

COLLINS ON DEFAMATION

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A. Exordium

The law of defamation—the umbrella term for the torts of libel and slander—is the highly imperfect mechanism by which the law attempts to reconcile the competing interests of the protection of reputation and freedom of expression. It has been memorably described as the ‘Galapagos Islands Division of the law of torts’, having ‘evolved all on its own’ with ‘legal forms and practices unknown anywhere else’ and ‘its own dialect and adopted esoteric customs’.¹ The bigger problem, however, for students, practitioners, and courts struggling to grapple with its many complexities is that the law of defamation is an unsatisfying and unsatisfactory mélange of principles with no coherent underlying thread. 1.01

The principles of the law of defamation have evolved over centuries, for the most part in reaction to the complaints brought before common law courts. Those complaints are the relatively small proportion of defamation disputes that litigants and their advisers have been unable to resolve without the aid of an umpire. Very often, those disputes are between high-profile public figure claimants and mainstream media organization defendants. The 1.02

¹ David Ipp, ‘Themes in the Law of Torts’ (2007) 81 *Australian Law Journal* 609, 615.

first instance judges who manage and determine defamation actions are drawn disproportionately from small defamation bars of practitioners schooled in the arcane intricacies of the jurisdiction. Statutory reforms are usually a response to a perception that the common law, as it has evolved from that small subset of disputes, requires correction. Each of these factors has introduced distorting elements to the development of the law.

- 1.03** Too often, defamation law is a tool in the hands of litigants. Publishers, explicitly or implicitly, use the threat of costly and time-consuming litigation to deter worthy claimants. Tenacious, mad, or well-resourced claimants, and impecunious litigants with nothing to lose, use the same threat to deter publishers from exposing matters they would prefer not to see the light of day. The costs incurred by successful claimants routinely exceed the damages they are awarded, exposing them to the risk of being left out-of-pocket for the privilege of having successfully prosecuted their claims. Defendants, who will rarely have an offsetting counterclaim, are almost invariably out-of-pocket, and often significantly so, even where they are wholly successful. Losing a defamation claim, whether as claimant or defendant, can be ruinous. Bringing a defamation claim is not for the faint of heart; defending a claim on principle is financially irrational.
- 1.04** Matters of real consequence are, however, almost always at stake in defamation actions. They are the juridical stage on which important questions of public policy in a civilized society are played out: how to vindicate reputations when they are damaged, how to encourage freedom of expression when it advances the public interest, and how to curb abuses of that freedom, particularly by the press: in short, how to balance fundamental rights and freedoms that are inherently in conflict.

B. Objective

- 1.05** This book contains a systematic analysis of the principles of English defamation law, with particular regard to their application to modern media of communication.
- 1.06** The principal motivation for its preparation was the passage of the Defamation Act 2013. That Act effects wide-ranging changes to the law of defamation in England and Wales. It will take a considerable time to tease out its implications.
- 1.07** The objective of this book is to present a coherent exegesis of the English law of defamation as a whole, by integrating the 2013 reforms with the surviving common law principles and earlier statutory modifications. An attempt has been made to predict the likely operation of the modifications to the law implemented by the 2013 Act in a way that is consistent with the words used by parliament interpreted in light of the mischiefs the statute is supposed to cure,² the rights and freedoms in the European Convention on Human Rights (ECHR) and, so far as possible, the harmonious and principled operation of this branch of the law.
- 1.08** A secondary purpose of this book is to propound a modern explanation of the principles of defamation law appropriate to an era in which instantaneous, global communication has become effortlessly available throughout the developed world, and to grapple with the challenges that that revolution in communications has exposed for the application of legal

² See paras 1.58–1.61.

principles that date back, in many important respects, to the days of the town crier and Gutenberg's printing press.

C. Origins and Influences

Initially, libel was principally a crime, often prosecuted in the Star Chamber, while slander was a civil cause of action.³ By 1670, a distinction had been drawn in the common law courts between 'general words spoken once, without writing' and the same words 'being writ and published'; only the latter being actionable because they contained 'more malice, than if they had been once spoken'.⁴ **1.09**

Almost a century-and-a-half later in *Thorley v Kerry*, Mansfield CJ identified the obvious flaw in that rationale, observing that 'an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter'. Had he not taken the view, perhaps wrongly, that the distinction between 'written and spoken scandal' had been 'established by some of the greatest names known to the law' over more than a century, he would have had 'no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken'.⁵ **1.10**

Following *Thorley v Kerry*, the modern distinction between libel and slander emerged: libel is usually in writing and is actionable per se; slander involves the spoken word and is actionable, with limited exceptions, only on proof of special damage.⁶ Save for the obligation to prove special damage in the case of most slanders, the torts are otherwise identical. In this book, the term defamation is used to refer to both torts. **1.11**

English defamation law has been periodically modified by legislation, most significantly in the 1840s,⁷ the 1880s,⁸ 1952,⁹ and 1996.¹⁰ The modifications effected by those legislation, however, are dwarfed by those to be found in the 2013 Act. **1.12**

Another important influence on the evolution of defamation law principles is the jurisprudence of the European Court of Human Rights, most significantly by reason of the domestic implementation of the ECHR by the Human Rights Act 1998. That jurisprudence has led to incremental changes to some principles of English defamation law. Other principles of defamation law may require calibration either generally, or in particular cases, to secure compatibility with the ECHR. **1.13**

³ Paul Mitchell, *The Making of the Modern Law of Defamation* (2005) 3–9; *Jones v Jones* [1916] 2 AC 481 (HL), 489–92; *Meldrum v Australian Broadcasting Co Ltd* [1932] VLR 425 (VSCFC), 430–2; *Watkins v Secretary of State for the Home Department* [2004] EWCA Civ 966, [2005] QB 883, paras 35–6.

⁴ *R v Lake* (1667–70) Hardres 470 (Ex), 145 ER 552.

⁵ *Thorley v Kerry* (1812) 4 Taunton 355 (CP), 365–6; 128 ER 367, 371. Mitchell (n 3) 8–9, contends that the authorities prior to *Thorley v Kerry* do not support the drawing of a bright distinction between written and spoken defamation, consisting in reality of 'one firm decision and a couple of passing references'.

⁶ See eg *Lumby v Allday* (1831) 1 Cr & J 301 (Ex), 305; 148 ER 1434, 1436; *Allsop v Allsop* (1860) 5 H & N 534 (Ex), 537, 538–9, 539; 157 ER 1292; *Jones v Jones* [1916] 2 AC 481 (HL), 490, 499–500, 506. The distinction between libel and slander is the subject of chapter 3.

⁷ Libel Act 1843; Libel Act 1845.

⁸ Newspaper Libel and Registration Act 1881; Law of Libel Amendment Act 1888.

⁹ Defamation Act 1952.

¹⁰ Defamation Act 1996.

D. Structure of the Law of Defamation

Elements of the cause of action

- 1.14** The cause of action for defamation is enlivened where claimants prove that defamatory material has been published of and concerning them.¹¹ A publication is a communication to at least one person other than the claimant in any form capable of signifying meaning, including the written and spoken word, symbols, pictures, visual images, and gestures.¹² A publication will be of and concerning the claimant if he or she is named, or otherwise identified in some way either generally or to persons with whom he or she is acquainted.¹³ A publication will be defamatory if it conveys a sufficiently serious¹⁴ imputation that, applying the standard tests, tends to lower the reputation of the claimant in the estimation of right-thinking members of society generally, or to cause others to shun and avoid the claimant, or to expose the claimant to hatred, contempt, or ridicule.¹⁵
- 1.15** English defamation law presumes publications that adversely affect a claimant's reputation to be false¹⁶ and, in most cases, to have caused damage.¹⁷

Defences

- 1.16** In most serious defamation cases, claimants will have little difficulty in establishing the elements of the cause of action, triggering the presumption that their reputations have been damaged. Most of the heavy lifting is done by defendants, who will seek to establish that they were doing no more than exercising a right to freedom of expression that is protected by law.
- 1.17** Freedom of expression is weighed in the balance mostly through the operation of a farrago of overlapping defences, the most important of which¹⁸ are truth,¹⁹ honest opinion,²⁰ and various forms of common law and statutory privilege.²¹ There are additional defences for secondary publishers of defamatory statements—persons other than the author, editor, or commercial publisher—such as distributors, operators of websites, and other intermediaries.²²

¹¹ In Scots law, there is no cause of action for defamation unless, in addition, the defamatory statement is false, and has been communicated with malice; that is, with the intention of causing injury. Each of these latter requirements is, however, presumed where the statement complained of is defamatory. The onus is on the defender to rebut the presumption of falsity by pleading a defence of *veritas* (justification): *Mackellar v Duke of Sutherland* (1859) 21 D 222 (CSIH), 227–9 (Clerk LJ). Malice must be affirmatively pleaded by the pursuer in a case where 'qualified privilege would properly be inferred from the narrative which would be bound to appear in the summons': *Pearson v Educational Institute of Scotland* 1997 SC 245 (CSIH), 252. See also *Shaw v Morgan* (1888) 15 R 865 (CSIH), 869–71; *Lyons v House* [2013] CSIH 46, para 28.

¹² See chapter 4.

¹³ See chapter 5.

¹⁴ See paras 6.38–6.56, chapter 7.

¹⁵ See chapter 6.

¹⁶ See para 8.01, but cf para 8.60.

¹⁷ See paras 7.35, 21.04. Special damage must be proved by the claimant in order to establish a cause of action only in cases involving slanders that are not actionable per se: see chapter 3.

¹⁸ Miscellaneous defences available to defendants in defamation actions are considered in chapter 18: consent; failure to accept an offer to make amends; apology and payment into court.

¹⁹ See chapter 8.

²⁰ See chapter 9.

²¹ See chapters 10 (absolute privilege), 11 (duty and interest form of qualified privilege), 12 (publication on matter of public interest), 13 (fair report forms of privilege), and 14 (peer-reviewed statements, etc).

²² See chapters 15 (operators of websites), 16 (innocent dissemination), 17 (Electronic Commerce Regulations).

Defamation actions must generally be brought within one year from the date on which the relevant cause of action accrued.²³ **1.18**

Remedies

The principal remedy afforded by the law—an award of damages²⁴—is a blunt instrument which is ill-adapted to what claimants generally want, namely to prevent publication in the first place, a prompt correction of the record, or to prevent future distribution of the offending statement.²⁵ Many of the reforms to defamation law, both historically and more recently, have been directed at encouraging the resolution of defamation disputes without recourse to litigation, or affording quicker, cheaper, and better targeted remedies to claimants.²⁶ **1.19**

E. Human Rights and the European Convention

Human Rights Act

Until the commencement of the Human Rights Act 1998 on 1 October 2000, the rights and freedoms in the ECHR did not form a direct part of the law of the United Kingdom, in the sense that they did not confer substantive rights capable of being enforced in the courts of the United Kingdom between private citizens.²⁷ The Human Rights Act introduced the rights and freedoms in the ECHR into domestic law.²⁸ **1.20**

Section 6(1) of the Human Rights Act makes it unlawful for public authorities, including courts and tribunals,²⁹ to act in a way which is incompatible with Convention rights.³⁰ In determining questions arising in connection with Convention rights, courts and tribunals must take into account various matters, including relevant judgments, decisions, declarations, and advisory opinions of the European Court of Human Rights, certain opinions and decisions of the European Commission on Human Rights, and certain decisions of the Committee of Ministers.³¹ United Kingdom courts must read and give effect to legislation, as far as possible, in a way which is compatible with Convention rights.³² **1.21**

Further, by section 12 of the Human Rights Act, where a court is considering whether to grant any relief which might affect the exercise of the article 10 right to freedom of **1.22**

²³ See chapter 19.

²⁴ See chapter 21.

²⁵ See chapter 20.

²⁶ eg the apology and payment into court procedure in the Libel Act 1843, s 2 and the Libel Act 1845, s 2 (see paras 18.12–18.14); the offer to make amends procedure in the Defamation Act 1996, ss 2–4 (see paras 18.03–18.11); the summary disposal procedure in the Defamation Act 1996, ss 8–10 (see paras 20.87–20.99); the power of courts to order the publication of summaries of their judgments in the Defamation Act 2013, s 12 (see paras 20.36–20.62); the power of courts to order the removal, or the cessation of distribution, of unlawful statements in the Defamation Act 2013, s 13 (see paras 20.63–20.78).

²⁷ *The Parlement Belge* (1879) 4 PD 129.

²⁸ Human Rights Act 1998, s 1(2).

²⁹ Human Rights Act 1998, s 6(3)(a).

³⁰ By the Human Rights Act 1998, s 1(1), the implemented rights are those set out in arts 2–12 and 14 of the ECHR, arts 1–3 of the First Protocol to the ECHR, and art 1 of the Thirteenth Protocol, as read with arts 16–18 of the ECHR.

³¹ Human Rights Act 1998, s 2(1).

³² Human Rights Act 1998, s 3(1).

expression,³³ the court must have particular regard to the importance of that right.³⁴ It must also have regard, where the material is journalistic, literary, or artistic in nature, to the extent to which the material has or is about to become available to the public, the public interest in the publication of the material, and any relevant privacy code.³⁵

- 1.23** Where a party to litigation claims that an adverse verdict would contravene or has contravened a Convention right, that party may rely on the Convention right concerned at first instance or on appeal.³⁶
- 1.24** Two articles of the ECHR, in particular, are relevant to the rights which are most often in conflict in defamation actions.

Freedom of expression

- 1.25** First, article 10 of the ECHR guarantees a right to freedom of expression, in the following terms:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- 1.26** The article 10 right to freedom of expression will invariably be affected where relief is granted against a defendant, including injunctive relief or damages, in a defamation action.
- 1.27** Article 10 inverts, in a sense, the tension that is inherent in the common law of defamation. Where a defamatory statement has been published of and concerning a claimant, the common law presumes that the statement is false,³⁷ and usually that the claimant's reputation has been damaged.³⁸ It is for the defendant to establish, by one or more of the available defences, that publication of the statement was a justifiable exercise of the defendant's right to freedom of expression. Article 10 of the ECHR, by contrast, starts with the fundamental right to freedom of expression, and then identifies, in article 10(2), that there may be limits to the exercise of that right, including for the protection of reputation.

³³ Human Rights Act 1998, s 12(1).

³⁴ Human Rights Act 1998, s 12(4).

³⁵ Human Rights Act 1998. See also paras 20.19–20.25 (interim injunctions), 30.94–30.95, 30.103 (misuse of private information).

³⁶ Human Rights Act 1998, ss 7, 9.

³⁷ See para 8.01.

³⁸ See paras 7.35, 21.04. Proof of special damage is required in cases involving slanders that are not actionable per se: see chapter 3.

Private and family life

Secondly, article 8 of the ECHR, which is concerned with the right to private and family life, is also important. It states: **1.28**

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A relatively recent development in the jurisprudence of the European Court of Human Rights has been recognition that the right to reputation, as well as being a ground of permissible restriction to the right of freedom of expression in article 10 of the ECHR,³⁹ is an aspect of the right to private and family life in article 8. There is no necessary overlap between privacy and reputation.⁴⁰ The court has recognized, however, that individuals' article 8 rights are capable of being violated by publications which constitute a serious assault on their personal integrity.⁴¹ **1.29**

Relevance to defamation actions

In every defamation action in England and Wales, courts must thus have an eye to their obligation under the Human Rights Act 1998 not to act in a way that is incompatible with Convention rights.⁴² Questions of incompatibility will arise where a publication involves a grave attack on the personal integrity of a claimant, such that to deprive the claimant of a remedy might violate the claimant's article 8 right to respect for private and family life.⁴³ Equally, courts must not return verdicts for claimants where to do so would violate the defendant's article 10 right to freedom expression.⁴⁴ **1.30**

In rare cases, the complexity of the principles of English defamation law may also sustain complaints by either party that the right to a fair and public hearing under article 6 of the ECHR has been infringed.⁴⁵ **1.31**

³⁹ *Lindon, Otchakovsky-Laurens and July v France* (2008) 46 EHRR 35, concurring opinion of Judge Loucaides.

⁴⁰ *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] EMLR 16, para 96.

⁴¹ See paras 24.79–24.88.

⁴² Human Rights Act 1998, s 6(1).

⁴³ See paras 24.79–24.88.

⁴⁴ See paras 24.09–24.78.

⁴⁵ See paras 24.89–24.90. Article 6 of the ECHR states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- 1.32** Where the application of some common law principle would violate a party's rights under the ECHR, the court may reformulate the principle. Where a legislative provision is ambiguous, the court must read and give effect to it, as far as possible, in a way which secures compatibility with the rights in the ECHR.⁴⁶

Ultimate balancing test

- 1.33** Courts assess compatibility between the outcome of an application of common law or statutory principles on the one hand, and rights in the ECHR on the other, by performing what has come to be known in the authorities as the ultimate balancing test.
- 1.34** The most famous statement of the ultimate balancing test appears in the speech of Lord Steyn in *In re S (A Child)*, who said there were four relevant propositions in relation to the resolution of an interplay between articles 8 and 10:⁴⁷

First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

F. Defamation Act 2013

Background

- 1.35** Following the general election of 6 May 2010, the Conservative Party and the Liberal Democrats entered into a Coalition Agreement which identified as one of the priorities of the incoming government a review of libel laws 'to protect freedom of speech'.⁴⁸ That commitment followed a series of reviews of aspects of defamation law in 2009 and early 2010.⁴⁹
- 1.36** On 26 May 2010, a Liberal Democrat peer, Lord Lester, introduced the Defamation Bill 2010, as a private member's Bill, to the House of Lords. Lord Lester's Bill was read a second time on 9 July 2010, but was not pursued after the Ministry of Justice released a draft Defamation Bill, drawing heavily on Lord Lester's Bill, in March 2011.⁵⁰
- 1.37** The Ministry of Justice undertook a wide-ranging consultation on its draft Defamation Bill between March and June 2011, and released a summary of responses in November 2011.⁵¹ Concurrently, a joint committee of the House of Commons and the House of Lords conducted public hearings and private consultations in relation to the draft Bill, ultimately

⁴⁶ Human Rights Act 1998, s 3.

⁴⁷ [2004] UKHL 47, [2005] 1 AC 593, para 17. See also *In re British Broadcasting Corp* [2009] UKHL 34, [2010] 1 AC 145, para 23; *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, para 52; *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273, para 44.

⁴⁸ HM Government, *The Coalition: our programme for government* (2010) 11.

⁴⁹ Ministry of Justice, *Controlling Costs in Defamation Proceedings* (2009); English PEN & Index on Censorship, *Free Speech is Not for Sale* (2009); Ministry of Justice, *Report of the Libel Working Group* (2010); Culture Media and Sport Select Committee, *Press Standards, Privacy and Libel* (2010).

⁵⁰ Ministry of Justice, *Draft Defamation Bill: Consultation* (2011) Annex A.

⁵¹ Ministry of Justice, *Draft Defamation Bill: Summary of Responses to Consultation* (2011).

releasing a report on the Bill in October 2011.⁵² The government published a response to that report in February 2012.⁵³

The Bill which became the 2013 Act was informed by the Ministry of Justice and Joint Committee's consultations and deliberations. It was read a first time in the House of Commons on 10 May 2012. After a prolonged period of debate, and with amendments, the Bill passed both houses of parliament, receiving the Royal Assent on 25 April 2013. **1.38**

The cause of action

The 2013 Act introduces a serious harm threshold for the determination of whether a statement is defamatory. For causes of action accruing after the commencement of section 1 on 1 January 2014,⁵⁴ a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.⁵⁵ In the case of a body that trades for profit, a statement is not defamatory unless its publication has caused or is likely to cause the body serious financial loss.⁵⁶ These changes, at least in terms, raise the threshold for the actionability of defamatory statements. Section 1 will be invoked by defendants and applied by courts in order to filter out relatively trivial claims.⁵⁷ **1.39**

Section 14 of the 2013 Act effects changes to the categories of slander that are actionable without proof of special damage. For causes of action accruing after 1 January 2014,⁵⁸ the only slanders that are actionable per se are words imputing that a claimant has committed certain criminal offences,⁵⁹ and words imputing against the claimant in the way of his or her office, profession, or trade, or calculated to disparage the claimant in any office, profession, calling, trade, or business.⁶⁰ **1.40**

Defences

The 2013 Act has abolished some defences, altered others, and introduced a raft of new protections for publishers. Broadly speaking, although not uniformly, the changes favour defendants and tilt the balance of the law in the direction of freedom of expression. **1.41**

Truth

At common law, a defence of justification lay where a publisher established on the balance of probabilities that the imputation conveyed by a defamatory statement was a matter of substantial truth. The common law had been supplemented by a statutory defence of contextual justification that potentially applied where a defamatory statement contained two or more distinct imputations, not all of which were substantially true.⁶¹ The 2013 Act abolishes those **1.42**

⁵² Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011).

⁵³ Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* (2012).

⁵⁴ Defamation Act 2013, s 16(4); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁵⁵ Defamation Act 2013, s 1(1).

⁵⁶ Defamation Act 2013, s 1(2).

⁵⁷ See paras 6.42–6.56, chapter 7.

⁵⁸ Defamation Act 2013, s 16(4); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁵⁹ See paras 3.11–3.12.

⁶⁰ See paras 3.13–3.20.

⁶¹ Defamation Act 1952, s 5.

defences and replaces them with statutory formulations that are, for the most part, faithful codifications of the prior position.⁶²

Honest opinion

- 1.43** A common law defence of fair comment protected the publication, without malice, of an objectively fair opinion relating to a matter of public interest, where the opinion was based on facts that were true or protected by privilege and expressly or implicitly indicated, at least in general terms. That defence has been abolished, and replaced with a statutory defence of honest opinion that is, in significant respects, more liberal than the defence it replaces.⁶³ In particular, the new defence is capable of applying to expressions of opinion on any subject matter, including purely private matters.⁶⁴ Where an opinion is based on facts, it is no longer necessary for the defendant to prove that every underlying fact is true.⁶⁵ The new defence is capable of applying to opinions that are based upon matters asserted as facts on a broad range of occasions that are privileged by virtue of statute, but oddly not on occasions that are privileged at common law.⁶⁶ It seems that the defence is capable of protecting opinions that could be honestly held by a person based on facts, and matters asserted to be facts in privileged statements, that were in existence, but not known to the defendant at the time of publication.⁶⁷

Privilege

- 1.44** The common law defence of absolute privilege, and some forms of common law qualified privilege, for the publication of false, defamatory material on certain occasions of importance to the common convenience and welfare of society are unaffected by the 2013 Act. In other important respects, however, the 2013 Act alters the common law: most notably by abolishing the Reynolds defence for responsible journalism on matters of public concern⁶⁸ and replacing it with a defence for the publication of a defamatory statement on a matter of public interest, where the defendant reasonably believed that publication was in the public interest,⁶⁹ and by introducing a defence for the publication of peer-reviewed statements, and assessments of the merit of such statements, in scientific or academic journals, and of fair and accurate copies of, extracts from, or summaries of such statements and assessments.⁷⁰
- 1.45** The 2013 Act also liberalizes in a number of respects the statutory defences of absolute and qualified privilege in the Defamation Act 1996.⁷¹ In particular, it extends absolute privilege to contemporaneously published fair and accurate reports of proceedings in public before courts established by law anywhere in the world and before international courts and tribunals established by the Security Council of the United Nations or an international agreement.⁷² It extends the categories of statutory qualified privilege in a number of ways including, most significantly, to fair and accurate copies of, extracts from, or summaries of notices or other matter issued for the information of the public by or on behalf of an international organization or international conference, or a legislature, government, or authority

⁶² Defamation Act 2013, s 2; see chapter 8.

⁶³ Defamation Act 2013, s 3; see chapter 9.

⁶⁴ See paras 9.85–9.93.

⁶⁵ See paras 9.25–9.33.

⁶⁶ See paras 9.34–9.64.

⁶⁷ See para 9.32.

⁶⁸ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

⁶⁹ Defamation Act 2013, s 4; see chapter 12.

⁷⁰ Defamation Act 2013, s 6; see chapter 14.

⁷¹ Defamation Act 2013, s 7, amending Defamation Act 1996, ss 14, 15 and Sch 1; see chapter 13.

⁷² Defamation Act 2013, s 7(1); see paras 13.23–13.30.

performing governmental functions (including police functions) anywhere in the world;⁷³ fair and accurate copies of, extracts from, or summaries of documents made available by a court anywhere in the world, or by a judge or officer of such a court;⁷⁴ fair and accurate reports of proceedings at press conferences held anywhere in the world for the discussion of any matter of public interest;⁷⁵ fair and accurate reports of proceedings at any public meeting held anywhere in the world;⁷⁶ fair and accurate reports of proceedings at general meetings, and fair and accurate copies of, extracts from, or summaries of various documents circulated to members, of listed companies anywhere in the world;⁷⁷ and fair and accurate reports of proceedings of scientific or academic conferences held anywhere in the world, or copies of, extracts from, or summaries of matter published by such conferences.⁷⁸

Operators of websites

The 2013 Act introduces a new defence for operators of websites who facilitate the publication of defamatory statements that they did not themselves create, even where they have been put on notice that their services are being used for the communication of such statements.⁷⁹ The defence can be lost, however, where operators of websites fail to respond to notices of complaint in accordance with the cumbersome procedures set out in the Defamation (Operators of Websites) Regulations 2013,⁸⁰ or are shown to have acted with malice in relation to the posting of the statement concerned.⁸¹ **1.46**

Other defences

The defence of innocent dissemination in section 1 of the Defamation Act 1996⁸² is untouched by the 2013 Act, as are the common law defence of innocent dissemination on which that defence is based,⁸³ the defences for internet intermediaries in the Electronic Commerce (EC Directive) Regulations 2002,⁸⁴ and other miscellaneous common law and statutory defences.⁸⁵ **1.47**

Other changes

The 2013 Act effects various other changes to the law of defamation of England and Wales. **1.48**

Jurisdiction against secondary publishers

For causes of action accruing after the commencement of section 10 of the 2013 Act on 1 January 2014,⁸⁶ courts in England and Wales no longer have jurisdiction to determine defamation actions brought against most secondary publishers of defamatory statements, unless it is not reasonably practicable for the claimant to bring a defamation action against the author, editor, or commercial publisher of the statement.⁸⁷ This is a significant change which will, in **1.49**

⁷³ Defamation Act 2013, s 7(4); see paras 13.41–13.42.

⁷⁴ Defamation Act 2013, s 7(4); see para 13.43.

⁷⁵ Defamation Act 2013, s 7(5); see paras 13.45–13.48.

⁷⁶ Defamation Act 2013, s 7(6); see paras 13.49–13.51.

⁷⁷ Defamation Act 2013, s 7(7); see paras 13.52–13.53.

⁷⁸ Defamation Act 2013, s 7(9); see paras 13.55–13.58.

⁷⁹ Defamation Act 2013, s 5; see chapter 15.

⁸⁰ SI 2013/3028.

⁸¹ Defamation Act 2013, s 5(3), (11); see paras 15.45–15.52.

⁸² See paras 16.07–16.28.

⁸³ See paras 16.29–16.59.

⁸⁴ See chapter 17.

⁸⁵ See chapter 18.

⁸⁶ Defamation Act 2013, s 16(5); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁸⁷ Defamation Act 2013, s 10.

most cases, prevent claimants from pursuing defamation actions against wholesale and retail distributors of printed and audiovisual matter, libraries, commercial printers, cinemas, the operators of film festivals, the operators of online services that make others' film and sound recordings available, many internet content hosts, broadcasters of live programmes in respect of statements made by persons over whom the broadcaster has no effective control, telecommunications carriers, mere conduit internet service providers, and postal and courier services.⁸⁸

Single publication rule

- 1.50** Another significant reform is the partial replacement of the common law principle that each publication of the same defamatory statement gives rise to a separate cause of action. Section 8 of the 2013 Act provides that if a person has published a statement to the public or a section of the public, and that person subsequently publishes the same statement or a statement that is substantially the same as the statement, time runs for limitation of action purposes with respect to the subsequent publication from the date the statement was first published, unless the manner of the subsequent publication is materially different from the manner of the first publication. This single publication rule will principally benefit online publishers, by dramatically reducing the potential for claimants to sue in respect of defamatory statements first published long ago that are stored in and remain accessible from online archives.⁸⁹

Libel tourism

- 1.51** The 2013 Act tackles, though only in part, the rather overstated problem of libel tourism: the phenomenon of foreigners bringing defamation claims before the courts of England and Wales because they are perceived to be claimant-friendly. For defamation actions brought after the commencement of section 9 on 1 January 2014,⁹⁰ courts in England and Wales no longer have jurisdiction against defendants domiciled outside the United Kingdom, other member States of the European Union, Iceland, Norway, or Switzerland unless, of all the places in which the statement complained of, and any statement which conveys the same or substantially the same imputation as the statement complained of, has been published, England and Wales is clearly the most appropriate place in which to bring the action.⁹¹

Trial by jury and new powers for courts

- 1.52** Other changes effected by the 2013 Act include a reversal of the presumption that defamation actions are to be tried before a jury on the application of either party,⁹² and new powers for courts to order unsuccessful defendants to publish a summary of the court's judgment,⁹³ and that secondary publishers cease making available or distributing defamatory statements created by others.⁹⁴

Commencement

- 1.53** With four exceptions, the substantive provisions in the 2013 Act only affect causes of action accruing after 1 January 2014.⁹⁵

⁸⁸ See paras 2.21–2.66.

⁸⁹ See paras 19.18–19.43.

⁹⁰ Defamation Act 2013, s 16(7); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁹¹ Defamation Act 2013, s 9; see paras 25.51–25.89.

⁹² Defamation Act 2013, s 11; see paras 2.121–2.128.

⁹³ Defamation Act 2013, s 12; see paras 20.36–20.62.

⁹⁴ Defamation Act 2013, s 13; see paras 20.63–20.78.

⁹⁵ Defamation Act 2013, s 16(4)–(5); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027. As to when causes of action accrue for the purposes of defamation law, see paras 4.17–4.22, 19.08–19.43.

The first exception concerns the single publication rule in section 8 of the 2013 Act. In determining whether that rule applies, courts are required to disregard any publications made before the commencement of the section.⁹⁶ The single publication rule will thus only apply to subsequent publications of statements that were first published to the public or a section of the public after 1 January 2014. **1.54**

The second exception concerns section 9 of the 2013 Act, which removes the jurisdiction of courts in England and Wales to hear and determine some defamation actions brought against defendants who are domiciled outside the United Kingdom, other member States of the European Union, Iceland, Norway, or Switzerland. Section 9 applies to defamation actions brought after 1 January 2014, even in respect of causes of action that accrued before the commencement of the section.⁹⁷ **1.55**

The third exception concerns the reversal of the presumption with respect to trials by jury in defamation actions. The new rule applies to defamation actions brought after the commencement of section 11 of the 2013 Act on 1 January 2014, even where they concern causes of action that accrued earlier.⁹⁸ **1.56**

Finally, the section 3 defence of honest opinion is capable of protecting opinions that could have been held by an honest person on the basis of, among other things, anything asserted to be a fact in a publication that would attract the section 4 defence for publications on a matter of public interest, if an action for defamation were brought against the person responsible for the publication.⁹⁹ Although, by section 16(5) of the 2013 Act, the section 4 defence is only available in respect of causes of action accruing after the commencement of the section, section 16(5) is to be ignored for the purposes of the section 3 defence.¹⁰⁰ The effect is that the honest opinion defence is capable of protecting an opinion based upon a publication made before the commencement of section 4 on 1 January 2014 that would, if it had been published after that date, have attracted a section 4 defence in an action brought against the person responsible for the publication. **1.57**

Statutory interpretation

Potential ambiguities and uncertainties in the operation of the provisions of the 2013 Act—the most significant of which are highlighted in the preface—will be identified throughout this book. Their resolution will turn on the application of principles of statutory interpretation. **1.58**

In construing legislation, the function of the court is to ‘say what the application of the words used to particular cases or individuals is to be.’¹⁰¹ The court seeks ‘not what Parliament meant but the true meaning of what they said.’¹⁰² In ascertaining the meaning of a statute, it **1.59**

⁹⁶ Defamation Act 2013, s 16(6).

⁹⁷ Defamation Act 2013, s 16(7); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁹⁸ Defamation Act 2013, s 16(7); Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

⁹⁹ Defamation Act 2013, s 3(4)(b), (7)(a).

¹⁰⁰ Defamation Act 2013, s 16(8).

¹⁰¹ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 629 (Lord Wilberforce).

¹⁰² *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 613 (Lord Reid).

is ‘important to consider the “mischief” which the Act was apparently intended to remedy’, by reading the Act and, if necessary, looking ‘at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it’.¹⁰³

- 1.60** Where legislation is ambiguous or obscure, it is permissible for courts to have regard to any report which informed the framing of the statute, for the purpose of ascertaining the mischief the statute was intended to remedy,¹⁰⁴ provided that the report ‘clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words’.¹⁰⁵ Inferences as to legislative intent may also be able to be drawn where parliament has not adopted a recommendation in a report about reform of the law,¹⁰⁶ or by considering how the terms of a draft Bill differ from those of the statute.¹⁰⁷ The principal reports which are potentially capable of shedding light on the meaning of ambiguous or uncertain provisions in the 2013 Act are the Ministry of Justice’s consultation paper on the draft Defamation Bill,¹⁰⁸ the report of the Joint Committee on the draft Defamation Bill,¹⁰⁹ and the government’s response to the Joint Committee’s report.¹¹⁰
- 1.61** It is also sometimes permissible to have regard, as an aid to statutory construction, to statements made in the course of parliamentary debates by the responsible Minister or promoter of the relevant Bill. As with other extrinsic materials, recourse to parliamentary statements will only be appropriate where the meaning of the words used by the legislature is ambiguous or obscure, and where the parliamentary statement clearly identifies ‘the mischief aimed at, or the nature of the cure intended, by the legislation’.¹¹¹ Recourse to such statements should ‘be a last resort’.¹¹² Only very rarely will they result in a court construing the legislation:

as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including Ministers) during the debates in one or other House of Parliament.¹¹³

C. Other Sources of Law

Relevance

- 1.62** This book is written for a primary audience of lawyers and students in England and Wales, and for a secondary audience in the rest of the United Kingdom and in other common law countries that take the English law of defamation as their base, particularly Australia, Canada, Ireland, New Zealand, and the United States. The rules of civil defamation law in each of those places have a common heritage, and for that reason their caselaw is frequently

¹⁰³ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 614.

¹⁰⁴ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 614, 622–3, 637–9, 651–2.

¹⁰⁵ *Pepper v Hart* [1993] AC 593, 634 (Lord Browne-Wilkinson).

¹⁰⁶ *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85 (HL), 149; *Pepper v Hart* [1993] AC 593, 630–1.

¹⁰⁷ *Pepper v Hart* [1993] AC 593, 635.

¹⁰⁸ Ministry of Justice, *Draft Defamation Bill: Consultation* (2011).

¹⁰⁹ Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011).

¹¹⁰ Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (2012).

¹¹¹ *Pepper v Hart* [1992] AC 593 (HL), 635 (Lord Browne-Wilkinson).

¹¹² *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633, para 126.

¹¹³ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, para 40 (Lord Hoffmann).

cited in courts in England and Wales, and is capable of informing and providing useful illustrations of the applicable principles. Foreign authorities are cited liberally throughout this book.

Increasingly, however, the principles of defamation law that apply in comparable jurisdictions are diverging. It is thus unsafe to assume that foreign authorities on principles of defamation law, even from countries as jurisprudentially close to England and Wales as Australia and Canada, have automatic application. Without any pretence of comprehensiveness, an attempt has been made throughout this book to identify relevant differences where they arise. **1.63**

Scotland

Although in many respects similar to defamation law in England and Wales, the principles of defamation law differ materially in Scotland, and most of the substantive reforms in the 2013 Act have no application there. The section 6 defence (peer-reviewed statement in scientific or academic journal, etc), and the extension of statutory qualified privilege to fair and accurate reports of scientific or academic conferences and copies of, extracts from, or summaries of matter published by such conferences do, however, extend to Scotland.¹¹⁴ The heightened differences between the principles applicable in Scots law, and those in England and Wales, as a result of the 2013 Act may encourage forum shopping in favour of Scotland in some cases involving publications that are accessible throughout the United Kingdom.¹¹⁵ **1.64**

The terminology of the authorities of England and Wales has been preferred in this book. For example, ‘claimant’ or ‘plaintiff’ are used instead of ‘pursuer’, ‘defendant’ instead of ‘defender’, ‘tort’ instead of ‘delict’, ‘publication’ instead of ‘communication’, ‘justification’ or ‘truth’ instead of ‘veritas’, ‘injunction’ instead of ‘interdict’, and ‘costs’ instead of ‘expenses’. **1.65**

Northern Ireland

In Northern Ireland, the common law is subject to the Defamation Act (Northern Ireland) 1955 and the Defamation Act 1996.¹¹⁶ The 2013 Act does not extend to Northern Ireland. In May 2013, it was reported that the Northern Ireland Executive had decided not to act to implement the 2013 Act in Northern Ireland, a decision that raised consternation in the House of Lords.¹¹⁷ Unless reversed, that decision may result in some claimants commencing actions in respect of allegedly defamatory statements that can be shown to have been published in Northern Ireland in Belfast, even if they were overwhelmingly published in England and Wales, in order to attempt to circumvent the operation of reforms in the 2013 Act that favour, or are perceived to favour, defendants.¹¹⁸ **1.66**

¹¹⁴ Defamation Act 2013, s 17(3). In so far as it extends to Scotland, the Defamation Act 2013 came into force on 1 January 2014: Defamation Act 2013 (Commencement) (Scotland) Order 2013, SSI 2013/339.

¹¹⁵ See para 26.42.

¹¹⁶ Sections 2–4 (offer to make amends provisions), 7 (ruling on the meaning of a statement), and 8–11 (summary disposal provisions) came into force for Northern Ireland on 6 January 2010: Defamation Act 1996 (Commencement No 4) Order 2009, SI 2009/2858. Section 4 of the Defamation Act (Northern Ireland) 1955 (which was materially identical to s 4 of the Defamation Act 1952) continues to apply, as if it had not been repealed, to offers of amends made before 6 January 2010 and to any legal proceedings relating to such offers. The Defamation Act 1952 does not extend to Northern Ireland: Defamation Act 1952, s 18(2).

¹¹⁷ Hansard, House of Lords Grand Committee, 27 June 2013, GC330–46.

¹¹⁸ See para 26.42.

Australia

- 1.67** Australian defamation law derives from English common law, but has been substantially modified by statute.
- 1.68** Until 2006, jurisdictional differences abounded between the eight Australian states and territories, due to the differing extents to which the common law had been modified by legislation in each law area.¹¹⁹
- 1.69** The jurisdictional differences have now been overcome by the enactment, by each Australian state and territory, of uniform defamation legislation in substantially identical form. In each state, the relevant statute is the Defamation Act 2005. In the Northern Territory, the statute is the Defamation Act 2006. In the Australian Capital Territory, the corresponding provisions appear as chapter 9 of the Civil Law (Wrongs) Act 2002. The uniform legislation came into effect in all states on 1 January 2006, in the Australian Capital Territory on 23 February 2006, and in the Northern Territory on 26 April 2006.
- 1.70** The uniform legislation is not, in fact, entirely uniform. The variations in the legislation are, however, minor.¹²⁰
- 1.71** The uniform legislation does not affect the operation of common law principles except to the extent that it provides otherwise, whether expressly or by necessary implication.¹²¹
- 1.72** Prior to the commencement of the uniform legislation, defamation law in Australia had adapted to conform to the freedom to discuss government and political matters that is implied in Australia's federal Constitution. The implied freedom led, ultimately, to the development of a common law defence of qualified privilege for the reasonable discussion of

¹¹⁹ Under the previous regime, the cause of action and defences for defamation were largely a matter of common law in South Australia, Victoria, and Western Australia. The principles had been significantly modified by legislation in New South Wales, the Australian Capital Territory, and the Northern Territory: Defamation Act 1974 (NSW); Civil Law (Wrongs) Act 2002 (ACT); Defamation Act 1938 (NT). The law of defamation was codified in Queensland and Tasmania: Defamation Act 1889 (Qld); Defamation Act 1957 (Tas).

¹²⁰ There are no provisions in the legislation of South Australia, the Australian Capital Territory, or the Northern Territory equivalent to ss 21 and 22 of the legislation of the other states. Those sections are concerned with the role of juries in defamation actions. Juries are not available in civil defamation actions in South Australia or the territories: Juries Act 1927 (SA), s 5; Supreme Court Act 1933 (ACT), s 22; Juries Act (NT), s 6A. Where defamation actions are heard in the Federal Court of Australia, the court has a discretion to direct that the trial proceed with a jury: Federal Court of Australia Act 1976 (Cth), ss 39–41; *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148.

The Defamation Act 2005 (Tas) contains two limitation of actions provisions, ss 20A and 20B. In all other states and the territories, limitation of actions provisions appear in separate limitations legislation: see paras 19.01 (n 1), 19.03 (n 3).

Alone among the legislation of the states and territories, the Tasmanian statute does not exclude the bringing or continuing of defamation claims by or against persons who have died or their personal representatives: cf Defamation Act 2005 (NSW, Qld, SA, Vic, WA), s 10; Civil Law (Wrongs) Act 2002 (ACT), s 122; Defamation Act 2006 (NT), s 9.

The miscellaneous provisions in Part 5 of, and the Schedules to, the uniform legislation, vary slightly from place to place. Most significantly, Schedules 1 to 3 to the Defamation Act 2005 (NSW) prescribe additional publications attracting absolute privilege, and additional kinds of public documents and proceedings of public concern attracting the operation of the statutory defences in ss 28 and 29 of that Act.

¹²¹ Defamation Act 2005 (NSW, Qld, SA, Tas, Vic, WA), s 6; Civil Law (Wrongs) Act 2002 (ACT), s 119; Defamation Act 2006 (NT), s 5.

government and political matters.¹²² That defence has now, for most practical purposes, been overtaken by a broader statutory defence in the uniform legislation.¹²³

Canada

Other than in Québec, which has a civil law tradition, Canadian defamation law is based on the English common law. Canadian common law principles have, however, diverged in various ways. Perhaps most significantly, the Supreme Court of Canada has developed a common law defence of responsible communication on matters of public interest,¹²⁴ which borrowed heavily, but is jurisprudentially distinct, from the Reynolds defence of qualified privilege for responsible journalism when reporting on matters of public concern developed in the United Kingdom.¹²⁵ The 2013 Act abolished the Reynolds defence in England and Wales and replaced it with a statutory formulation.¹²⁶ **1.73**

Each Canadian province and territory, other than Québec, has defamation legislation that complements and modifies the common law.¹²⁷ **1.74**

Québec does not have a specific statutory cause of action for defamation. Where claimants seek redress for interference with reputation there, the general fault-based rules that apply to questions of civil liability operate.¹²⁸ To succeed in an action arising out of the publication of defamatory material, claimants must establish the existence of injury from the publication of the material; a malicious or negligent act by the defendant; and a causal connection between that act and the injury.¹²⁹ **1.75**

United States

Although the United States has a common law system of defamation laws, it also accords, by reason of the First Amendment to that country's Constitution, a unique value to the right to freedom of speech and of the press. First Amendment jurisprudence has resulted in American defamation laws diverging from the English common law to a dramatically greater extent than the defamation laws of other common law countries. American authorities, accordingly, tend to have less direct relevance in defamation actions in England and Wales. An overview of some key principles of American defamation law appears in Appendix C. **1.76**

Other countries

Defamation laws in places such as New Zealand, Ireland, Hong Kong, Malaysia, and Singapore are also based on common law principles, modified by statute, and interesting **1.77**

¹²² See App D, paras D.1–D.6.

¹²³ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 30; Defamation Act 2005 (SA), s 28; Civil Law (Wrongs) Act 2002 (ACT), s 139A; Defamation Act 2006 (NT), s 27. See App D, paras D.7–D.15.

¹²⁴ *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640; see App D, paras D.20–D.25.

¹²⁵ See paras 12.04–12.16.

¹²⁶ Defamation Act 2013, s 4; see chapter 12.

¹²⁷ Defamation Act, RSA 2000; Libel and Slander Act, RSBC 1996; Defamation Act, CCSM; Defamation Act, RSNB 2011; Defamation Act, RSNL 1990; Defamation Act, RSNWT 1988; Defamation Act, RSNS 1989; Libel and Slander Act, RSO 1990; Defamation Act, RSPEI 1988; Libel and Slander Act, RSS 1978; Defamation Act, RSY 2002.

¹²⁸ Civil Code of Québec, LRQ 1991, art 1457.

¹²⁹ *Prud'homme v Prud'homme* 2002 SCC 85, [2002] 4 SCR 663, paras 32–45; see also *Genex Communications Inc v Association Québécoise de l'Industrie du Disque, du Spectacle et de la Vidéo* 2009 QCCA 2201, [2009] RJQ 2743; *Malhab v Diffusion Métromédia CMR inc* 2011 SCC 9, [2011] 1 SCR 214, paras 14–79.

authorities have emerged in each of those places, particularly in relation to the application of defamation law principles to online publications.

H. Structure of this Book

Pre-action and other preliminary considerations

- 1.78** Chapter 2 deals with various pre-action and other preliminary considerations, including the persons and entities who have standing to bring defamation actions, and the persons and entities against whom defamation actions can be brought. It also analyses the implications of section 10 of the 2013 Act, which removes the jurisdiction of courts in England and Wales to determine most defamation actions brought against secondary publishers of defamatory statements, and addresses matters such as letters of claim and responses, offers to make amends, notices to operators of websites, and applications for trial before a jury.

The cause of action for defamation

- 1.79** Part II explains the distinction between libel and slander,¹³⁰ and addresses each of the elements of the cause of action for defamation, namely publication,¹³¹ identification,¹³² and defamatory meaning.¹³³ It also deals with the serious harm threshold for defamation actions in section 1 of the 2013 Act.¹³⁴

Defences

- 1.80** Part III is concerned with the defences to the cause of action for defamation.
- 1.81** Chapter 8 deals with the defence of truth in section 2 of the 2013 Act, which replaces the common law defence of justification and the defence of contextual justification in section 5 of the Defamation Act 1952.
- 1.82** Chapter 9 addresses the defence of honest opinion in section 3 of the 2013 Act, and explains how it differs from the common law defence of fair comment which it replaces.
- 1.83** Chapters 10 to 14 are concerned with defences of and related to absolute and qualified privilege, including the defence in section 4 of the 2013 Act for publications on matters of public interest,¹³⁵ and the section 6 defence for peer-reviewed statements and assessments in scientific or academic journals and fair and accurate copies of, extracts from, and summaries of such statements and assessments.¹³⁶
- 1.84** Chapters 15 to 17 explain the defences for secondary publishers of defamatory statements, namely the new defence for operators of websites in section 5 of the 2013 Act,¹³⁷ statutory and common law innocent dissemination,¹³⁸ and the defences in regulations 17 to 19 of the Electronic Commerce Regulations.¹³⁹

¹³⁰ See chapter 3.

¹³¹ See chapter 4.

¹³² See chapter 5.

¹³³ See chapter 6.

¹³⁴ See paras 6.42–6.56, chapter 7.

¹³⁵ See chapter 12.

¹³⁶ See chapter 14.

¹³⁷ See chapter 15.

¹³⁸ See chapter 16.

¹³⁹ See chapter 17.

Miscellaneous other defences available to publishers of defamatory statements are dealt with in chapter 18. **1.85**

The principles relating to the accrual of causes of action for defamation, the running of time, the application of limitation periods, and the single publication rule in section 8 of the 2013 Act, are the subject of chapter 19. **1.86**

Remedies and related matters

The remedies available to successful claimants in defamation actions—including injunctions and other non-pecuniary remedies,¹⁴⁰ damages,¹⁴¹ and the new powers conferred on courts to order that defendants publish a summary of their judgments¹⁴² and that secondary publishers cease distributing, selling, or exhibiting statements that have been found to be unlawful¹⁴³—are the subject of Part IV. Also considered are the application of principles of vicarious liability in defamation actions,¹⁴⁴ the ways in which foreign defamation judgments can be recognized and enforced,¹⁴⁵ and the circumstances in which defamation judgments might be enforced in other countries, particularly the United States.¹⁴⁶ **1.87**

European influences

Part V considers the jurisprudence of the European Court of Human Rights concerning, in particular, the right to respect for private and family life in article 8,¹⁴⁷ and the guarantee of freedom of expression in article 10, of the ECHR.¹⁴⁸ Also considered are the implications of that jurisprudence for the principles of defamation law that apply in England and Wales by reason of the domestic implementation of the ECHR effected by the Human Rights Act 1998.¹⁴⁹ **1.88**

Conflict of laws

Before the invention of the printing press, publications overwhelmingly occurred in a single place and at a single point in time, and had limited audiences. Successive technological advances have increased the potential for permanent, multiple, and multi-jurisdictional publications, and publications by foreigners which have effect at home. **1.89**

The advent of the internet has dramatically increased the potential for multi-jurisdictional defamation. Defamatory material published via the internet may remain accessible indefinitely, have a global audience of indeterminate size, and a devastating impact on the reputation of its target. What constitutes actionable defamation in one jurisdiction may be entirely lawful in another. **1.90**

Conflict of law questions thus arise with increasing frequency in defamation proceedings arising out of the publication of material via modern communication media. The jurisdiction **1.91**

¹⁴⁰ See chapter 20.

¹⁴¹ See chapter 21.

¹⁴² See paras 20.36–20.62.

¹⁴³ See paras 20.63–20.78.

¹⁴⁴ See chapter 22.

¹⁴⁵ See paras 23.01–23.07.

¹⁴⁶ See paras 23.08–23.49.

¹⁴⁷ See paras 24.79–24.88.

¹⁴⁸ See paras 24.09–24.78.

¹⁴⁹ See paras 24.91–24.110.

of courts to hear and determine defamation proceedings against defendants domiciled outside England and Wales or concerning multi-jurisdictional publications,¹⁵⁰ choice of law rules,¹⁵¹ and the methods of proving the content of applicable foreign law,¹⁵² are the subject of Part VI.

Related causes of action

- 1.92** In Part VII, the principal alternatives to civil defamation law are canvassed. In particular, the operation of the tort of malicious falsehood,¹⁵³ the increasingly important cause of action for misuse of private information,¹⁵⁴ data protection principles as they apply to the publication of statements,¹⁵⁵ and the operation of the Protection from Harassment Act 1997,¹⁵⁶ are outlined. There are also brief treatments of the now abolished crime of criminal libel,¹⁵⁷ the overlap between defamation and the tort of negligence,¹⁵⁸ and alternative mechanisms for the resolution of defamation complaints.¹⁵⁹

Appendices

- 1.93** Appendix A contains a collation of selected legislative materials relevant to the defamation law of England and Wales, including the whole of the text of the 2013 Act. Appendix B reproduces provisions of the Civil Procedure Rules, Pre-action Protocols, and Practice Directions relevant to the conduct of defamation actions in England and Wales in force as at 1 January 2014.
- 1.94** Appendix C contains an overview of some key principles of American defamation law. Appendix D provides a comparative summary of the liberalized defences of qualified privilege that apply in Australia, Canada, Ireland, and New Zealand.
- 1.95** Appendix E is a digest of damages awards in defamation actions made by judges in England and Wales, or the subject of substantive consideration by appellate courts, since 1991, drawn from reported or readily accessible judgments. Appendix F is a corresponding digest of damages awards in misuse of private information cases since that cause of action was authoritatively considered by the House of Lords in *Campbell v MGN Ltd.*¹⁶⁰
- 1.96** Appendix G contains a number of precedents, including a letter of claim and response, an offer to make amends, a notice of complaint to the operator of a website, and standard form corrections and apologies. Precedent pleadings have been included for particulars of claim, defences, and replies for defamation actions, and particulars of claim and defences for malicious falsehood and misuse of private information actions. The Appendix also contains a number of precedent application notices for common applications.

¹⁵⁰ See chapter 25.

¹⁵¹ See chapter 26.

¹⁵² See chapter 27.

¹⁵³ See chapter 29.

¹⁵⁴ See chapter 30.

¹⁵⁵ See chapter 31.

¹⁵⁶ See chapter 33.

¹⁵⁷ See chapter 28.

¹⁵⁸ See chapter 32.

¹⁵⁹ See chapter 34.

¹⁶⁰ [2004] UKHL 22, [2004] 2 AC 457.