consideration and consultation on all policy issues arising in the context both of defamation law and diverse other areas of law relevant to the use of those networks.[27]

Subsection 3 also seeks to give the courts a discretion to decide by analogy with the excluded categories whether a person is to be considered the author, editor or publisher of a statement. This allows for the possibility of including within the scope of the defence people who in the future might use new technologies for printing, selling etc which are not currently available.

By **subsection 5** the court would be required to have regard to the following matters in determining whether a person took reasonable care or had reason to believe that what he did contributed to the publication of a defamatory statement (ie in determining whether the defence should operate in relation to those to whom it may apply):

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of publication, and

(c) the previous conduct or character of the author, editor or publisher.

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[26] Limiting Libel -*Gazette* 21 February 1996

[27] HL Deb vol 570 c605 - 8.3.96

Subsection 5(c) would mean that a person who comes within the scope of the defence should take care in their dealings with those who have been involved in previous defamation actions or who could be liable to make potentially defamatory statements.

Subsection 6 seeks to confine the operation of this defence to causes of action arising after it comes into force.

On Lords Second Reading Lord Lester took the view that it was desirable for the defence of innocent dissemination to be statutorily defined and extended to cover a wider class of secondary publishers (eg distributors and printers)[28]. However he took the view that **Clause 1** does not adequately protect secondary publishers and would be likely to encourage increased and unnecessarily complicated litigation. In Committee he introduced an amendment which sought to bring **Clause 1** into line with the common law defence of innocent dissemination where a secondary distributor is protected if he has no knowledge of the publication containing a defamatory statement. He said:[29]

> It is certainly desirable for the defence of innocent dissemination to be statutorily defined and to be extended to cover a wider class of secondary publishers; that is, distributors, printers and others. The problem with Clause 1 as it stands, however, is that it does not contain a wholly accurate formulation of the elements of the existing common law defence of innocent dissemination.
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> An individual libels someone else when he publishes in permanent form to a third person words or matter containing an untrue imputation against the reputation of that person. At common law, secondary distributors can rely on the defence of innocent dissemination provided that they did not know that the publication contained the libel complained of and did not know that the publication was of a character likely to contain a libel and that such want of knowledge was not due to any negligence on their part. Consequently, it is the current practice of large newsagents, aware that many of the publications they sell contain defamatory statements, to seek and obtain reassurance that there is no libel risk because there is every reason to believe that these statements are true.
>
> Yet the defence of innocent dissemination, as it is set out in Clause 1, would, as I understand it, exclude from its protection those who were aware, or ought to have known, that the material they were handling was merely defamatory whether or not its publication was defensible. This, I believe, would have important implications for the large newsagents I have mentioned. Once they have discovered a defamatory statement in one of the publications they distributed, they would be denied the protection of the defence of innocent dissemination regardless of any steps that they subsequently took to assure themselves that the statement was true and that its publication was not therefore libellous. If I am right, that would have the unfortunate effect that it might encourage newsagents, booksellers and libraries to keep their eyes shut and remain ignorant of the contents of the publications they carry.
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> This amendment seeks to bring the defence of innocent dissemination in Clause 1 into line with my understanding of the common law defence. I beg to move.

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[28] HL Deb vol 570 c584 - 8.3.96

[29] HL Deb vol 571 c213-4 - 2.4.96

In reply the Lord Chancellor said:[30]

> Clause 1 is intended to provide a defence for those who have unwittingly provided a conduit which has enabled another person to publish defamatory material. It is intended to provide a modern equivalent of the common law defence of innocent dissemination, recognising that there may be circumstances in which the unwitting contributor to the process of publication may have had no idea of the defamatory nature of the material he has handled or processed.
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> The amendment proposed by the noble Lord would, in effect, create an entirely new defence. It would give a defence to a person who was indeed aware, or on notice, that he was contributing to a defamatory publication, but nevertheless chose to do so. It would allow him to rely on his own judgment as to whether there might be some other defence in the event of the defamed person taking proceedings, and have the effect of presenting him with a real defence because he thought, however wrongly, that he would be able to rely on some other defence.
>
> It is imperative that we do not lose sight of the effect on plaintiffs of giving a defence to those who have in fact been instrumental in bringing material which has defamed the plaintiff to its audience. The effect in practice may be to deprive the plaintiff of any cause of action to remedy the wrong which he has suffered and which he would not have suffered had it not been for the link in the chain of publication provided by the contributor who escapes liability because of this defence. That may happen when the originator of the defamatory statement is impecunious or cannot be found.
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> That is an important point which I stressed when I consulted on the question of whether it was right for a defence of this nature to be available to printers. That had been recommended by the Faulks Committee in 1975, and the response to my public consultation persuaded me that it was right.
>
> However, the Faulks Committee had concluded that it would be wrong to make the defence an absolute defence absolving distributors from any responsibility in any circumstances, for, broadly the reasons I have sought to explain. I believe that the reasoning of the Faulks Committee, and the public response to my consultation, justifies some broadening of the categories of defendant to whom this defence may be available beyond those to whom the common law defence of innocent dissemination might have been. But in my submission it would not be right to deprive a plaintiff of his cause of action against a defendant who was aware that he might be wronging the plaintiff and misjudged the plaintiff's chances of succeeding in a defamation action. Unlike the defamed plaintiff, those who may participate in the publication of a libel can protect themselves from the consequences by taking care, by taking indemnities or by taking out insurance against liability.

The Lord Chancellor was supported by Lord Williams of Mostyn and Lord Lester said that he was persuaded by the Lord Chancellor's arguments and that they shared the common aim of seeking to achieve in the Bill a fair balance between the rights of plaintiffs and defendants. The amendment was withdrawn.

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[30] c214-5

3. Extent

This clause would apply in all three jurisdictions of the United Kingdom.[31]

B. Offer of Amends Defence

1. The Bill

Section 4 of the *Defamation Act 1952* contains a little used defence of unintentional defamation. **Clauses 2 to 4** of the present Bill seek to replace this defence with a new defence of offering to make amends. It would be available to a defendant who offered to make amends by publishing a correction and apology, and by paying such compensation (if any) as is agreed by the parties or as assessed by the judge where there is no agreement. The defence would not succeed if it is shown that the defendant knew he was or that he might be defaming the plaintiff.

This new defence is intended to be simpler and more streamlined than the section 4 defence and to provide a more realistic opportunity for defendants to recognise and make up for the harm they have done.[32] The availability will not be limited to defendants who can prove positively that the publication was "innocent": state of mind would be irrelevant unless the plaintiff shows that the defendant knew or had reason to believe that the published statement was false or defamatory.

This new defence would implement a recommendation of the Neill report[33] that such a defence should be enacted to enable defendants, where they recognise that the plaintiff has been defamed, to curtail proceedings by making such an offer including a willingness to pay damages assessed by a judge.

The offer of amends defence together with the new summary procedure (see Part III E of this paper) together seek to make defamation actions more speedy and less costly.

The provisions in the current Bill relating to the defence differ slightly from those contained in the draft Bill[34] to take into account the responses that indicated a need to make special provision for those cases where a defendant conceded that he was wrong and was prepared

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31 Clause 19

32 p4, *Notes on Clauses* for the Lords proceedings, Lord Chancellor's Department March 1996

33 section VII, *Report on Practice and Procedure in Defamation* July 1991

34 contained in *Reforming Defamation Law and Practice* Lord Chancellor's Department July 1995

to offer amends, but was not prepared to do so on the basis that amends might be ordered to reflect a more seriously defamatory meaning than he considered his statement could have. **Clauses 2 to 4** would now allow the defendant to specify the defamatory meaning for which he is willing to make amends, so that his offer is limited to that meaning and he can defend the plaintiff's claim insofar as the plaintiff contends that the statement has some other defamatory meaning.

Clause 2 seeks to define an offer of amends and set out the circumstances in which it can be made or withdrawn. By **subsection 1** the offer could be made by a person who has published a statement alleged to be defamatory of another. By **subsection 2** it could be made in relation to statement generally or it could be a qualified offer made only in relation to a specified defamatory meaning which is accepted by the defendant making the offer. **Subsection 3** would require the offer to be in writing, to be expressed as an offer under the section and to state whether it is a qualified offer and if so to specify the defamatory meaning in relation to which the offer is made.

The Offer

Subsection 4 sets out what would constitute an offer of amends. It would be an offer to do the following:

(a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party

(b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and

(c) to pay to the aggrieved party such compensation (if any) and such costs as may be agreed or determined to be payable.

Offers may be accompanied by an offer to take specific other steps but in order to be an offer of amends it must also be an offer to do all those matters listed above.

Making and Withdrawing the Offer

Subsection 5 seeks to make it clear that a person who has served a defence to the proceedings cannot then make an offer of amends. This is because an offer may be made only where the defendant accepts that he has defamed the other party. However the defendant could make the offer any time before or after a writ is issued against him provided that it is done before he serves a defence on the plaintiff.

Subsection 6 seeks to allow for an offer to be withdrawn at any time before it is accepted. If he then wished to renew that offer then it would be treated as a new offer.

Accepting the Offer

Clause 3 sets out the proposed effects of accepting an offer of amends.

By **subsection 2** acceptance by the plaintiff of an offer would stop the defamation proceedings although a plaintiff would still be entitled to enforce the offer.

By **subsection 3** where the parties agree on the steps to be taken in fulfilment on the offer the aggrieved party would be able to apply to the court to make an order enforcing that agreement. By **subsection 4** where the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer would be able to take such steps as he thought appropriate; in particular he would be able to make the correction and apology by a statement and apology in open court in terms approved by the court and give an undertaking to the court as to the manner of their publication.

By **subsection 5** if the parties cannot agree on the amount of compensation then the court (ie a judge, rather than a jury[35]) would be able to determine the level of compensation on the same principles as damages in defamation proceedings. Similarly the court would be able to award costs in the absence of agreement between the parties on the same principles as costs awarded in court proceedings.[36] When determining compensation the court would be required to take account a number of matters and is given power to reduce or increase the amount of compensation accordingly. Those matters are:

(a) any steps already taken in fulfilment of the offer

(b) the suitability of the correction if it has not been agreed by the parties

(c) the sufficiency of the apology

(d) whether the manner of the publication of the correction and apology was reasonable in the circumstances

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35 clause 3(10)

36 clause 3(6)

The intention is then that the parties would normally seek to reach agreement on the details of what the defendant must do to fulfil his offer to the satisfaction of the plaintiff, with further recourse to the court only where no agreement can be reached.

Subsections 7 to 9 seek to prevent the acceptance of an offer from affecting any cause of action against another person in respect of the same publication except in so far as the maker of an offer might be required to pay a contribution to any other person found liable in relation to the publication of the defamatory statement. However the maker of an offer could not be required to contribute more than the amount of compensation payable under the terms of the offer of amends.

Failure to Accept an Offer of Amends

Clause 4 seeks to set out the consequences for the plaintiff of not accepting an offer of amends which is still open (ie has not been withdrawn). The unaccepted offer would amount to a defence to any claim based on any defamatory meaning admitted in the offer. However, by **subsection 3**, the offer would not amount to a defence if the plaintiff could show that the defendant knew or had reason to believe that the statement referred to the plaintiff and was both false and defamatory of him. An offer of amends could then only be a defence in respect of unintentional defamation unless the plaintiff has not been able to reverse the presumption contained in **subsection 3** that the defendant did not know or have reason to believe otherwise.

By **subsection 4** the maker of an offer of amends would not be obliged to rely on that offer by way of defence but if he did so then he could not rely on any other defence. In any event the fact of the offer could be relied on by the defendant in mitigation of damages if he were subsequently unsuccessful at trial.

Lords Debates on the Offer of Amends

There had been some concern about **Clauses 2 and 3** as drafted in the original Lords Bill which gave the court power to determine the form and manner of publication of a suitable correction and apology where the parties could not agree. In Committee, Lord Lester moved an amendment, later withdrawn, which initiated a debate on the power of the court to determine the form of fulfilment of an offer of amends.[37] He noted the concerns of newspapers and other media organisations about the proposals to give the court a power to specify the terms and the timing of the apology both in relation to the offer of amends and in relation to the summary procedure. This was seen as interfering with editorial freedom and the concerns were also shared by Lord Williams of Mostyn who pointed out that it would be

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[37] HL Deb vol 571 c222ff - 2.4.96

wrong to force an editor or a broadcaster to include an apology that was not wholeheartedly meant as this could vitiate the value and the effectiveness of the offer of amends procedure. Lord Lester said:[38]

In my view, the Bill rightly seeks in Clauses 2 and 3 to remove the obstacles to the successful operation of unintentional defamation by means of the new defence of offer of amends. That is greatly to be welcomed. The new streamlined defence would provide a welcome means of reducing unnecessary litigation while vindicating the plaintiff's good name provided that the procedure was used in practice. The conditions necessary to bring the defence into operation have been amended and that too is welcome. However, the power of the court to make orders dealing with the prominence and wording of apologies and corrections in default of agreement between the parties has not been amended. It is the continued inclusion of that power which is unwelcome to most broadcasters and newspaper editors.

I shall explain why that matters a great deal. An editor or broadcaster confronted with the ultimate prospect of being ordered to give an apology or correct a prominence which he felt was not merited would be most unlikely to be willing to make an offer of any kind. Rightly or wrongly, the threatened loss of editorial sovereignty would be too great. If that is right, the defence will again be little used in practice. If any evidence is needed for that one only has to look at the editorial in today's copy of *The Times.*

The amendment would alter the focus from an offer to publish an apology or correction to an offer to join in the making of a statement in open court. The power of the judge would be confined to ruling on whether what was said in open court was suitable and efficient as an apology. The statement would come to the attention of the public vindicating the reputation of the plaintiff in two ways. First, the Press Association is, as a matter of routine, present in court when defamation proceedings are disposed of by a statement in open court. The outcome of the hearing is then wired to newspapers and periodicals. Secondly, if the defendant were a newspaper or a broadcaster its respective code of practice would require it to report the outcome of the action. The code of practice of the Press Complaints Commission requires, for example. that a newspaper or outcome of an action for defamation to which it has been a party.

Clause 2 as it currently stands would allow for a degree of judicial encroachment of a coercive kind that would be regarded as too coercive to make the offer of amends procedure likely to be attractive in practice. My amendment seeks to make the defence of offer of amends workable for both plaintiffs and defendants and to strike a fair balance between their competing interests. I beg to move.

In reply the Lord Chancellor said:[39]

I agree that there is a problem in relation to forcing an apology from someone who does not wish to make an apology. I certainly do not wish to do that and we have tried to meet the point in the wording of Clause 9. It states:

"If they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with the rules of court".

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38 HL Deb vol 571 c223-4 - 2.4.96

39 c225

That is intended to deal precisely with the situation where a party does not wish to apologise because he believes that he was right in the first place but cannot prove it. Therefore, he is likely to have been found liable but does not wish to make an apology. Therefore, we have substituted for an enforced apology a judgment of the court on the outcome to be agreed by the parties or, failing agreement, to be settled by the court. I believe that that deals with that point.

I have read carefully, as I always do, the leaders in *The Times.* I have thought about the ITN broadcasts which will start with a "bong". I have not yet heard one of those but I am sure that *The Times* will anticipate the future in a way that I cannot. However, I do not believe that this amendment deals with that point. We have not yet reached the amendment which deals with that point. The answer to the "bong" editorial, if I may call it that, is to be found at the third paragraph of Clause 9(2), which states:

"If they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate".

The use of the words "reasonable" and "practicable" are intended to guard against the scenario which one finds in the leader in *The Times.*

Of course, it is possible to take the view that the court would act unreasonably or impracticably, but I am not prepared to take that view. The judges would take account of the particular conditions set out in Clause 9. However, this amendment does not directly address those matters and therefore I should have thought that it restricts the scope of an offer to make amends. I cannot see why it needs to take the restricted form which the amendment proposes. An essential element of the offer, which has been accepted, would be missing if the parties were unable to agree.

There is a question of precisely what the formulation should be. I should be the last to want to have a system which would not work for one reason or another. So far I have accepted the essence of the point made by the noble Lord, Lord Williams of Mostyn, and have tried to deal with it in the form of words which I used in Clause 9(2). It may be that something more needs to be done. I shall be happy to consider that because I want this to work. It is a question of whether it needs to be restricted to a statement in open court.

(NB The Times editorial[40] had suggested that the Bill as originally drafted could lead to apologies being given undue prominence, for example by being the opening headline on ITN's *News at Ten.*

Lord Hoffman questioned whether there really would be an erosion of editorial freedom:[41]

It is only the most doctrinaire view of editorial freedom which will seriously object to a newspaper simply having to publish a summary of the judgement. The right to make a statement in court which the newspaper can ignore is perfectly useless. I know that my noble friend Lord Lester says that there is a code of practice relating to those matters, but we have some experience of what happens to codes of practice in this area. You may as well allow the victim to go out and proclaim his innocence to the passers-by in the Strand. The only proper remedy is to bring what the judge considers to be the truth to the attention of the same people who saw the original libel.

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40 Lords of Libel - *Times* 2.4.96

41 c226

If that is thought to be an invasion of editorial freedom, one should remember that that is part of a larger package. First, there is the limitation of summary damages to £10,000. I should not like to see that limit increased to £25,000, as the noble Lord, Lord Lester, suggests, because £25,000 is quite a large sum of money. It is important to make it clear that the summary remedy is intended for people who are not primarily interested in money.

Secondly, the other part of the package is that newspapers have the advantage of using the summary procedure as a cheap way to get rid of gold-digging claims. All that I have heard from editors and newspaper lawyers suggests that they regard this as a useful weapon. The amendment in the name of the noble Lord, Lord Lester, would give them all the advantages of the summary procedure with virtually no concession on their part to the rights of libel victims. I do not believe that that is fair.

Lord Lester returned to the subject of judicial control over the published prominence of apologies on Report.[42] He said that the net effect of this would be that a newspaper editor or broadcaster faced with the ultimate prospect of being compelled to publish an apology or correction with a prominence which he considers was not merited would be most unlikely to be willing to make an offer of amends. In reply the Lord Chancellor said that he had initiated discussions with various representative of the media to see if a solution could be found which would allow not only for the public recognition of the defamation in a particular case but also for a published recognition of it.[43]

On Third Reading the Lord Chancellor successfully brought forward amendments to **Clauses 2 and 3** which modified the offer of amends procedure to try and meet those concerns. He said:[44]

As I said at Report, it seems to me that the dramatic examples which have been given to illustrate why the media would be reluctant to offer amends in provisions do not reflect the likely reality of their operation. Nevertheless, we are all anxious to see that the new procedure will achieve the desired result, that where a person has been defamed, and the mistake is acknowledged, a system of speedy and voluntary amends should become the recognised conventional path to choose to resolve differences which might otherwise involve the parties in protracted and expensive litigation. This is something which may not happen if there is a general reluctance to come forward and make offers, even if that reluctance is attributable to what we would consider to be an unnecessarily cautious approach. As I said, I wish to reach the best possible solution to this problem. We want to encourage maximum use of the offer machinery, provided, of course, that its use will lead to effective amends being made to those who have suffered defamation.

Effective amends is the whole purpose and centre of the provisions. It involves not merely acknowledgement of the wrong but an attempt to undo the wrong which has been done. It is essential that the person who has done the wrong should be willing to, and should, take steps which will achieve that aim. It is in both parties' interests that the wrong should be righted as quickly as possible and as inexpensively as possible. In most cases, therefore, there is likely to be agreement as to the amends which will be appropriate.

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42 HL Deb vol 571 c628ff - 16.4.96

43 c631

44 HL Deb vol 572 c20-21- 7.5.96

But inevitably there will be some cases in which, although the parties are agreed in principle, they are unable to agree the exact steps to be taken. That may be because the offeror is not willing to apologise in terms which would be acceptable to the wronged party and which the court would consider reasonable or he is not prepared to give his withdrawal a prominence which the wronged party considers proportionate to the prominence of the original published wrong; or it may be that the wronged party is making unreasonable demands. Only the court can judge in a particular circumstance which is the case. This is where I have modified the provisions. I believe that it would be wholly appropriate for the court to judge those matters and to make an order accordingly, so that the package awarded to the person who accepted the offer will reflect the full amends that he is entitled to expect when he accepts the offer- no more and no less.

It may be that a very limited publication is apt. It may be that the money element in the package, if any, would be very small. Nevertheless, it has been represented to me that there is a very real fear among the media that, if they made offers, orders might occasionally be made against them in terms which differed very radically from what they had contemplated when making the offer. It is suggested that while there was any such risk offers would not be forthcoming. Of course, the media do not have the exclusive privilege of being at the receiving end of libel claims, and this procedure is not designed for their exclusive use. But it is important that those who are defamed by the media should not be deprived of the benefit of it because of the reasons which I have outlined. I have, therefore, sought an accommodation to vary the provisions which will apply when the parties cannot agree the details in such a way as to preserve the core of the amends package while removing that element which was seen as a serious disincentive to offering amends; namely, that offers might rarely, if ever, be made.

The amendments now proposed to Clauses 2 and 3 maintain the emphasis on the need for appropriate publicity being given to the correction and apology. But if the parties fail to agree those details, the defendant must take his chances on the basis of his best offer. The details of his best offer-as to wording and manner of publication-will be scrutinised by the court. If the court thinks that the plaintiff's demands for more were unreasonable, the position will be much the same as if the court had made an order coinciding with the best offer. If, however, it falls short of what the court considers to be adequate, that will be reflected in the money compensation.

One possibility which did concern me was that an offer of amends might be made as something of a tactical ploy by a person who had no intention whatever of righting the wrong in the manner contemplated by the provisions and whose "best offer" might even exacerbate rather than amend the original wrong. It is an established principle of defamation law that conduct after the original publication may be taken into account in the assessment of damages, whether that conduct shows a will to make good or determination not to do so. I have taken great care, therefore, to ensure that that principle is clearly manifested in the provisions. If it appears that an offer has been made hypocritically, that may indeed sound in the compensation. That, I think, will discourage any attempt to abuse the new machinery.

The amendment was supported by Lord Williams and Lord Lester who said that it met the the legitimate interests of the media while preserving the core of the offer of amends procedure.[45]

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[45] c23

A further matter of concern that arose during the Lords debate in relation to the offer of amends was the timing of the offer.

In Committee, Lord Williams of Mostyn sought to introduce an amendment which would have allowed a defendant to make an offer even after the serving of another defence. He argued that a newspaper may not discover that it had made an erroneous statement until after the close of pleadings or the exchange of witness statements which would then be too late to make an offer of amends.[46] He was supported by Lord Lester. The Lord Chancellor replied that the purpose of **Clauses 2 to 4** was to encourage a defendant who has published a defamatory statement to make speedy reparation to the wronged plaintiff. He took the view that time is allowed for the defendant to make the necessary investigation so as to decide whether to enter a substantive defence or to make an offer of amends and that to accept the amendment could take away all sense of urgency and fail to provide the plaintiff with prompt amends.[47]

Lord Williams returned to this matter on Report[48] and again the Lord Chancellor expressed more fully his argument as to why he was not prepared to accept the amendment:[49]

> The special machinery provided in Clauses 2 to 4 is neither needed nor intended as a substitute or alternative formal procedure for cases that have reached the stage of defences having been lodged. It is designed to provide immediate amends avoiding all the trouble and expense of conventional proceedings where the defendant comes forward at once ready to minimise and make up for the harm he has done. This has advantages for both sides in achieving a mutually satisfactory outcome quickly and cheaply. The plaintiff knows that proper amends will be made without his having to go through an action, and the defendant knows that the steps which he will have to take once he has committed himself to an offer will be reasonable.
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> The question is why the machinery should not be made available to cut short proceedings which have already gone further down the line, since the lack of immediacy could be reflected by a larger award. There would, I think, be dangers in this. If we try to give the same advantage to the honourable defendant who has been misled by his sources or advisers as to those who have immediately admitted their wrong, advantage could also be taken by those who were less "honourable" and simply did not bother to make appropriate inquiries before deciding to contest the claim or saw the machinery as a useful fall-back to guarantee that they would never have to face a full trial even if the plaintiff was not intimidated by the pleaded defences.
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> It was suggested on the previous occasion-and I think it is implicit in what was said tonight-that defendants may need more time to make their decisions before lodging defences. Of course there will be flexibility in that. A defendant who has had time to decide to contest the claim on the basis of a particular defence has also had time to make the inquiries on which that decision is based. However, it is right to consider the interaction which this new machinery will have with the new provisions for summary disposal. Under Clause 10 there is an express power to make special rules as to summary disposal. These may include modification of the rules usually governing the timetable for serving pleadings and authorising the

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46 HL Deb vol 571 c227 - 2.4.96

47 c228

48 HL Deb vol 571 c633ff - 16.4.96

49 c634-5

court to require a defendant to elect, at or before the summary disposal hearing, whether to make an offer to make amends. In practice, therefore, the defendant may have rather longer to make his inquiries and make his election than if the standard timetable applied.

Therefore I believe that there is an opportunity in the procedures which we are introducing to give defendants a longer time to make their decisions than perhaps exists at the present moment. I believe that is a better type of flexibility to introduce than to allow this procedure to be used after defences have been lodged, when it is a procedure which is really designed to avoid the necessity of a case going that far. I hope that that will meet the type of flexibility that is asked for, and that therefore the noble Lord will feel able not just to withdraw his amendment but to feel reasonable in that the point is properly dealt with.

Lord Williams remained unconvinced but withdrew his amendment.

In Committee Lord Williams of Mostyn also addressed the question of lack of jury involvement in the offer amends procedure. He sought to introduce an amendment so that the proceedings where there has been an offer of amends should be determined by a judge alone (rather than by a jury) only with the agreement of both parties.[50] He argued that judges were "notoriously mean" in assessing damages in personal injuries cases and that this could prejudice plaintiffs. The Lord Chancellor replied that the offer of amends procedure is designed to encourage the parties to come to their own agreement and to keep costs down. He expressed the view that a defendant may not even contemplate making an offer of amends if it would mean entering a commitment to pay whatever sum and take whatever steps a jury may decide on.[51] The amendment was withdrawn.

2. Extent

The offer of amends defence would apply throughout the United Kingdom.[52]

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50 HL Deb vol 571 c230 - 2.4.96

51 c230-1

52 clause 19

3. A Press "Right of Reply"

The offer of amends provisions in the Bill have some points in common with the campaign which has been fought for some years to legislate for a statutory right of reply in the media. The Bills introduced by Frank Allaun each year from 1980 until he retired at the general election of 1983, the bills presented by Austin Mitchell in 1984, by Ann Clwyd in 1987-88, by Tony Worthington in 1988-89 and finally Clive Soley in 1992-93 unsuccessfully sought to provide for the right to seek correction of factual inaccuracies. The phrase "right to reply" tends to suggest a right to respond to misrepresentation or unfair comment and some of the earlier bills proposed such a right. They were later restricted to the correction of factual inaccuracies

One of the factors which led to the setting up of the first Committee under the chairmanship of Sir David Calcutt QC was the strength of support for the bill introduced by Tony Worthington in 1988-89. The report of the Committee on Privacy and Related Matters[53] set out the arguments of principle about the need for a statutory right of reply to rectify inaccuracies which are not necessarily libellous:

> 11.4 Two arguments of principle compete in this area. On one side is the argument that any requirement upon the press to publish any matter at the instance of another party restricts its freedom and opens the door to abuse. A statutory right of reply as contemplated in the Bill could be invoked to compel an editor to publish material that he did not believe to be true or even knew to be false. The impression might be given that the editor accepted that the original story had been incorrect. This could lead to readers being misled into believing that a complainant had been given a clean bill of health, though the editor considered this unjustified. By contrast, in defamation actions, even if a case against a newspaper is proved, the court cannot force an editor to acknowledge his error in print. Indeed the newspaper might not even report the outcome of the case.
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> 11.5 On the other hand, it is argued that any person who is inaccurately described or criticised in the press should be entitled to have the inaccuracy corrected. Since the press has failed to provide a sufficient remedy of its own volition, a statutory right should be created. Such a right would enhance individual freedom by allowing a person to respond. The ability of the press to publish stories would be no more limited than under the law of defamation. In assessing these competing arguments we have been conscious that there is no necessary correlation between the publication of an inaccurate story about an individual and an intrusion into his privacy. Nevertheless, there is sometimes an overlap which justifies our considering a possible right of reply alongside other remedies.
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> 11.6 We have borne in mind that statute already provides for a limited right of reply, which is little known and rarely used in practice. Under section 7 of the Defamation Act 1952, it is provided that newspaper reports of certain meetings (for example public meetings or those of local authority committees) are protected by qualified privilege, but only "subject to explanation or contradiction". In other words, the newspaper will lose the privilege if it fails to afford the complainant a reasonable opportunity to contradict the defamatory allegation. Significantly, however, the editor is not required to accept the complainant's reply as accurate

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[53] June 1990, Cm 1102

or to present it to his readers as established fact. Moreover, any such proposed reply would have to be reasonable both as to length and content.

The Committee concluded:

11.14 We think it right that an individual who is the subject of a seriously inaccurate story should be able to seek a correction and an apology. We also consider that there is an onus upon the press, if it wishes to retain public confidence, to set the record straight whenever practicable and, moreover, to give any such correction due prominence. Where the facts are disputed it would generally be appropriate for the newspaper to publish instead a reasonable letter from the individual or organisation concerned.

However they did not recommend the introduction of a statutory right of reply, and considered that the problem should be tackled within the ambit of a code of practice or under the law of defamation according to the circumstances of each individual case. They proposed the setting up of a new Press Complaints Commission to operate along the lines of the Broadcasting Complaints Commission to provide, on a non statutory basis, an effective means of redress for complaints against the press. The Press Complaints Commission came into being in 1991 and articles 1 and 2 of their code of practice set out the responsibilities of the print media:

1. Accuracy

(i) Newspapers and periodicals should take care not to publish inaccurate, misleading or distorted material.
(ii) Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence.
(iii) An apology should be published whenever appropriate.
(iv) A newspaper or periodical should always report fairly and accurately the outcome of an action for defamation to which it has been a party.

2. Opportunity to reply

A fair opportunity for reply to inaccuracies should be given to individuals or organisations when reasonably called for.

Some newspapers have a regular place near the front of the paper where any corrections are to be found.

Complaints about unjust and unfair treatment in broadcasting may be made by those directly affected to the Broadcasting Complaints Commission, which the current Broadcasting Bill proposes to amalgamate into a new Broadcasting Standards Commission to deal with all complaints about broadcasting. This body will be permitted to decide not to consider a complaint if the person affected has a remedy by way of proceedings in a court of law.

C. Limitation Period for Defamation Actions

1. Background

Limitation rules exist to protect defendants by bringing certainty to legal proceedings and preventing old and stale claims from being resurrected.

In England and Wales at present the limitation period (ie the time period in which an action can be brought) for libel and slander cases is three years by virtue of section 4A of the *Limitation Act 1980*.[54] The limitation period was previously reduced from six years to three years by the *Administration of Justice Act 1985* thereby enacting one of the recommendations of the Faulks Report[55]. This is one of only two of the Faulks Report recommendations to have been introduced to date.

The current three year period does not however constitute on absolute "statute-bar" as section 32A of the *Limitation Act 1980* allowed an action to be brought with the leave of the High Court if it was brought within one year from the earliest date on which the plaintiff knew all the facts relevant to the cause of action, but only if all or any of the facts relevant to the cause of action had not become known to him until after the expiration of the three year limitation period. The effect of this is, therefore, that a plaintiff who discovers the publication after the three year limitation period expires is in a better position than a plaintiff who discovers the publication just before the end of the three year period as he must nevertheless act before the period actually does expire.

The current limitation period for malicious falsehood actions is six years which is the limitation period applicable in causes of action in tort generally.[56]

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54 as amended by section 57(2) of the *Administration of Justice Act 1985*

55 *op cit*

56 section 2, *Limitation Act 1980*

In its consultation paper on the draft Bill[57] the Lord Chancellor's Department stated that the main purpose of a defamation claim is to repair the damage done to the plaintiff's reputation and that that should be done quickly to be effective.[58] It proposed therefore a reduction in the limitation period to one year with a discretion given to the court to allow actions to be begun later if in all the circumstances that would be fair. The view was also taken that the limitation period for malicious falsehood actions should be the same as for defamation actions as the same facts could give rise to both types of action. This would implement one of the major recommendations of Lord Justice Neill's working group on the practice and recommendation in defamation.[59]

2. The Bill

Clause 5 seeks to reduce the limitation period in actions for libel, slander and malicious falsehood arising after the section comes into force to twelve months. However the court would be given a general discretion to disapply the limitation period if in all the circumstances that would be equitable. In particular the court would be required to have regard to the length of, and the reasons for, the delay on the part of the plaintiff; when the facts became known to the plaintiff and the promptness of his action on becoming apprised of those facts; and the effect of the delay on the availability and cogency of relevant evidence. In its consultation paper on the draft Bill the Lord Chancellor's Department gave examples of reasonable grounds for delay, including where the plaintiff has tried to avoid litigation by seeking a remedy under an alternative form of dispute resolution, or where the viability of his claim depended on the outcome of other pending proceedings such as a criminal prosecution or disciplinary proceedings affecting the reputation which the plaintiff is seeking to protect.[60]

Clause 5 forms part of the general emphasis in the Bill on the speedy and effective resolution of defamation claims.

On Lords Second Reading, Lord Williams of Mostyn expressed concern about the effect on plaintiffs of the reduction of the limitation period.[61] He said that despite the proposed discretion to allow the courts to disapply the time limit where it would be equitable to do plaintiffs could be constrained by the one year period and that the one year period does not offer an incentive to defendants to retain documents beyond that period although a claim could later come to light. Lord Williams introduced an amendment at Committee Stage which sought to require the court to take into account the conduct of the defendant after the

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57 *op cit*
58 para 4.3
59 Section VIII *Report on Practice and Procedure in Defamation*, July 1991
60 para 4.4
61 HL Deb vol 570 c580 - 8.3.96

cause of action arose and in particular his response to the plaintiff's requests for information. He said:[62]

My fundamental objection to Clause 5 is that it is wrong to take away a plaintiff's right, subject to exceptions, to the three-year period in respect of limitation. Amendment No. 30 includes a further relevant protection for a plaintiff who, if Clause 5 becomes Section 5 of the Act, may need further protection.

Perhaps I may make one or two general observations. If I stand on the pavement outside this House and am run over by the *Evening Standard* delivery van, I do not understand why I should have three years in which to claim in respect of my broken leg; but if another newspaper defames me, perhaps wounds my life more fundamentally than the break of my leg would represent or imply, I have only the one year. I know it will be said that there are exclusions. I do not see why there should be any reason in principle that a plaintiff should be limited to one year.

There is no legal aid for plaintiffs. Many plaintiffs are private individuals. Very often a plaintiff will want to take action-for instance, if he is a doctor or a member of a profession which is subject to an internal complaints machinery. Very often a plaintiff will have to save quite strenuously to afford the costs. If no legal aid is available, there is normally an inequality of arms between defendants, who tend to be well off, and plaintiffs, who, if they are not a member of a union or a professional organisation, are not well off.

Despite the explanations given on an earlier occasion it seems to me that there is no proper reason to limit the limitation period to 12 months in respect of false material published which is defamatory as opposed to the personal injury example that I gave earlier.

I recognise, of course, that there are exceptions. But the court will tend to be rigid if the experience of the Limitation Act in personal injury cases is any guide. For the convenience of the Committee, I have sought to address the matter generally. I beg to move.

In reply the Lord Chancellor said:[63]

Clause 5 implements one of the major recommendations made by Lord Justice Neill's working group; and I need not remind the Committee of the depth of experience which resided in that group.

I think that I discern a difference between the situation in which, unfortunately, the noble Lord had his leg broken by a newspaper van and in which he was defamed either by that newspaper or another. The injury by defamation is an injury done at the time, and the sooner it is corrected the better for everyone. In so far as the injury to the broken leg heals, that is well and good. But the substitution of damages, which is the remedy, depends a good deal on how the injury turns out. One might hope that the injury would heal quickly and that so good and so straight would be the result

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62 HL Deb vol 571 c233-4 - 2.4.96

63 c234-5

that one would hardly notice the difference as the noble Lord walked on in his brilliant career. In that case the damages would be somewhat reduced. Therefore, a three-year period of limitation for personal injuries seems reasonable in regard to these circumstances.

However, as the Neill group said, in its experience it would be in only the most exceptional cases that a plaintiff could be justified in delaying for more than a year before starting defamation proceedings. That is the result of a great deal of experience. I think that all of us agree that the sooner these actions are taken the better for reasons of freshness of evidence and the like.

Looking at the law of limitation generally, I cannot anticipate what the Law Commissioners may say, for example, on the law of limitation on personal injuries.

As regards Amendment No. 30, we put the measure into the Bill as published for consultation. Following consultation, and in response to many comments on the clause, it was modified so that fewer examples of "all the circumstances of the case" to which the court might need to have regard were provided. The basic and essential provision is that the court shall have regard to all the circumstances, which was not the case under the previous legislation. Although the reason for and length of delay will always be relevant, and lack of knowledge will often be, it is clearly not possible to identify all the kinds of circumstances which could conceivably in any case be relevant for consideration.

Moreover, it was pointed out in consultation that the inclusion of a specific example could raise two expectations which it should not do. One possible expectation was that a plaintiff who could show that his case fell within that example must succeed. That is clearly not right if it is just an example of a matter which could affect the exercise of the discretion. The reason that we took that out in the final form of the Bill as laid before the Committee was in order to avoid those difficulties.

My answer on the main point is that there is an essential difference between the cause of action in defamation and the cause of action in personal injuries. The accumulated experience of the Neill Committee was in favour of, and recommended as a central recommendation, the limitation to 12 months. The discretion should be a completely open one and particular examples are on the whole unwise.

Lord Williams withdrew the amendment but said that he could see no difference in principle between a person who suffers personal injuries and another who suffers injury to his reputation. He returned to the subject at Report Stage by introducing an amendment to delete **Clause 5** from the Bill. The Lord Chancellor gave a fuller explanation of the reasoning of the Lord Justice Neill's working group in recommending the reduction in the limitation period:[64]

My Lords, I have always found some difficulty about limitation generally. There is always a question about precisely what purpose it serves and what the principle should be on which it should proceed. A good deal of concern has gone into that subject matter over the years. The more I have

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[64] HL Deb vol 571 c638-9 - 16.4.96

seen of detailed provisions of limitation, the more complicated they look.

The amendment would amount to the rejection of one of the major recommendations by Lord Justice Neill's working group-namely, that the limitation period both for actions in defamation, and actions for malicious falsehood, should be reduced to one year, but that there should be a discretion to extend the period. Therefore there is in the Bill, in this situation, a completely open discretion to extend the period.

I have considered quite carefully, in particular in relation to some of the examples that the noble Lord, Lord Williams of Mostyn, gave last time, whether the discretion should be in some way elaborated so as to indicate what might be done in particular situations. However, I have concluded that that would be unwise. On the whole, judicial discretion in this area without any circumscription, would be the right answer. I am comforted in the view that that is correct when I consider the attempts made to limit judicial discretion in other types of limitation. They produce tremendous complexity and metaphysical distinctions of comparative fineness.

The recommendation of Lord Justice Neill's working group was made after careful consideration of the reality and all the issues arising in considering the time limits which should apply to defamation proceedings. Your Lordships will remember that the personnel of the working group were extremely experienced in this area of the law. The group pointed out that only in the most exceptional circumstances could a plaintiff be justified in delaying for more than a year before starting proceedings. It is almost always in his own interest to do so as soon as he knows that he has been defamed. If he acts at once, his action can minimise or even prevent any substantial damage, which is why he has a cause of action, and presumably why he chooses to take proceedings.

This is very different from a personal injuries claim, where it may not immediately be apparent to an injured person that his injury is attributable to some other person's fault, and his action, however prompt, cannot halt, minimise or prevent the injury: indeed it may be impossible to assess the inexorable long term effect of the injury. It is right, therefore, to require particularly swift action as the norm in defamation cases.

The group gave examples of circumstances (other than the plaintiffs lack of requisite knowledge during the running of the limitation period) which would justify extension. The present law allows extension only in the narrow case of when the plaintiff in defamation (not malicious falsehood) did not acquire the relevant knowledge until after the period had expired. Thus this clause is in two ways more generous to plaintiffs than the old ones, since the strict limitation rule may be relaxed, for instance, in favour of a plaintiff who only acquired the requisite knowledge at the eleventh hour, or a plaintiff who had some other good reason for not starting proceedings within the period prescribed.

In my submission, the balance of a very ample judicial discretion is the answer in relation to those cases where there is a special reason for not taking action within the year. I therefore think that it is right that your Lordships should give effect to the recommendations of the Neill Committee having regard to the reasons which it has given and which I have sought both to summarise and to elaborate.

Although Lord Williams remained unconvinced he withdrew the amendment.

3. Extent

Clause 6 would make similar provision for Northern Ireland.

The current Bill does not reduce the limitation period for Scotland and so it will remain at three years by virtue of the *Law Reform Miscellaneous Provisions (Scotland) Act 1985.* It has been suggested[65] that as most newspapers circulate and radio and television broadcasts take place within both jurisdictions this would give a plaintiff two years more to issue proceedings in Scotland than in England and Wales. It could be said, then, that the intention of providing speedy resolution of claims could be undermined for potential defendants.

D. Rulings on the Meanings of Statements

1. The Bill

Clause 7 seeks to prevent parties from seeking preliminary rulings on whether statements are "arguably capable" of bearing particular meanings. This implements the recommendations of Lord Justice Neill's working group on the meaning of words.[66]

In *Reforming Defamation Law and Practice*, the consultation paper on the draft Bill, the reasons for seeking to institute this change were explained as follows:[67]

> 5.1 Where an action for defamation is tried with a jury, it is for the jury to decide the meaning of the words complained of. But the decision as to whether the words are *capable* of bearing a particular defamatory meaning is reserved to the judge, and he will withdraw from the jury any meaning, contended by the plaintiff, which in the judge's opinion a reasonable man could not understand the words to bear. There used to be no special interlocutory procedure for early disposal of that issue, which was usually left to the trial, but the defendant could apply to strike out the claim on the basis that it was *not arguable* that the words complained of were capable of bearing a meaning defamatory of the plaintiff.
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> 5.2 Following a recommendation in the Neill Report, the Rules of the Supreme Court have been amended so that, under Order 82 rule 3A, either party can now apply for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings (i.e. whether the words can have that meaning, as opposed to whether that meaning could be defamatory). The judge may dismiss the claim if it appears to him that the words are not capable of bearing those meanings.

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65 Law changes 'will hit Scots media' - *Scotsman* 30.10.95

66 section II, *Practice and Procedure in Defamation* July 1991

67 chapter 5

5.3 It is therefore quite pointless for the court to go through the additional stage of considering whether those words are arguably, as opposed to actually, capable of bearing particular meanings. The old "arguably capable" test is no longer needed, but clause 6 expressly provides that the court shall not be asked to rule on it. This recognises that the old test has been superseded, and may not be used as a delaying or other tactic.

NB Clause 6 of the draft Bill was identical to **Clause 7** in the present Bill

On Lords Second Reading the Lord Chancellor said that **Clause 7** was "part of a lesser reform, designed to eradicate delaying tactics by parties going through the unnecessary stage of applying for rulings as to meanings which statements are "arguably" capable of bearing".[68]

2. Extent

Clause 7 would apply to England and Wales and Northern Ireland.

E. Summary Disposal of Claims

1. Background

Currently defamation actions cannot be dealt with by summary judgment under Order 14 of the *Rules of the Supreme Court* which allows the court in other civil cases to dispose of a case summarily on the basis that there is no arguable defence to the plaintiff's claim. However in the late '80s Mr Justice Hoffman (now Lord Hoffman) drafted a Bill seeking to introduce a summary procedure in defamation cases in recognition of the fact that plaintiffs in libel cases often desired a quick and easy way to clear their name and a swift public statement correcting the false statement. This point was also made in the recent Commons debate on the costs of libel cases initiated by Peter Bottomley.[69] It was also thought that newspapers would like to have a summary procedure for the disposal of trivial 'gold-digging' claims.

Lord Hoffman's proposals had three objectives:

1. to give plaintiffs the opportunity to obtain an immediate correction, coupled with a payment of a relatively small sum in compensation

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[68] HL Deb vol 570 c 577 - 8.3.96

[69] HC Deb vol 272 c557ff - 22.2.96: see Peter Bottomley at c557 and Edward Garnier at c558

2. to give defendants the opportunity to dispose quickly and cheaply of relatively trivial claims

3. to encourage both parties to put their cards on the table as soon as possible, with a view to achieving early settlement

The proposal was to provide for a form of summary procedure in suitable defamation cases under which a judge could decide the issue and award damages not exceeding £5000. It was also proposed that the judge would be able to order the publication of an apology or correction. There would be no jury in such cases.

These proposals were considered by Lord Justice Neill's working group in their report on *Practice and Procedure in Defamation* of July 1991. The report noted the similarities between the proposal that a judge should be able to order the publication of an apology or correction in such place and form and at such time as the judge may direct and the Worthington Right of Reply Bill of 1988/89. The working group stated that it agreed with the view of the Calcutt Committee in its report on *Privacy and Related Matters*[70] that it would be undesirable that there should be a power to compel an editor to publish either a correction or an apology in terms unacceptable to him. It expressed the view that the proposals could force an editor to publish something which he may not believe or even which he knows to be false (without being able to prove it under the rules of evidence).[71]

In addition the working group expressed doubts about the desirability of a judge being empowered to determine the meaning of words without the parties necessarily consenting to his doing so. It took the view that as long as jury trial is retained in defamation cases then a party should not be deprived of the opportunity of jury trial without his consent. The group pointed to the difficulty in determining what was a 'trivial' case and doubted whether there were many cases that would fit into the criteria for summary relief.

They also expressed the view that the proposed scheme would lead to an increased rate of appeals involving additional cost and delay.[72] The working group believed that many of the problems the proposals sought to address could be remedied by the implementation of their own recommendations on the abolition of the rule in *Scott v Sampson* (see Part III G of this Paper) and for an 'offer of amends' defence (see Part III B of this Paper) and recommended that Mr Justice Hoffman's proposals for a summary procedure should not be introduced.[73]

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70 Cm 1102 1990, para 11.4

71 para XVII.3

72 para XVII.14

73 section XVII

On winding up the Second Reading debate in the Lords, Lord Inglewood said that the revised provisions in the present Bill overcame the general criticisms of the summary procedure as originally drawn and that Lord Justice Neill was content that his concerns had been met.[74]

To an extent the summary disposal provisions presage Lord Woolf's civil justice reform proposals contained in his interim report to the Lord Chancellor on *Access to Justice*[75]. In that report he made proposals for a fast track procedure for simple and straightforward civil cases beyond the small claims limit. He hopes that this will provide access to justice for litigants of limited means and ensure equality of treatment between litigants if they are of unequal means. these issues are important in defamation cases given that there is no legal aid for libel actions and that plaintiffs often face newspapers etc of much larger means at their disposal for the payment of legal costs.

There remains some concern, however, that the summary procedure might perversely result in increased costs and complicate rather than simplify libel actions. On Lords Second Reading Lord Lester said that the matter needed to be looked at carefully to ensure that the "fast-track" did not become "gridlock".[76]

For others the proposed procedure does not go far enough. For example, on Second Reading Lord Alexander of Weedon, a former chairman of the Bar Council, said:

> In some ways, I should have liked to see the Bill achieve a slightly less modest result than that so clearly described by the noble and learned Lord, Lord Hoffmann. I remember the end of one hot July at the conclusion of a libel case which I had found exacting and which, I think, even my normally ebullient client found exhausting, I wrote an article for the *Independent* expressing my view that there should be an opportunity for a plaintiff to go before a judge at an early stage and ask that an apology be ordered by the court. The judge could then call for immediate material from the newspaper and form an impression of whether a correction was required and, if so, in what terms. While the plaintiff would be entitled to ask for costs, the price for that fast-track procedure should be that he could be required to forgo his claim for damages as a term of obtaining an apology. I believe that I then envisaged that a judge would be able to form not only a view of whether a claim was unarguable or certain to succeed, but also a robust prima facie view on a case and seek a commonsense solution. But, nonetheless, I agree that the proposal put forward for a fast-track procedure is modest progress.

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74 HL Deb vol 570 c605 - 8.3.96

75 June 1995

76 c585

Despite the anticipated reduced costs of the summary procedure there is no proposal to introduce legal aid for such cases. In a written answer of 26 March 1996 Jonathan Evans, Parliamentary Secretary, Lord Chancellor's Department said that it was not the Government's intention to extend the scope of legal aid to libel cases.[77] However the reduced costs could mean that plaintiffs of moderate means might be able to consider taking proceedings in respect of a defamatory statement.

Some commentators believe that the proposals would not necessarily reduce costs as summary hearings would still depend on resolving conflicts of evidence. In addition lawyers would still argue about the appropriateness of the procedure and the form of the correction and apology. In addition it has been suggested that the proposals would tilt the present balance of power more towards the media by lowering awards.

2. The Bill

Clauses 8-11 of the Bill seek to provide for a new "fast track" procedure aimed at providing a prompt and inexpensive remedy in less serious defamation cases. There would be no effect on cases where there is a defence with realistic prospect of success to be argued nor cases where a serious charge has been made against a person's character. An entirely new regime would be created under which every defamation action would come before a judge at an early stage for a decision on whether the claim is suitable for summary disposal. The judge's powers of summary disposal would enable him to dismiss weak claims, and in the case of strong claims, to make an award in the plaintiff's favour including damages up to a fixed ceiling (£10,000 is proposed in **Clause 9** of the Bill) if he feels that the plaintiff would be adequately compensated. The Bill contains a special rule-making power in **Clause 10** which indicates the procedure which is likely to be prescribed for the court's consideration of the suitability of individual defamation claims for summary disposal. General rule-making powers are already contained in section 84 of the *Supreme Court Act 1981* and section 75 of the *County Court Act 1984*. **Clause 10** indicates that the use of summary disposal would not be dependant on an application by the parties.

The summary procedure is intended to benefit both plaintiffs and defendants and in the consultation paper on the draft Bill the advantages for litigants were set out as follows:

> 6.7 This early clarification of the issues, and testing the strength of both claim and defences, should encourage more parties to settle before trial, and even before the special hearing. For those claims which cannot be settled, it offers a streamlined disposal procedure where the claim is straightforward and less serious. Even if the issues are so complex, or the allegations so grave, that summary disposal cannot be appropriate, the cards will be on the table much sooner than is now the case.

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[77] HC Deb vol 274 c541W - 26.3.96

Taken together the summary, procedure and the proposed new offer of amends defence (see Part III B of this Paper) are intended to make relevant defamation actions more speedy and less costly.

At present virtually all defamation hearings are heard in the High Court as county court jurisdiction is non-existent. In the consultation paper on the draft Bill the Lord Chancellor's Department said that the new procedure would filter out less complex cases and those, which, even if not trivial, are not weighty. Those cases could be suitable for disposal in the county court (where costs are lower) and once the new procedure had been set up the Lord Chancellor would consider whether to exercise his power under section 1 of the *Courts and Legal Services Act 1990* to confer jurisdiction on the county courts to hear such cases.

Clause 8 seeks to provide for the summary disposal of a claim without a jury. The court's jurisdiction is defined in **Clause 8(2)** which seeks to provide for the court to dismiss the plaintiff's claim if it had no realistic prospect of success and there is no reason why it should not be tried. **Subsection 4** sets out the matters to which the court would be required to have regard in considering whether a claim should be tried. In Committee the Lord Chancellor made it clear that the list is not intended to be exhaustive.[78] The matters listed in **subsection 4** are:

(a) whether all the defendants or potential defendants to the claim are before the court when the question of summary disposal arises

(b) whether there is another defendant against whom summary disposal would not be appropriate. (It could be that summary disposal against one defendant could prejudice the fair trial of a claim against another defendant)

(c) the extent to which there is a conflict of evidence

(d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of the publication)

(e) whether a full trial of the claim would be justified in the circumstances

The proposed powers of the court to give relief are set out in **Clause 9**. A court would be able to do one or more of the following:

(a) make a declaration that the statement was false and defamatory of the plaintiff (NB judges have not hitherto been able to decide the issue in defamation trials)

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[78] HL Deb vol 571 c245 - 2.4.96

(b) order that the defendant publish or cause to be published a suitable correction and apology

(c) award damages not exceeding £10,000 (the Lord Chancellor would be able to change this prescribed amount by order subject to the negative resolution procedure[79])

(d) make an order restraining the defendant from publishing or further publishing the defamatory statement

By **clause 9(2)** it would be for the parties to agree on the content of any correction or apology and on the time, manner, form and place of publication. However, if they could not agree on the content then the court could direct the defendant to publish or cause to publish a summary of the court's judgment or the parties' settlement. If the parties could not agree on any of the other matters then the court could direct the defendant to take such reasonable and practicable steps as the court considers appropriate. The court would not then be able to dictate the content of an apology or correction if the parties cannot agree.

In Committee, Lord Lester, supported by Lord Williams of Mostyn, sought to raise the ceiling on the compensation that could be awarded under the summary procedure to £25,000.[80] He believed that the operation of the procedure could become constrained as a result of the £10,000 maximum. In reply the Lord Chancellor referred to the difficulty of deciding on a figure but said that he did not know why £25,000 was considered more appropriate than £10,000.[81] He went on to say that he was concerned that the procedure should offer some attraction to a defendant as well as to a plaintiff and he took the view that the protection of the £10,00 limit was important for the defendant. The amendment was withdrawn.

Clause 10 seeks to provide for rules of court to be made governing summary disposals. **Subsection 2** lists specific matters for which rules might be made but without prejudice to the general power to make rules. Provision could be made to:

(a) authorise a party to apply for summary disposal at any stage of the proceedings

(b) authorise the court to consider whether a claim is suitable for summary disposal and to dispose of it summarily where neither party has made an application for summary disposal. That consideration could be triggered automatically by the taking of any step in the proceedings by one or other of the parties or when the proceedings reach a particular stage in the timetable laid down for the preparation of the case (see (c) below)

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79 clause 9(3)
80 HL Deb vol 571 c245ff - 2.4.96
81 c247

(c) lay down a timetable for the preparation of a case

(d) require the parties to identify the legal issues for determination in the proceedings

(e) lay down the form in which evidence must be given. It is envisaged that this would not normally be by way of oral evidence without leave of the court.

(f) require the defendant to elect whether or not to make an offer of amends under **clause 2 to 4**. The *Notes on Clauses* for the Lords stages explain that this would be necessary as no time limit is given for the making of such an offer, except that it must be made before the serving of a defence. In the event that the court was considering whether a case was suitable for summary determination, before a defence had been served, the court would need to know whether there was a possibility that the defendant would seek to rely on the offer of amends defence.

Thus it is envisaged that virtually every action will at some stage fall to be evaluated by the Court as to its suitability for the summary procedure.

3. Extent

Clause 11 seeks to provide that in their application to Northern Ireland the provisions of **Clauses 8 to 10** on summary disposals would apply only to the High Court. This is because, although most cases are brought in the High Court in Northern Ireland as in England and Wales, there is currently a small county court jurisdiction in libel and slander with a statutory ceiling of £3,000.

In Scotland summary procedures are already available for the disposal of defamation actions in both the Sheriff Court and the Court of Session.

F. Evidence of Convictions

1. The Bill

Clause 12 seeks to provide that in defamation proceedings evidence of a person's conviction will no longer be conclusive proof that he committed the offence, unless he is the plaintiff. This was a recommendation contained in the Neill working group report on *Practice and*

Procedure in Defamation.[82] However, as in all civil proceedings, evidence of a conviction would still be admissible as evidence to prove that a person did commit the offence.

The consultation paper on the draft Bill explained the reasoning behind this clause (clause 10 of the draft Bill) as follows:[83]

> 7.1 Before 1968, a person's conviction of a criminal offence was not admissible in defamation or any other civil actions. The curious result in one case was that a plaintiff who had been convicted of robbery succeeded in an action for libel against a defendant who had published a statement that he was guilty of the robbery. After 11 years, the defendant was unable to prove justification, on the balance of probabilities, despite the previous conviction. The rules were changed following recommendations of the Law Reform Committee so that :
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> - in a defamation action, proof that a person has been convicted of an offence is, where relevant, conclusive evidence that he committed the offence (Civil Evidence Act 1968, s. 13); and
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> - in other civil proceedings, the fact of a person's conviction is admissible, but not conclusive, evidence that he committed the offence, (ibid, s. 11).
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> 7.2 It is sometimes necessary to prove the guilt of a person who was not a party to the civil proceedings, e.g. in a claim against an employer who is vicariously liable for the acts of a convicted employee. However, the effect of making proof of a person's conviction conclusive in defamation proceedings to which he is not a party appears not to have been fully considered. As the Neill working group pointed out, this rule can operate unfairly when it prevents a party from challenging the correctness of some other person's conviction. It can inhibit a defendant, such as an investigative journalist, from justifying defamatory allegations about the conduct of police officers and others who were involved in the prosecution.
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> 7.3 Clause 10 narrows the application of the rule which makes conviction evidence conclusive, to those cases where the convicted person is the plaintiff, or one of several plaintiffs. Proof of the conviction of any other person will still be admissible evidence, under section 11, but it will no longer be conclusive.

On Second Reading the Lord Chancellor said that "plaintiffs in defamation proceedings will no longer enjoy the artificial advantage of the rightness of someone else's conviction being unchallengeable".[84]

In Committee Lord Lester expressed the view that the clause had "welcome implications for freedom of the press and public discussion of the conduct of those who exercise public

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82 section XXI

83 chapter 7, *Reforming Defamation Law and Procedure*

84 HL Deb vol 570 c578 - 8.3.96

powers".[85] However Lord Williams of Mostyn expressed concern that the clause would admit collateral attacks on criminal convictions and could cause unfairness to certain plaintiffs who could not rely on a defendant's conviction as conclusive proof that he committed the offence in question.[86]

2. Extent

Amendments are made by **Clause 12** to the relevant legislation in each of the three jurisdictions of the United Kingdom[87] so as to achieve the same result throughout the UK.

G. Abolition of the Rule in Scott v Sampson - Damages and the Plaintiff's Reputation

1. The Bill

Clause 13 seeks to abolish the common law rule known as the rule in *Scott v Sampson*[88] which restricts the evidence which a defendant can lead in mitigation of damages to show that a plaintiff has a bad reputation. The defendant can always lead evidence to show the general bad reputation of the plaintiff but is not permitted to lead evidence of particular acts of misconduct on the part of the plaintiff tending to show his character or disposition. Thus a plaintiff can recover damages based on an unblemished reputation even if it could have been shown that he had acted discreditably unless the defendant can show that the reputation he actually enjoyed at the date of publication was tarnished.

Lord Justice Neill's Working Group on Practice and Procedure in Defamation recommended the abolition of the rule noting that one of the reasons why defendants in what appear on the surface appear to be trivial cases are reluctant to settle is because they have information about the conduct of the plaintiff which in their eyes makes his demand for damages appear to be disproportionate[89]. Abolition of the rule in *Scott v Sampson* was previously recommended by both the Porter and the Faulks Committees.[90]

Clause 13 would then prevent the plaintiff from recovering damages for injury to his reputation beyond what he would be entitled to if everything likely to affect his reputation (at the time that damages fall to be assessed), in relation to the sector of his life to which the

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85 HL Deb vol 571 c248 - 2.4.96

86 HL Deb vol 571 c248 - 2.4.96

87 *Civil Evidence Act 1968, Law Reform (Miscellaneous Provisions) (Scotland) Act 1968* and the *Civil Evidence Act (Northern Ireland) 1971*

88 (1882) 8 QBD 491

89 section III, *Report on Practice and Procedure in Defamation* July 1991

90 Cmd 7536 (1948), paras 146-156 and Cmd 5909 (1975), para 372

defamatory statement related, were public knowledge. It also seeks to enable the defendant to rely, in mitigation of damages, on evidence of relevant discreditable acts by the plaintiff as well as on evidence of the plaintiff's general reputation which can currently be introduced. In this regard a defendant may introduce evidence that the plaintiff has been convicted of a criminal offence whether or not that conviction is otherwise to be treated as spent for the purposes of the *Rehabilitation of Offenders Act 1974*. **Paragraph 1** of the **Schedule 2** to the Bill seeks to make a consequential amendment to section 8 of the 1974 Act.

It would be for the court to decide whether the matters raised do relate to the relevant sector of the plaintiff's life and **subsection 3** seeks to give the court power also to exclude evidence of specific facts if it appears in the interests of justice to do so, having regard to the time which has elapsed since the matters in question occurred and their relative unimportance in the quantification of damages.

By **subsection 4** this clause would not apply to causes of action arising before the clause comes into force.

On Lords Second Reading Lord Williams expressed concern that the purpose of the Bill to make defamation proceedings simpler and less costly could be undermined if there were lengthy and complicated hearings about matters not going to the question in issue such as character evidence.[91]

Clause 13 has been described by Patrick Milmo QC[92] as arguably the most controversial provision in the Bill. It is feared that this provision could become a 'muckraker's charter'. Newspapers who are defendants in defamation cases could be tempted or advised to undertake an in-depth investigation into the plaintiff's private life seeking to unearth something to his discredit which they could then expose in open court. However it would protect against the situation which, for example, arose in libel cases involving the late Robert Maxwell where discreditable actions by a plaintiff, not related to current proceedings, could not be brought before the court.

2. Extent

Clause 13 would extend to England and Wales and Northern Ireland.

H. Statutory Privilege

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91 HL Deb vol 570 c581 - 8.3.96

92 Fast track or gridlock? - *New Law Journal* 16.2.96

1. Absolute Privilege

i. The Bill

Clause 15 seeks to confirm and clarify the existing statutory privilege of contemporaneous reports of judicial proceedings which is currently contained in section 3 of the *Law of Libel Amendment Act 1888.* Section 3 was silent as to the nature of the privilege but **Clause 15** makes it clear that it would be absolute and so it will not therefore be displaced even if a report was published maliciously. By **subsection 2** the report will be treated as having been made contemporaneously and thus attract the privilege where there is a restriction (either in law or by court order) on publication provided that it is published as soon as practicable after publication is permitted.

Subsection 3 seeks to apply the privilege to:

(a) any court in the United Kingdom (including any tribunal or body exercising the judicial power of the State)

(b) the European Court of Justice or any court attached to that court

(c) the European Court of Human Rights

(d) any international criminal tribunal established by the Secretary of State if the United Nations or by an international agreement to which the United Kingdom is a party (eg an international war crimes tribunal).

ii Extent

This clause would apply throughout the United Kingdom.

2. Qualified Privilege

i. The Bill

Sections 7 and 9 of the *Defamation Act 1952* together with the Schedule to that Act specify categories of reports published in newspapers or broadcast which are given qualified privilege as a defence to an action for libel. Broadly these relate to reports of specified legislative and judicial proceedings and proceedings at public meetings. Qualified privilege applies as a defence in circumstances in which an untrue and defamatory statement has been published but there was no improper motive in publishing.

Clause 16 and **Schedule 1** seek to bring this area of law up to date and in particular include reports relating to proceedings in European institutions. The Schedule contains a provision seeking to enable the Lord Chancellor (for England and Wales and Northern Ireland) and the Secretary of State (for Scotland) to designate (by order subject to the negative resolution procedure) other bodies in respect of which the privilege would apply. This would allow for newly created statutory or other bodies to be included within the scope of this defence. The consultation on the draft Bill explained the effect of these provisions and the reasoning behind the changes as follows (**Clause 16** relates to clause 13 in the draft Bill):[93]

> 9.1 By sections 7 and 9 of the Defamation Act 1952, specified categories of reports, published in newspapers, or broadcast, were given qualified privilege as a defence to an action for libel. Broadly these relate to reports of specified legislative and judicial proceedings, and proceedings at public meetings. A qualified privilege provides a defence, even where the defendant has published a statement which was defamatory and untrue, provided that he did not have an improper motive (such as ill-will or spite) for publishing it. In some cases, copies of official documents, or extracts, rather than reports of them attract the privilege.
>
> 9.2 The specified categories are set out in the Schedule to the Act, in a list which is divided into two parts. The first part broadly covers reports of legislative and judicial proceedings and proceedings of public inquiries and international organisations. Those listed in the second part relate to a range of public meetings and proceedings of associations. Reports in the second part are "subject to explanation or contradiction", which means that the defence is not available if it is proved that, although the defendant has been asked to publish a reasonable letter or statement by way of explanation or contradiction, he has not done so.
>
> 9.3 Clause 13 brings the privilege up to date in two ways. Firstly, it extends the privilege to all forms of publication. The 1952 privilege excluded many media - including free newspapers which might now reasonably be expected to carry such reports as part of the service they provide. It also excluded one-off or occasional publications, and periodicals which appeared less often than monthly. Since the privilege has always applied to historical reports, as well as to contemporaneous ones, it is difficult to see any justification for restricting it to publications which appear frequently, and broadcasts.
>
> 9.4 Secondly, it greatly extends the categories of reports and copies to which this privilege applies, by substituting a new Schedule. The universal requirement is that the report or copy should be fair and accurate. As recommended by the Neill working group, the new Schedule recognises that it is no longer appropriate to confine the privilege to reports of parliamentary and other proceedings in this country, and therefore extends the privilege to cover reports of legislative, court and other public proceedings, and official publications on a world wide basis. These reports will have the same privilege as reports of UK proceedings already have under the 1952 Act. The categories of report which are privileged, subject to explanation or contradiction,

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93 Chapter 9, *Reforming Defamation Law and Procedure* July 1995

are also enlarged and modernised. This is broadly in line with the recommendations of the Faulks Committee, as indorsed by the Neill Report, with a capacity for further modernisation as it becomes necessary. This likely need is illustrated by the fact that the Faulks Committee recommended, in 1975, that the privilege should apply to reports of the adjudications, statements etc issued by several bodies, such as the Press Council, which have now ceased to exist but been superseded by new bodies.

ii Extent

Clause 16 and **Schedule 1** would apply throughout the United Kingdom.

J. Financial Effects and Business Compliance Costs of the Bill

The Explanatory and Financial Memorandum to the Bill states that:

> The effect of the Bill will be to simplify and streamline the procedure in defamation cases and to encourage earlier settlement, so reducing the cost and the number of cases decided by the court. There may be some increase in the number of claims made, because some people who have been defamed are now deterred from proceeding by fears that the costs will be excessive.

and:

> There are no significant business compliance costs. *Clause 1* will reduce the risk of printers, distributors and others being held liable when they have unknowingly contributed to the publication of defamatory material. There should be a corresponding reduction in the cost of insuring against the risk of liability for libel.

There has, however, been some controversy over whether the result of the Bill's reforms, in particular, the offer of amends defence and the summary procedure, will in fact be to reduce the number of cases going to court and over the effect of the innocent dissemination defence on distributors. These issues were discussed in Parts III B, III E and III A respectively of this Paper.

K. Commencement

Clause 20 sets out the commencement provisions. The clauses relating to innocent dissemination, the limitation period, evidence of convictions, abolition of the rule in *Scott v*

Simpson, evidence concerning proceedings in Parliament would come into force two months after enactment. The remaining provisions would come into force by order.

IV Other Issues not in the Current Bill

A. Gagging Writs

On Second Reading Lord Simon of Glaisdale, a former Law Lord, raised the subject of "gagging" writs. He said that "they are generally felt, and especially recently, to shut out information which if it had been published would have precluded a great deal of loss and scandal."[94]

In Committee Lord Lester sought to introduce an amendment on behalf of himself and Lord Simon which would have provided for relief (including damages) to be given by the court in the event that a writ was threatened or issued without reasonable cause alleging defamation. Lord Lester said:[95]

> The amendment follows from a point raised by the noble and learned Lord during the Second Reading debate; namely, the notorious practice by some rich and powerful individuals in the commercial world and elsewhere to issue groundless or so-called gagging writs to suppress damaging information about themselves or their malpractices from the public. One of the most notorious examples was the practice of the late Robert Maxwell. He was able to take advantage of the fact that under the law of libel, as under no other branch of the law of tort, the burden is on the defendant to discharge the effective burden of disproving that the words published or to be published are false. That problem would be solved if the burden of proof were shifted. That is the subject of one of my later amendments. On the assumption that the burden remains upon the defendant, I submit that it is fair and reasonable to provide the defendant with an effective remedy for the unwarranted and groundless use of gagging libel writs.

Both Lord Williams of Mostyn and the Lord Chancellor recognised the possibility of a mischief but both took the view that it was a mischief that could be resisted. The amendment was withdrawn.

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94 HL Deb vol 570 c604 - 8.3.96

95 HL Deb vol 571 c236-7 - 2.4.96

Lord Lester and Lord Simon returned to the mater on report and the Lord Chancellor undertook that his Department would consider the matter further.[96]

B. Public Figure Defence

During the Second Reading debate Lord Williams of Mostyn asked whether the Government had a concluded view about the public figure defence (known as the "Sullivan" defence after an American case[97]).[98] Such a defence means that if a person is in public life and is properly described as a public figure, he or she cannot succeed in defamation unless malice can be proved and demonstrated against the defendant. Lord Alexander of Weedon, a former chairman of the Bar Council, said that he had grave doubts about the desirability of moving toward a Sullivan defence. He said that the press have ample ability to draw to the public's attention facts which they consider affect the conduct of a person in public office and that some of the facts they draw to the public's interest are only doubtfully in the public interest.

The question of a Sullivan defence was considered by the Neill working group[99] and it was not in favour of its introduction in the UK. They took the view that "standards of care and accuracy in the press are ... not such as to give any confidence that a "Sullivan" defence would be treated responsibly" and that it 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 "public figure". They concluded that the media were adequately protected by the defences of justification and fair comment.

The working group's conclusion was endorsed by Lord Inglewood on winding up the Second Reading debate and he made particular reference to the different culture in the United States.[100]

C. Reversing the Burden of Proof

At Committee stage Lord Lester sought to introduce an amendment to reverse the burden of proof in defamation cases. At present damage is presumed which means that the defendant must prove his case whereas generally in civil proceedings it is the plaintiff who must prove his case. Lord Lester said that the existence of the rule had important consequences for the

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96 HL Deb vol 571 c643 - 16.4.96

97 *New York Times v Sullivan* (1964) 376 US 254

98 HL Deb vol 570 c579 - 8.3.96

99 section XIX *Report on Practice and Procedure in Defamation* July 1991

100 HL Deb vol 570 c607-8 - 8.3.96

defence of libel actions and said that "villains" can (and frequently do) recover substantial damages without having to show that what has been published about them is false. He said that only two arguments had ever been given for the present incidence of the burden of proof: the deterrent argument as expressed by the Faulks Committee that the rule tends to inculcate a spirit of caution in publishers of potentially actionable statements and the argument that the plaintiff cannot be expected to prove a negative.

Lord Williams of Mostyn did not support the amendment on the basis that the scales are often uneven in defamation cases where the plaintiff is often a private person who cannot get legal aid and the defendant is often a wealthy corporation.

The Lord Chancellor was not in favour of the amendment either. He commented that the Neill working group had pointed out that it is normally the plaintiff who is the accused and who should be presumed innocent of the defamatory charge unless the defendant can prove that he was guilty.

Lord Lester withdrew the amendment.

D. Death of a Party to Defamation Proceedings

The publication of defamatory words about someone who is already dead cannot be the subject of a legal proceedings under the present law. The Faulks Committee recommended a right of action, available to certain close relatives for five years after the person's death, limited to a claim for a declaration that the subject matter complained of was untrue, an injunction against repetition and costs.[101] In addition the Committee recommended that a cause of action in respect of defamation should survive against the estate of the deceased and that where the person defamed has started an action but has died at any item prior to judgement his personal representative should be entitled to carry on the action to the extent of recovering both general and special damages.

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[101] para 423,Cmnd 5909 1975

On 25 October 1990 the Lord Chancellor issued a consultation paper on the rules under which an action for defamation cannot survive the death of either party to it. The consultation paper considered the arguments for and against the rule and put forward a number of options. However in a written answer of 14 May 1991[102] the Lord Chancellor announced that the responses to the consultation paper had disclosed "widely diverging" views as to whether or not it would be fairer to allow proceedings to be started or continued in the absence of a party who has died. He said that the response had not persuaded him that the present rule should be changed. This response was endorsed by the Neill working group in its *Report on Practice and Procedure in Defamation.*[103]

The issue of death of a party in defamation proceedings was not raised during the Lords debates on the current Bill.

V Scotland

Although the law of defamation is substantially the same in Scotland as in England and Wales, there are certain procedural differences in Scotland which mean that some of the problems that are perceived in the English system do not arise. For example, a pursuer in Scotland must state at the outset the sum of damages which he claims and although he may amend this sum as the action proceeds the court cannot award him more than the final specified figure in making its judgment. This means that the very high and unpredictable awards that have been made in English cases are unlikely to arise in Scotland but in any event the majority of cases are heard in the Sheriff Courts (where the Sheriff sets the amount of the award) rather than in the Court of Session by way of jury trial.

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[102] HC Deb vol 528 c465-66WA - 14.5.91

[103] July 1991

Appendix

Lords Debates:

Second Reading	HL Deb vol 570 c576ff, 8 March 1996
Committee Stage	HL Deb vol 571 c211ff, 2 April 1996
Report Stage	HL Deb vol 571 c628ff, 16 April 1996
Third Reading	HL Deb vol 572 c17ff, 7 May 1996

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