Defamation Bill

House of Lords Second Reading

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Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

2. JUSTICE has long pressed for changes to the English law of defamation. We are therefore pleased to give our support to the Private Members' Bill on Defamation introduced by Lord Lester of Herne Hill QC. Although we think there is scope to go further in addressing the various problems that beset the current law, we welcome the Bill as an important first step in rebalancing the law on defamation in favour of greater freedom of expression.

Problems with the current law

3. For several decades, JUSTICE has argued for various changes to the law of defamation in order to better protect freedom of expression. In 1965, for instance, we published *The Law and the Press* which recommended, among other things, the introduction of:[1]

> a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true

In *Freedom of Expression and the* Law, the 1990 report of a JUSTICE committee chaired by Lord Deedes stated that freedom of expression was 'our bedrock'', something that should be restricted 'only when absolutely necessary for limited purposes'.[2] Although we noted that 'freedom of expression has long been recognised as an important value in this country', we also speculated that 'perhaps we have grown careless of its value', noting the increasing trend towards restrictions upon print media and broadcasting.[3] We expressed concern that the government and the judiciary had 'grown progressively more careless about the principles

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[1] JUSTICE and the British Committee of the International Press Institute, *The Law and the Press* (1965), recommendation 6. This defence was available if the defendant had published a 'reasonable letter or statement by way of explanation or contradiction' at the claimant's request.

[2] JUSTICE, *Freedom of Expression and the Law,* p1 and para 1.5. See also para 1.9: '[t]he fundamental rule should be that the free expression of ideas and information is only to be restricted for the most pressing of reasons, and that restrictions must be only those that are necessary for those reasons. That general principle should be made specific by the revival of Blackstone's description that freedom of the press should be an absence of prior restraint' [emphasis added].

[3] Ibid, para 1.8.

which should govern all limitations on free expression'.[4] In particular, we described the law on defamation as 'one of the pressing issues of law and freedom of expression':[5]

> The lottery of libel is out of control. At one extreme the absence of legal aid for libel means that the poor (and not-so-poor) can be libelled with impunity and have no means of remedy. At the other extreme, the level of libel damages (and settlements in anticipation of them) make libel trials a very expensive game …. *There must be a better way of protecting the right to reputation*.

4. While several things have changed in the twenty years since our 1990 report, including the availability of legal aid, many of the essential problems remain the same and even some new ones have emerged. Notwithstanding such developments as the judgment of the European Court of Human Rights in *Steel and Morris v United Kingdom*[6] (which held that the blanket denial of legal aid to defendants in libel claims was a breach of the right to a fair hearing under article 6 ECHR), the introduction of conditional fee agreements for libel claimants, and the judgments of the House of Lords in *Reynolds v Times Newspapers*[7] and *Jameel v Wall Street Journal*[8] (establishing a defence of qualified privilege concerning matters of public interest), the English law on defamation still poses a substantial interference with press freedom and with freedom of expression in general. Specifically:

   - The level of libel damages remains extraordinarily high. Despite various attempts at reform over the years,[9] we find it astonishing that it continues to be possible for a successful claimant to recover more for damage to reputation than, for example, the loss of a limb.[10]

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[4] Ibid, p1.

[5] Ibid, paras 2.16 and 2.17. Emphasis added.

[6] (2005) 41 EHRR 22.

[7] [1999] 3 All ER 961.

[8] [2006] UKHL 44.

[9] Section 8(2) of the Courts and Legal Services Act 1990 enables the Court of Appeal to substitute for an 'excessive' award by a jury 'such sum as appears to the Court to be proper'. In *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, the European Court of Human Rights held that the jury's award of £1.5 million in damages following a defamation claim was a disproportionate interference with the right to freedom of expression under article 10 ECHR.

[10] According to two academic defenders of the existing law, 'the Court of Appeal now exercises considerable control over the level of damages, with the effective maximum now just over £200k. Moreover, the award of even half that amount is a rare occurrence' (Mullis and Scott, 'Something Rotten in the State of English Libel Law?', January 2010). In JUSTICE's view, however, the fact that libel awards only infrequently exceed £100,000 is hardly evidence of either proportionality or restraint. We note, for instance, that the average award for the loss of a leg is approximately £70,000 (see Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 9th ed (Oxford University Press). In the circumstances, we do not think the proposal of English PEN and Index of Censorship to impose a cap of damages of

- Costs in defamation cases are similarly excessive,[11] and out of all proportion to the general complexity of the law in this area: a 2008 study by the Programme in Comparative Media Law and Policy at the Oxford Centre for Socio-Legal Studies found that England and Wales was by far the most expensive European jurisdiction in which to conduct defamation proceedings.[12] This has been exacerbated by the introduction of conditional fee agreements (CFAs) in defamation cases. Originally intended to address the lack of legal aid for poorer claimants (one of the points we highlighted in our 1990 report), we have seen little evidence to suggest that CFAs have increased access to justice in this area. On the contrary, it seems to us that claimants in defamation cases are by-and-large those same private individuals and organisations who would have been able to afford to bring a defamation claim in any event.

- The reversal of the ordinary burden of proof, which obliges defendants to prove that their statements were *not* defamatory, combined with the high cost of defending libel claims and the threat of substantial damages, gives rise to enormous pressure upon defendants to settle out of court rather than risk an adverse finding. More generally, it gives rise to a potential chilling effect on all those who would publish or express critical views that may be taken by others to be defamatory.

- Notwithstanding the establishment of the *Reynolds* defence of qualified privilege for so-called 'responsible journalism', and its further clarification by the House of Lords in *Jameel v Wall Street Journal*, we remain concerned that the scope of this defence may be too narrow, and that the lower courts may continue to apply it in a conservative manner.

£10,000 to be an unreasonable one (see *Free Speech Is Not For Sale: The impact of English libel law on freedom of expression*, 2009 at p8).

[11] See e.g. most recently the judgment of the Court of Appeal in *Fiddes v Channel Four Television* [2010] EWCA Civ 730, endorsing Tugendhat J's account of the 'vast costs in this case' as a 'fair description on our understanding of the figures' (para 13). At first instance, Tugendhat J accepted in principle that 'the level of costs in libel proceedings could in some cases have a possible chilling effect on freedom of speech' (para 40). The Court of Appeal, including the Master of the Rolls, unanimously held that this was a 'perfectly proper' factor for the judge to have taken into account when deciding whether to hold the trial with a jury (para 42).

[12] Programme in Comparative Media Law and Policy at the Oxford Centre for Socio-Legal Studies, *A Comparative Study of Costs in Defamation Proceedings across Europe* (December 2008, p187. See also Ministry of Justice, *Report of the Libel Working Group* (March 2010), referring to the 'widespread perception that the costs of [defamation] proceedings are prohibitive' (para 89).

- Despite the skepticism of some legal figures,[13] we have no doubt that forum-shopping and 'libel tourism' – whereby foreign claimants seek to establish a UK readership or audience, however small, in order to bring a defamation claim within the jurisdiction of English courts – is a serious problem, particularly for NGOs and investigative journalists reporting on matters of public interest outside the UK. It is shameful that the threat of a libel action in English courts should be used to stifle freedom of expression abroad. Nor is England's reputation as a 'mecca for aggrieved people from around the world who want to sue for libel' anything to be proud of.[14] One factor contributing to the growth of libel tourism has been the rule in the Duke of Brunswick's case from 1849,[15] which – in the age of the internet and online archives – has greatly multiplied the opportunities for foreign claimants to find instances of 'publication' here in the UK. In December 2009, we argued for the rule to be abolished on the basis that it undermined legal certainty and was impractical given the nature of modern media.[16]

5. In light of these problems, JUSTICE is pleased to support the Private Members Bill introduced by Lord Lester of Herne Hill QC. While we think there is certainly scope to go further in addressing the problems described above, we welcome the Bill as an important first step towards rebalancing the law on defamation in favour of greater freedom of expression.

Clause 1 – Responsible publication on matters of public interest

6. Clause 1 provides a statutory defence to an action for defamation where the defendant can show that the statement in question was published for the purposes of discussing a matter of public interest and 'the defendant acted *responsibly* in making the publication' (clause 1(1)(b), emphasis added).

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[13] See e.g. the comments of Lord Hoffmann, 'Libel Tourism', February 2010, at para 28 '[T]he complaints about libel tourism come entirely from the Americans and are based upon a belief that the whole world should share their view about how to strike the balance between freedom of expression and the defence of reputation …. If the *Ehrenfeld* case or the *Don King* case is the best that the campaigners for a change in our law can do, their case seems to me far from overwhelming'. But see contra, the speech of Lord Steyn, 'Defamation and Privacy: Momentum for substantive and procedural change?', 3rd annual Boydell Lecture, 26 May 2010 at p4: 'Some libel specialists question that libel tourism is a significant problem. *In my respectful view the concerns of the Lord Chief Justice are well-founded.* A combination of the multiple publication rule, and the even a small number of internet readers of the United Kingdom, has created the risk of a cause of action here, and opened the door to libel tourism' [emphasis added].

[14] 'Britain, Long a Libel Mecca, Reviews Laws' by Sarah Lyall, *New York Times*, 10 December 2009: 'England has long been a mecca for aggrieved people from around the world who want to sue for libel. Russian oligarchs, Saudi businessmen, multinational corporations, American celebrities — all have made their way to London's courts, where jurisdiction is easy to obtain and libel laws are heavily weighted in favor of complainants'.

[15] *Duke of Brunswick v Harmer* (1849) 14 QB 185.

[16] JUSTICE response to *Defamation and the Internet: The multiple publication rule:* consultation paper CP 20/09 (December 2009).

7. Clause 1(3) requires the court to assess the question of whether the defendant acted responsibly by reference to 'all the circumstances of the case'. These *may* include :

    - what steps (if any) were taken by the defendant were taken to verify what was published (clause 1(4)(d));

    - if appropriate, whether the defendant gave the claimant an opportunity to comment before publication (clause 1(4)(e)); and

    - the extent of the defendant's compliance with any relevant code of conduct or other relevant guidelines (clause 1(4)(g)).

8. Clause 1 essentially codifies the existing defence of qualified privilege for publication in the public interest as laid down by the House of Lords in *Reynolds* and *Jameel*. Having first called for the establishment of such a defence more than forty five years ago, we find it deeply unfortunate that it should have taken so long to be recognised by the courts. We share the view expressed by Lord Steyn, previously chair of JUSTICE, in May this year:[17]

    > Optimism about the practical utility of *Reynolds* privilege unfortunately proved misplaced. The great majority of *Reynolds* defences failed at first instance. The decision in *Reynolds* was criticised by the New Zealand Court of Appeal in *Lange v Atkinson and Australian Consolidated NZ Limited* [2003] 4 LRC 596, a case involving again a suit in defamation by a public figure. It held that the *Reynolds* decision altered the law of qualified privilege in a way which added to the uncertainty and chilling effect of the existing law of defamation …. As a matter of precedent, *Jameel* did not amount to the much-needed critical re-examination of Reynolds. Unfortunately as matters stand, the Reynolds privilege will continue to complicate the task of journalists and editors who wish to explore matters of public interest and it will continue to erode freedom of expression.

9. Following *Jameel*, therefore, we think it important that the public interest defence should be construed as broadly and as generously as possible. In particular, we caution against treating the concept of responsibility in clause 1(1)(b) and 1(3) in a restrictive manner, and that the

[17] Lord Steyn, 3rd annual Boydell lecture, n13 above, pp5-8.

criteria in clause 1(4) should be regarded as merely illustrative rather than exhaustive. As Lord Bingham said of the factors listed by Lord Nicholls in *Reynolds*:[18]

> He [Lord Nicholls] intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, *and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege*.

10. We also think it is crucial that the availability of the public interest defence should not be limited to professional journalists. The importance of a free press lies in its contribution to the free and open exchange of information, ideas and opinions. In JUSTICE's view, this is not an activity that depends on being an accredited member of some particular profession, or having a contract of employment with a media organisation. Accordingly, we take the view expressed by Lord Hoffmann in *Jameel* that the defence of public interest should be 'available to anyone who publishes material of public interest in any medium',[19] whether they be a reporter for an international news channel, an NGO or an unpaid blogger. Given the increasing importance of the internet as a source for news and reportage, we think it would be impractical to limit the scope of the defence to paid journalists only. This also reinforces our earlier point about the concept of 'responsible journalism' being applied in as broad and as flexible a manner as possible. The resources available to undertake fact-checking and the like will obviously differ depending on whether the defendant is a major newspaper, for instance, or someone who blogs on the internet in their spare time. It would be unjust to require the latter to meet the standards that can reasonably be expected of the former.

Clause 2 – Honest opinion

11. Under clause 2, the old defence of fair comment is given the new name 'honest opinion'. As the Court of Appeal noted in its recent judgment in *British Chiropractic Association v Singh,* the term 'fair comment' is misleading: [20]

> In an area of law concerned with sometimes conflicting issues of great sensitivity involving both the protection of good reputation and the maintenance of the principles of free expression, it is somewhat alarming to read in the standard textbook on the Law of Libel and Slander (Gatley, 11th edition) in relation to the defence of fair

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[18] *Jameel*, n8 above, para 33. See also Lord Hoffman at para 56: 'Lord Nicholl's well-known non-exhaustive list of ten matters … are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds* they can become ten hurdles at any of which the defence can fail. That is how Eady J treated them'.

[19] Ibid, para 54.

[20] [2010] EWCA Civ 350, paras 35-36. Emphasis added.

> comment, which is said to be a 'bulwark of free speech', that '…the law here is dogged by misleading terminology… 'Comment' or 'honest comment' or 'honest opinion' would be a better name, but the traditional terminology is so well established in England that it is adhered to here'.
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> We question why this should be so. The law of defamation surely requires that language should not be used which obscures the true import of a defence to an action for damages. Recent legislation in a number of common law jurisdictions - New Zealand, Australia, and the Republic of Ireland - now describes the defence of fair comment as 'honest opinion'. It is not open to us to alter or add to or indeed for that matter reduce the essential elements of this defence, *but to describe the defence for what it is would lend greater emphasis to its importance as an essential ingredient of the right to free expression.* Fair comment may have come to 'decay with … imprecision'. 'Honest opinion' better reflects the realities.

Clause 2 therefore brings English law in line with the majority of other common law jurisdictions.

Clause 3 – Establishing a defence of honest opinion

12. As with clause 1, clause 3 essentially restates the existing defence of fair comment (now renamed 'honest opinion'). We welcome this codification on the grounds that it is likely to promote greater certainty. To some extent, as the Court of Appeal's judgment in *Singh* shows, the fault of the existing law lies not so much in the legal principles themselves but in how they have been applied by the courts. In Singh's case, the judge at first instance had concluded that the defendant's expression of opinion (that various treatments offered by members of the Chiropractic Association were bogus) was to be treated as a factual claim (i.e. members of the Association offered the treatments knowing that they were bogus). Accordingly, although the defendant had only alleged foolishness, he was required to prove deceit. As the Court of Appeal held, the court below was mistaken:[21]

> the material words, however one represents or paraphrases their meaning, are in our judgment expressions of opinion. The opinion may be mistaken, but to allow the party which has been denounced on the basis of it to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth. Milton, recalling in the *Areopagitica* his visit to Italy in 1638-9, wrote:

[21] Ibid, para 23.

> 'I have sat among their learned men, for that honour I had, and been counted happy to be born in such a place of philosophic freedom, as they supposed England was, while themselves did nothing but bemoan the servile condition into which learning among them was brought; …. that nothing had been there written now these many years but flattery and fustian. There it was that I found and visited the famous Galileo, grown old a prisoner of the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought.'
>
> That is a pass to which we ought not to come again.

Although the courts ultimately arrived at the correct result, we note that the defendant was put to costs of approximately £200,000 in defending the claim.[22] The *Singh* case is as good an illustration as any of the propensity of many libel claimants to use the English law of defamation as a means to silence unwelcome comment. In the circumstances, while we welcome the codification set out in clause 3, we believe that there is a principled case for going further and establishing a broader defence of honest opinion, to make clear to the courts that robust expressions of opinion should not readily be construed as factual claims.

Clause 4 – Truth

Clause 5 – Establishing a defence of truth

13. Just as the old defence of fair comment has been renamed as 'honest opinion' by clause 2, the old defence of justification is renamed 'truth' by clause 4. Again, the Bill substantially restates the existing law, in that a defendant has a defence if he or she can show that the allegedly defamatory statement is 'substantially true' (clause 5(2)(a)).

14. For the reasons outlined earlier,[23] we would prefer the burden of proof in defamation cases to be put on the claimant rather than the defendant, as they are in all other civil claims. We note that this is the case in the United States and most European countries, and it does not appear to us that individual reputations in those places are much the worse for wear because of it. Nonetheless, we welcome clause 5 as an important first step in clarifying the existing law.

Clause 6 – Reports of court proceedings protected by absolute privilege

15. Clause 6 restates the existing protection given to fair and accurate reporting of court proceedings, but expands the courts whose proceedings may attract such privilege to include

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[22] See e.g. The Times, 'Science writer Simon Singh wins bitter libel battle', 16 April 2010.

[23] See p 6 above.

all foreign courts, and the increasing number of international courts and tribunals including the International Criminal Court, the various international criminal tribunals and the European, Inter-American Court and African Courts of Human Rights. We welcome this extension.

Clause 7 – Reports of certain Parliamentary matters protected by absolute privilege

16. Clause 7 restates the absolute privilege attaching to the reporting of parliamentary proceedings, including those of the Welsh and Northern Ireland Assemblies (the Bill does not address the Scottish law of defamation, which is different to that of England and Wales).

17. This privilege is particularly important in light of the October 2009 injunction obtained on behalf of Trafigura against the Guardian, which astonishingly purported to restrict the Guardian from reporting, among other things, a question in Parliament asked by Paul Farrelly MP. As Trafigura's solicitors subsequently told a parliamentary committee:[24]

> [O]n the wording of the Order as it then stood, it was clear to us that, absent a variation of its terms, it would amount to a breach and therefore a contempt for the *Guardian* to publish, as it proposed, information about Mr Farrelly's parliamentary question, referring to the existence of the injunction.

The Lord Chief Justice subsequently said:[25]

> I am speaking entirely personally but I should need some very powerful persuasion indeed - and that, I suppose, is close to saying I simply cannot envisage - that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament. Or that any judge would intentionally formulate an injunction which would purport to have that effect.

We agree with the view expressed by the House of Commons Committee on Culture Media and Sport that the 'free and fair reporting of proceedings in Parliament is a cornerstone of a democracy'.[26] We therefore particularly welcome the provision in clause 7(2) of the Bill that – for the avoidance of doubt - requires the court to stay any proceedings where the defendant is able to show that they would 'prevent or postpone' the reporting of parliamentary proceedings.

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[24] House of Commons Committee on Culture, Media and Sport, *Press Standards, Privacy and Libel* (HC 532: February 2010), para 99.

[25] Statement of the Lord Chief Justice, 20 October 2009.

[26] Note 24 above, para 101.

Clause 8 – Other reports etc protected by Parliamentary privilege

18. Clause 8 extends the scope of qualified privilege to fair and accurate reporting of a very wide range of proceedings set out in Schedule 1 of the Bill, including proceedings of foreign legislatures, international organisations, public inquiries, academic conferences, evidence that has been made public in court proceedings overseas, meetings of international sports bodies, publicly listed companies, local authorities and the like. Some of these were already covered under section 15 and Schedule 1 of the Defamation Act 1996, but it also goes considerably further. In JUSTICE's view, clause 8 is a valuable provision that will, among other things, reduce the threat of needless litigation brought in respect of information that is already in the public domain, or at least should be.

Clause 9 – Responsibility for publication

19. Clause 9 provides a defence for broadcasters and 'facilitators' in circumstances where they have merely acted as a conduit for defamatory statements made by another. The category of 'facilitators' – new to English law – is clearly intended to protect Internet Service Providers and the like from liability, unless they have been given specific notice of the defamatory material and have been requested to remove it (clause 9(2)). This seems to us an entirely sensible measure given the potentially extremely broad liability of those who host websites for discussions by others.

Clause 10 – Multiple publications

20. Clause 10 abolishes the rule in the Duke of Brunswick case, [27] providing instead that the first occasion on which material becomes publicly available shall be treated as the date of publication for all purposes (clause 10(1)(b)). In our response to the Ministry of Justice consultation on the multiple publication rule last December, we argued for the rule to be abolished on the basis that it undermined legal certainty and was impractical given the nature of modern media.[28] We are therefore pleased to support the approach taken in clause 10.

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[27] See n15 above.

[28] JUSTICE response to *Defamation and the Internet: The multiple publication rule:* consultation paper CP 20/09 (December 2009).

Clause 11 – Action for defamation brought by body corporate

Clause 12 – Striking out where claimant suffers no substantial harm

21. In cases where an action for defamation is brought by a company rather than a natural person, clause 11 provides that the cause of action must show that the allegedly defamatory statement has, or is likely to cause, 'substantial financial loss'.

22. Similarly, clause 12 provides that an action in defamation must be struck out by the court unless the claimant is able to show that the allegedly defamatory statement has caused, or is likely to cause, 'substantial harm' to the claimant. Clause 12(2) gives the court a discretion to refuse striking out an otherwise ineligible claim in 'exceptional circumstances' where it would be in the interests of justice.

23. We strongly support these provisions. It is well-understood that the reverse burden of proof, together with the threat of substantial damages and costs, produces tremendous pressure on defendants to settle an otherwise meritorious case for fear of an adverse ruling. As Lord Steyn noted recently:[29]

> It is (I believe) a fact that very often that British newspapers, when sued in libel, give up and settle when one would not expect them to do so. The reasons for this state of affairs are to be found in centuries old strict liability in defamation law. Libel law is tilted against the media.

In light of this problem, we think the requirement on claimants to show substantial harm (or, if a corporation, 'substantial financial loss') is a sensible and proportionate way of limiting the number of libel claims that may be brought by wealthy or CFA-aided claimants for weak or even frivolous reasons.[30]

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[29] See n13 above, p 3.

[30] See e.g. *Khader v Aziz and others* [2010] EWCA Civ 716 at para 32 per May P: 'The appellant's claim on the first publication is at best fraught with difficulties. But even if it were to succeed at trial, it would not be worth the candle. She would at best recover minimal damages at huge expense to the parties and of court time. This would be so, even if she and those representing her were to adopt for the future a hitherto elusive economical approach to the amount of paper and time which the case might need. As things are, the parties' expenditure must vastly exceed the minimal amount of damages which the appellant might recover even if she were to succeed in overcoming all the obstacles in the path of such success. The judge was correct to conclude that this claim is disproportionate and that it should be struck out as an abuse'.

Clause 13 – Harmful event in cases of publication outside the jurisdiction

24. Clause 13 seeks to limit the opportunities for libel tourism by requiring the court to take account of the extent of publication outside England and Wales. Clause 13(2) provides that no harm is deemed to take place in this jurisdiction unless 'substantial harm' to the claimant's reputation here can be shown. In JUSTICE's view, this is an entirely proportionate restriction on the right of foreign claimants to bring an action for defamation in England and Wales, and one that helps safeguard the importance of freedom of expression both here and abroad.

Clause 14 – Reversal of presumption of trial by jury in defamation proceedings
Clause 15 – Determining an application for trial by a jury

25. Clause 14 reverses the long-standing statutory presumption that actions in defamation will be heard by a jury. Instead, clause 15(1) gives the judge the power to order a jury trial where satisfied that it is in the interests of justice to do so. It is also open to either party to apply to the court for the case to be heard with a jury (clause 15(2)), and the court may have regard to a variety of factors including:

> the extent to which early resolution of any matter (for example, as to the meaning of the words complained of) is likely to facilitate settlement of the action, improve active case management or assist in achieving a just and equitable outcome (clause 15(3)(e)).

26. In the recent Court of Appeal judgment in *Fiddes v Channel Four Television* [2010] EWCA Civ 730, the Court upheld the trial judge's ruling that it was appropriate to hear the case without a jury in light of the 'vast costs' that had already been incurred. Although we believe that juries are an important safeguard against unfairness and injustice, we agree that the generally high cost of defamation proceedings means that ending the presumption in favour of jury trial is a reasonable step. We would, however, suggest that greater weight should be given to a defendant's application for a jury than a claimant's. After all, if the defendant is going to have the burden of proving his case, we think it only reasonable that greater weight should be given to his view that a jury is required.

Clause 16 – Evidence concerning proceedings in Parliament

27. The 1688 Bill of Rights provides, among other things, that:

> the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

28. Clause 16(2) allows the Speaker of either House of Parliament to waive parliamentary privilege as it applies to defamation proceedings, at least to allow evidence of proceedings in Parliament to be given in open court. Inasfar as clause 16 does *not* seek to remove the absolute immunity of members of Parliament for things said in Parliament (clause 16(4)), we think this is a sensible clarification.

ERIC METCALFE
JUSTICE
7 July 2010